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## Is it a Violation of the Equal Credit Opportunity Act to Require a Spouse to Guarantee a Loan? If Not, it Should be.

### I. INTRODUCTION

Access to credit is an integral part of our economic structure.<sup>1</sup> Credit, which has not always been simple to obtain, is necessary for most people to purchase a home or invest in a business.<sup>2</sup> In the past, women seeking out loans were frequently rejected from obtaining credit despite being otherwise creditworthy candidates.<sup>3</sup> Often this was due to discriminatory lending practices.<sup>4</sup> In an effort to counteract the discriminatory practices involved in credit lending, Congress enacted the Equal Credit Opportunity Act (“ECOA”) in 1974.<sup>5</sup> The ECOA protects creditworthy borrowers from being denied credit based on a number of characteristics that have no bearing on their ability to repay a loan.<sup>6</sup> One

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1. See Todd Zywicki, “Consumer Credit and the American Economy,” *Part I: Consumer Demand for Credit*, WASH. POST (Oct. 13, 2014), [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/10/13/consumer-credit-and-the-american-economy-part-i-consumer-demand-for-credit/?utm\\_term=.510c93cab79c](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/10/13/consumer-credit-and-the-american-economy-part-i-consumer-demand-for-credit/?utm_term=.510c93cab79c) (“Evidence shows that three-fifths to two-thirds of families have such credit outstanding at any one time in recent decades and that most consumers use consumer credit at least sometime during their financial lifetime.”).

2. *Id.*

3. See Allen Abraham, *Credit Discrimination Based on Gender: The Need to Expand the Rights of a Spousal Guarantor Under the Equal Credit Opportunity Act*, 10 BROOK. J. CORP. FIN. & COM. L. 473, 478 (2016) (“[D]ivorced, separated or widowed wom[en were] considered a bad credit risk because [they were] without male support, financial or otherwise.”).

4. See *id.* (quoting Comment, *Credit Equality Comes to Women: An Analysis of the Equal Credit Opportunity Act*, 13 SAN DIEGO L. REV. 960, 965 nn.28–29 (1976)) (“Some creditors went as far as requiring women to sign an affidavit ‘swearing not to endanger their ability to repay their debts by having children.’”).

5. See Equal Credit Opportunity Act, Pub. L. No. 93-495, § 502, 88 Stat. 1521, 1521 (1974) (codified 15 U.S.C. § 1691 (2016)) (“It is the purpose of this Act to require that financial institutions and other firms engaged in the extension of credit make that credit equally available to all creditworthy customers without regard to sex or marital status.”).

6. *Id.*; see *Consumer Financial Protection Bureau Amends Rules to Provide Flexibility and Clarity to Certain Mortgage Lenders in Collecting Information*, CONSUMER FIN. PROT. BUREAU (Sept. 20, 2017), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-amends-rules-provide-flexibility-and-clarity-certain-mortgage-lenders-collecting-information/> (“The Equal Credit Opportunity Act is a federal civil rights law that protects against discrimination in the financial marketplace. Regulation B, the CFPB’s rule

such characteristic is marital status, in addition to race, color, religion, national origin, sex, age, receipt of public assistance income, and the good faith exercise of any rights under the Consumer Credit Protection Act.<sup>7</sup>

Although the ECOA was enacted to eliminate unfair lending practices, credit lending discrimination still occurs. *Hawkins v. Community Bank of Raymore* brought an oft-considered issue to the Supreme Court of the United States: whether it is a violation of the ECOA to require a spouse to guarantee a loan.<sup>8</sup> This issue has been litigated in a number of different jurisdictions, with no clear-cut answer rendered.<sup>9</sup> While courts were hopeful *Hawkins* would bring closure to the debate, an eight-member Supreme Court demonstrated how judicial philosophies are split on this issue through an equally divided per curiam decision.<sup>10</sup> Until the Supreme Court creates binding precedent on all circuits, creditors, borrowers, and lower courts are left in the dark as to what they should do when it comes to a spouse guaranteeing a loan.<sup>11</sup>

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implementing ECOA, includes restrictions regarding lenders' ability to ask consumers about their race, color, religion, national origin or sex, except in certain circumstances.”).

7. Equal Credit Opportunity Act, Pub. L. 93-495, § 502, 88 Stat. 1521, 1521 (1974) (codified 15 U.S.C. § 1691 (2016)) (“The Congress finds that there is a need to insure that the various financial institutions and other firms engaged in the extensions of credit exercise their responsibility to make credit available with fairness, impartiality, and without discrimination on the basis of sex or marital status.”).

8. See generally *Hawkins v. Cmty. Bank of Raymore*, 136 S. Ct. 1072, 1072 (2016).

9. See *Hawkins*, 136 S. Ct. at 1072 (rendering an equally divided Supreme Court per curiam); *RL BB Acquisition, LLC v. Bridgemill Commons Dev. Group, LLC*, 754 F.3d 380, 385 (6th Cir. 2014) (finding the ECOA definition to be ambiguous and instead relying on the Regulation B definition and ultimately ruling spousal guarantors are considered applicants); *Moran Foods, Inc. v. Mid-Atlantic Mkt. Dev. Co.*, 476 F.3d 436 (7th Cir. 2007) (holding wives are not considered applicants and therefore spouses cannot use the ECOA as protection when they are guarantors).

10. See *Hawkins*, 136 S. Ct. at 1072 (illustrating how challenging this matter is since the Supreme Court could not find a definitive answer to the question of whether or not a spousal guarantor could be considered an applicant under the ECOA); Evan Weinberger, *High Court Splits On Whether Loan Guarantors Are Applicants*, LAW360 (Oct. 5, 2015), <https://www.law360.com/articles/707802/high-court-splits-on-whether-loan-guarantors-are-applicants> (“As the high court heard arguments in the *Hawkins v. Community Bank of Raymore* case over loans for a failed real estate development, a rift opened between the court’s conservative bloc, led by Justice Antonin Scalia, and liberal wing over whether the Fed had the authority to specifically state in 1985 that spousal guarantors could bring a discrimination claim even though that right was not specifically provided in the ECOA.”).

11. See Kathryn Reed Edge, *Bank on it: Circuit Split on Definition of “Applicant”* 50 TENN. B.J. 28, 29 (2014) (“Until this issue is resolved by the United States Supreme Court, if ever, bankers in the 8th Circuit will wonder whether they should listen to the judiciary or Federal Reserve examiners who frequent their banks.”).

If a nine-member Supreme Court heard this issue and interpreted the language of the ECOA by using a *Chevron* analysis, the legal determination would likely be the same as it was in the Eighth Circuit's decision in *Hawkins*, holding that spousal guarantors are not protected by the ECOA.<sup>12</sup> Due to this likely outcome, Congress should amend the ECOA to include protection for spousal guarantors.<sup>13</sup>

This Note proceeds in six parts. Part II explains the history and background of the ECOA as well as Regulation B.<sup>14</sup> Part III analyzes the decision in *Hawkins v. Community Bank of Raymore*.<sup>15</sup> Part IV examines holdings in different circuits and what it means to be an "applicant" under both the ECOA's statutory language and according to Regulation B.<sup>16</sup> Part V discusses the potential impact of adopting each definition of "applicant."<sup>17</sup> Part VI presents recommendations to avoid future confusion about spousal guarantors.<sup>18</sup>

## II. THE PURPOSE OF THE EQUAL CREDIT OPPORTUNITY ACT AND REGULATION B

Before the ECOA put safeguards in place, women had difficulty obtaining credit.<sup>19</sup> It was not only a challenge for single or divorced women, but also for married women.<sup>20</sup> Often, married women would be denied credit unless their husbands guaranteed their debts.<sup>21</sup> Creditors frequently succumbed to outdated and unsubstantiated beliefs and would

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12. See *Hawkins*, 136 S. Ct. at 1072; see also *Chevron U.S.A. Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 842 (1984) (explaining if there is no ambiguity in the statutory language, then the Court is to follow the definition within the statute).

13. 12 C.F.R. § 1002.7(d)(5) (2017) ("The applicant's spouse may serve as an additional party [supporting the application], but the creditor shall not require that the spouse be the additional party."); *RL BB Acquisition*, 754 F.3d at 383 ("[A] portion of Regulation B . . . refer[red] to as the 'spousal-guarantor rule,' which prohibits a creditor from requiring an applicant's spouse to guarantee a credit instrument, even if the creditor requires *someone* to execute a guaranty").

14. See *infra* Part II.

15. See *infra* Part III.

16. See *infra* Part IV.

17. See *infra* Part V.

18. See *infra* Part VI.

19. Abraham, *supra* note 3, at 477–78.

20. Abraham, *supra* note 3.

21. See Abraham, *supra* note 3 (quoting Comment, *Credit Equality Comes to Women: An Analysis of the Equal Credit Opportunity Act*, 13 SAN DIEGO L. REV. 960, 965 nn.28–29 (1976)) ("Some creditors went as far as requiring women to sign an affidavit 'swearing not to endanger their ability to reap their best by having children.'").

deny a woman credit based on the idea that “she would be [too] distracted by child care or some other stereotypically female responsibility,” and therefore would be too much of a credit risk.<sup>22</sup> The ECOA was enacted in response to lenders requiring spousal guarantees, and set out to “make credit available with fairness, impartiality, and without discrimination on the basis of sex or marital status.”<sup>23</sup> Therefore, Congress made it “unlawful for any creditor to discriminate against any applicant . . . on the basis of . . . sex or marital status” regarding any aspect of a credit transaction.<sup>24</sup>

When the ECOA was first enacted, the Board of Governors of the Federal Reserve (“Board”) was responsible for its implementation.<sup>25</sup> However, after the 2008 financial crisis, the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (“Dodd-Frank Act”) transferred the authority of overseeing the ECOA to the Consumer Financial Protection Bureau (“CFPB”).<sup>26</sup> Under the Dodd-Frank Act, the CFPB was granted rule-making authority within its jurisdiction, and was also given authority to supervise and enforce compliance with the ECOA and its implementing regulations.<sup>27</sup> In keeping with the intended purpose of the ECOA, the CFPB adopted Regulation B, which makes it unlawful for a creditor to refuse credit to an otherwise creditworthy applicant on the basis of sex, marital status, or any other prohibited basis.<sup>28</sup>

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22. *Moran Foods, Inc. v. Mid-Atlantic Mkt. Dev. Co.*, 476 F.3d 436, 441 (7th Cir. 2007) (“[I]t is apparent that what the Act was intended to do was to forbid a creditor to deny credit to a woman on the basis of a belief that she would not be a good credit risk because she would be distracted by child care or some other stereotypically female responsibility.”).

23. Equal Credit Opportunity Act, Pub. L. No. 93-435, § 502, 88 Stat. 1521, 1521 (1974) (codified 15 U.S.C. § 1691 (2016)).

24. 15 U.S.C. § 1691(a).

25. 15 U.S.C. § 1691b(a).

26. 12 U.S.C. § 5581(b) (2016); 15 U.S.C. § 1639b(c)(3)(C) (2016) (“[T]he [CFPB] shall prescribe regulations to prohibit . . . abusive or unfair lending practices that promote disparities among consumers of equal credit worthiness but of different race, ethnicity, gender, or age”); *RL BB Acquisition, LLC v. Bridgemill Commons Dev. Group, LLC*, 754 F.3d 380, 383 (6th Cir. 2014) (“Congress mandated that the agency charged with overseeing ECOA—first the Federal Reserve, now the Consumer Financial Protection Bureau—promulgate regulations ‘to carry out the [statute’s] purposes.’”).

27. 15 U.S.C. § 1639b(c)(3)(C); Valerie L. Hletko & Caroline M. Stapleton, *Deference in Decline: ECOA’s Regulation B and Agency Discretion Might Not Be Broad Enough to Include Spousal Guarantors*, 104 BANKING REP. (BNA) NO. 3 (Jan. 20, 2015) (“The CFPB inherited the Board’s implementing regulations, including Regulation B, and accompanying administrative interpretations.”).

28. 12 C.F.R. § 1002.1(b) (2017) (“The purpose . . . is to promote the availability of credit to all creditworthy applicants without regard to race, color, religion, national origin, sex, marital status, or age.”).

Spousal guarantors are treated differently depending on whether the court chooses to adopt the ECOA or Regulation B definition. The major discrepancy between the two arises from one word: applicant.<sup>29</sup> An “applicant,” as defined in the ECOA, is “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.”<sup>30</sup> While this appears to be a straightforward definition, the ECOA’s definition of “applicant” differs slightly from that of Regulation B.<sup>31</sup>

Prior to 1985, guarantors were excluded from Regulation B’s definition of applicant.<sup>32</sup> However, the Board broadened Regulation B’s scope after learning credit discrimination was still occurring and having an impact on individuals guaranteeing loans.<sup>33</sup> Regulation B now defines “applicant” as “any person who requests or has received an extension of credit from a creditor, and includes any person who is or may become contractually liable regarding an extension of credit. For purposes of [section] 1002.7(d), the term includes guarantors, sureties, endorsers, and similar parties.”<sup>34</sup>

These differing definitions raise the issue of whether a “guarantor” can be considered an “applicant.”<sup>35</sup> The simple answer is that under the ECOA, maybe; under Regulation B, yes.<sup>36</sup>

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29. Compare 15 U.S.C. § 1691a(b) (2016), with 12 C.F.R. § 1002.2(e) (2017).

30. 15 U.S.C. § 1691a(b).

31. Compare 15 U.S.C. § 1691a(b), with 12 C.F.R. § 1002.2(e).

32. *Revision of the Board’s Equal Credit Regulation: An Overview*, 71 FED. RES. BULL. 12, 913, 918 (Dec. 1985) (defining “applicant” as “any person who requests or who has received an extension of credit from a creditor, and includes any person who is or may be contractually liable regarding an extension of credit other than a guarantor, surety, endorser, or similar party”).

33. *Id.* (“After weighing the various considerations, the Board revised the definition of applicant to include guarantors. It based the action on the premise that although its primary concern may have been to protect the individual seeking credit, the Congress had a broader purpose in enacting the ECOA: to bar discrimination on the basis of marital status in any aspect of a credit transaction.”); Hletko & Stapleton, *supra* note 27 (citing *Revision of the Board’s Equal Credit Regulation: An Overview*, 71 FED. RES. BULL. 12, 913, 918 (Dec. 1985)) (“The Board reasoned that a person required to ‘assume a debt obligation’ as a guarantor due to marriage ‘has suffered discrimination based on marital status’ within the meaning of ECOA.”).

34. 12 C.F.R. § 1002.2(e) (amending Regulation B’s definition of “applicant” to include “guarantors”).

35. Compare 15 U.S.C. § 1691a(b), with 12 C.F.R. § 1002.2(e).

36. 15 U.S.C. § 1691a(b); 12 C.F.R. § 1002.2(e).

The issue of whether or not a guarantor is an applicant has become a problem in the realm of spouses guaranteeing loans, commonly referred to as spousal guarantors.<sup>37</sup> When the Board promulgated Regulation B, it included the spousal guarantor rule.<sup>38</sup> The spousal guarantor rule prohibits creditors from requiring that a spouse guarantee the other spouse's debt, even if a guarantor is necessary for a creditor to extend the line of credit.<sup>39</sup> While it is lawful for a spouse to guarantee a loan, under Regulation B it is unlawful for a creditor to require the spouse to be a guarantor.<sup>40</sup> Under the spousal guarantor rule, if a spouse was forced into guaranteeing a loan, the spouse would be able to raise an ECOA violation as an affirmative defense to the creditor's action in the event of a default, and the entire debt may be voided and therefore uncollectable.<sup>41</sup> However, the ECOA definition includes no such provision.<sup>42</sup> The discrepancy between the competing definitions in ECOA and Regulation B was brought to bear in *Hawkins*.<sup>43</sup>

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37. 12 C.F.R. § 1002.7(d)(5) (2017) (“The applicant’s spouse may serve as an additional party [supporting the application], but the creditor shall not require that the spouse be the additional party.”); *RL BB Acquisition, LLC v. Bridgemill Commons Dev. Group, LLC*, 754 F.3d 380, 383 (6th Cir. 2014) (“[A] portion of Regulation B . . . refer[red] to as the ‘spousal-guarantor rule,’ which prohibits a creditor from requiring an applicant’s spouse to guarantee a credit instrument, even if the creditor requires *someone* to execute a guaranty.”).

38. 12 C.F.R. § 1002.7(d)(5).

39. *Id.* (“The applicant’s spouse may serve as an additional party [supporting the application], but the creditor shall not require that the spouse be the additional party.”).

40. *Id.*

41. *See Bolduc v. Beal Bank, SSB*, 167 F.3d 667, 672 (1st Cir. 1999) (allowing ECOA violations to be raised as an affirmative defense of recoupment); *Silverman v. Eastrich Multiple Investor Fund, L.P.*, 51 F.3d 28, 32–33 (3d Cir. 1995) (permitting defendants to use violations of the ECOA as an affirmative defense for recoupment); *Bank of the West v. Kline*, 782 N.W.2d 453, 462–63 (Iowa 2010) (accepting violations of the ECOA to be raised as an affirmative defense of illegality, which would completely invalidate the debt created from the violation); *see also* Ronald Mann, *Justices Dubious Of Protections For Spousal Guarantors*, LAW360 (Oct. 6, 2015), <https://www.law360.com/articles/709196/justices-dubious-of-protections-for-spousal-guarantors> (“[I]f ‘applicant’ is extended to include ‘guarantor,’ then the logical consequence would be that the guarantors have the right to invalidate the entire loan, not just their guaranties — a considerable windfall for the borrower.”); *Hletko & Stapleton*, *supra* note 27 (“[A] guarantor seeking to invalidate his or her guaranty based on an ECOA violation could render a debt *entirely* uncollectable.”) (emphasis added); *but see RL BB Acquisition*, 754 F.3d at 386 (emphasis added) (“A creditor will only lose its entire debt if the borrower immediately defaults and the pledged collateral turns out to be worthless.”).

42. *See generally* 15 U.S.C. § 1691 (2016).

43. *Hawkins v. Cmty. Bank of Raymore*, 136 S. Ct. 1072, 1072 (2016); *Hawkins v. Cmty. Bank of Raymore*, 761 F.3d 937, 939–40 (8th Cir. 2014); *Hawkins v. Cmty. Bank of Raymore*, No. 12-CV-00670-DW, 2013 WL 12074971, at \*3 (W.D. Mo. May 16, 2013); *Weinberger*, *supra* note 10 (“The case concerns whether Missouri-based Cmty. Bank of Raymore improperly required Valerie Hawkins and Janice Patterson to sign on as guarantors for more than \$2 million in loans that their husbands took out to fund a failed real estate

III. HAWKINS V. COMMUNITY BANK OF RAYMORE<sup>44</sup>

The dispute in *Hawkins v. Community Bank of Raymore* arose when co-owners of PHC Development, LLC (“PHC”) took out a loan requiring their wives to sign as guarantors.<sup>45</sup> Gary Hawkins and Chris Patterson owned PHC.<sup>46</sup> Between 2005 and 2008, the Community Bank of Raymore (“Community Bank”) made four loans to PHC, totaling more than \$2,000,000.<sup>47</sup> With each of these loans, the co-owners and their respective wives executed personal guarantees to Community Bank to secure the loans.<sup>48</sup> In April 2012, PHC defaulted on its loans from Community Bank.<sup>49</sup> Community Bank accelerated payment on the loans and demanded payment from PHC as well as Ms. Hawkins and Ms. Patterson (“the wives”) as guarantors.<sup>50</sup>

As guarantors, the wives were liable for the defaulted payments; however, if they demonstrated that the lenders violated the ECOA by requiring a spouse to guarantee a loan, it is likely, or at least possible, the loan would be deemed void and would not need to be repaid.<sup>51</sup> The decision of whether the wives owed \$2,000,000 in debt hinged on the interpretation of the word “applicant.”<sup>52</sup> If the wives were deemed

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development in Peculiar, Missouri. Hawkins and Patterson allege that the bank violated a Fed[eral] rule aimed at preventing discrimination against women based on their marital status by requiring them to serve as guarantors on the loans.”).

44. *Hawkins*, 136 S. Ct. at 1072; *Hawkins*, 761 F.3d at 937; *Hawkins*, 2013 WL 12074971, at \*3; Weinberger, *supra* note 10 (“The case concerns whether Missouri-based Community Bank of Raymore improperly required Valerie Hawkins and Janice Patterson to sign on as guarantors for more than \$2 million in loans that their husbands took out to fund a failed real estate development in Peculiar, Missouri. Hawkins and Patterson allege that the bank violated a Fed[eral] rule aimed at preventing discrimination against women based on their marital status by requiring them to serve as guarantors on the loans.”).

45. *Hawkins*, 761 F.3d at 939.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*; see Mann, *supra* note 41 (“[I]f ‘applicant’ is extended to include ‘guarantor,’ then the logical consequence would be that the guarantors have the right to invalidate the entire loan, not just their guaranties — a considerable windfall for the borrower.”); Hletko & Stapleton, *supra* note 27 (emphasis added) (“[A] guarantor seeking to invalidate his or her guaranty based on an ECOA violation could render a debt *entirely* uncollectable.”); but see *RL BB Acquisition, LLC v. Bridgemill Commons Dev. Group, LLC*, 754 F.3d 380, 386 (6th Cir. 2014) (emphasis added) (“A creditor will only lose its entire debt if the borrower immediately defaults and the pledged collateral turns out to be worthless.”).

52. Compare 15 U.S.C. § 1691a(b) (2016), with 12 C.F.R. § 1002.2(e) (2017).

“applicants,” then the spousal guarantees were in violation of the ECOA.<sup>53</sup> If the wives were not considered applicants, then the loan agreements are enforceable and the wives, as guarantors, were responsible for the defaulted loan payments.<sup>54</sup>

The wives filed an action against Community Bank in the United States District Court for the Western District of Missouri, seeking damages and an order declaring the guarantees void and unenforceable.<sup>55</sup> The wives alleged Community Bank required them to execute the guarantees securing PHC’s loans solely because they were married to their respective husbands; they claimed this was discrimination on the basis of their marital status, in violation of the ECOA.<sup>56</sup> On summary judgment, the district court concluded the wives were not “applicants” under the ECOA and, therefore, Community Bank did not violate the ECOA by requiring the wives to execute the guarantees.<sup>57</sup> The district court granted summary judgment in favor of Community Bank.<sup>58</sup>

The wives appealed to the Eighth Circuit.<sup>59</sup> They relied on Regulation B’s definition of “applicant,” which includes guarantors, to argue that they qualified as applicants within the meaning of the ECOA.<sup>60</sup> The Eighth Circuit examined whether it would be appropriate to rely on Regulation B’s definition of applicant or if it would instead need to use the statutory language of the ECOA, noting that if the wives did not qualify as applicants, then Community Bank did not violate the ECOA by requiring the wives to execute the guarantees.<sup>61</sup> Additionally, if the

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53. 12 C.F.R. § 1002.2(e).

54. 15 U.S.C. § 1691a(b).

55. *Hawkins v. Cmty. Bank of Raymore*, No. 12-CV-00670-DW, 2013 WL 12074971, at \*3 (W.D. Mo. May 16, 2013).

56. *Hawkins v. Cmty. Bank of Raymore*, 761 F.3d 937, 939 (8th Cir. 2014) (“[The wives] alleged that Community had required them to execute the guaranties securing PHC’s loans solely because they are married to their respective husbands. They claimed that this requirement constituted discrimination against them on the basis of their marital status in violation of the ECOA.”); *Hawkins*, 2013 WL 12074971, at \*3.

57. *Hawkins*, 761 F.3d at 940 (“The district court concluded that Hawkins and Patterson were not ‘applicants’ within the meaning of the ECOA and thus that Community had not violated the ECOA by requiring them to execute the guaranties.”); *Hawkins*, 2013 WL 12074971, at \*3.

58. *Hawkins*, 761 F.3d at 940; *Hawkins*, 2013 WL 12074971, at \*3.

59. *Hawkins*, 761 F.3d at 940.

60. 12 C.F.R. § 1002.2(e) (2017); *see id.* at 940–41 (“Hawkins and Patterson argue that they qualify as applicants within the meaning of the ECOA because they guaranteed PHC’s debt to Community. They do not argue that they qualify as applicants on any other basis.”).

61. *Hawkins*, 761 F.3d at 941 (“This case turns, then, on whether we should apply [12 C.F.R. § 1002.2(e)]’s definition of applicant, which would permit Hawkins and Patterson to

wives were able to rely on Regulation B, then the wives would be able to cite the spousal guarantor rule and raise an ECOA violation as an affirmative defense.<sup>62</sup> If the wives were only able to rely on the language within the ECOA, which does not reference spousal guarantors, then the wives would only be able to file a counterclaim against Community Bank if they believed there was an ECOA violation.<sup>63</sup>

The Eighth Circuit applied the *Chevron*<sup>64</sup> test to decide whether it should use the statutory definition provided, or if the court needed to adopt the agency's definition from Regulation B.<sup>65</sup> The *Chevron* test consists of two prongs.<sup>66</sup> The first prong requires the court to consider whether the statutory language clearly speaks to the question at issue.<sup>67</sup> If the court is able to determine Congress' intent, then the statute will suffice, and the inquiry will end with no need to look at the second prong.<sup>68</sup> If the statutory language is considered ambiguous and the legislative intent is not easily understood, then the court will move on to

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pursue an ECOA claim as applicants solely because they executed guarantees to secure PHC's loans.").

62. See *Bolduc v. Beal Bank, SSB*, 167 F.3d 667, 672 (1st Cir. 1999) (allowing defendants to raise an affirmative defense of recoupment); *Silverman v. Eastrich Multiple Investor Fund, L.P.*, 51 F.3d 28, 32–33 (3d Cir. 1995) (holding ECOA violations can be raised as an affirmative defense of recoupment); *Bank of the West v. Kline*, 782 N.W.2d 453, 462–63 (Iowa 2010) (ruling that violations to the ECOA may be used as an affirmative defense of illegality); see also *Revision of the Board's Equal Credit Regulation: An Overview*, 71 FED. RES. BULL. 12, at 919 ("Including guarantors as applicants] is also consistent with the congressional intent for enforcement through private lawsuits because it gives the guarantor the right to bring a lawsuit or to file a counterclaim against a creditor. To recover damages, the guarantor must prove that the creditor violated the signature rules and also must establish the damages suffered.").

63. See generally 15 U.S.C. § 1691 (2016); *Riggs Nat'l Bank of Wash., D.C. v. Linch*, 829 F. Supp. 163, 169 (E.D. Va. 1993) (denying defendants the opportunity to raise an ECOA violation as an affirmative defense, and only allowing claims or counterclaims to be brought).

64. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837 (1984).

65. *Hawkins*, 761 F.3d at 940–41 ("To determine whether we should defer to the Federal Reserve's interpretation of the ECOA's definition of applicant, we apply the two-step framework established by *Chevron U.S.A., Inc. v. Natural Resources Defense Council*.").

66. *Id.*

67. *Chevron*, 467 U.S. at 842 ("First, always, is the question whether Congress has directly spoken to the precise question at issue.").

68. *Id.* at 842–43 ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."); *North Dakota v. E.P.A.*, 730 F.3d 750, 763 (8th Cir. 2006) (quoting *Baptist Health v. Thompson*, 458 F.3d 768, 773 (8th Cir. 2006)) ("[W]e ask first whether the intent of Congress is clear as to the precise question at issue. If, by employing traditional tools of statutory construction, we determine that Congress' intent is clear, that is the end of the matter.").

the second prong.<sup>69</sup> If the second prong analysis is necessary, the court will consider whether the agency's definition of the ambiguous statutory language is a reasonable interpretation in light of the plain language of the statute.<sup>70</sup>

In *Hawkins*, the Eighth Circuit looked at the first prong of the test and concluded there was no ambiguity in the statutory language.<sup>71</sup> This meant the court would rely on the definition of "applicant" coming directly from Congress in the ECOA and not consider Regulation B's definition.<sup>72</sup> The court explained, "the text of the ECOA clearly provides that a person does not qualify as an applicant under the statute solely by virtue of executing a guarantee to secure the debt of another."<sup>73</sup> The court further clarified, "a person is an applicant only if she requests credit,"<sup>74</sup> and that "a person does not, by executing a guarantee, request credit."<sup>75</sup> This led the Eighth Circuit to its ultimate decision that "a guarantor does not request credit and therefore cannot qualify as an applicant under the unambiguous text of the ECOA."<sup>76</sup> Therefore, the court concluded that Community Bank did not violate the ECOA by requiring spousal guarantees.<sup>77</sup>

The Supreme Court agreed to hear the wives' claims on appeal; it seemed as if courts and creditors would finally receive an answer on

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69. *Chevron*, 467 U.S. at 843 ("If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation.").

70. *Chevron*, 467 U.S. at 843 ("[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."); *E.P.A.*, 730 F.3d at 763.

71. *Hawkins*, 761 F.3d at 941-42 ("Applying the first step of the *Chevron* framework, we conclude that the text of the ECOA clearly provides that a person does not qualify as an applicant under the statute solely by virtue of executing a guaranty to secure the debt of another.").

72. *Id.*

73. *Id.* at 941.

74. *Id.*

75. *Id.*

76. *Id.* at 942 ("Because the text of the ECOA is unambiguous regarding whether a guarantor constitutes an applicant, we will not defer to the Federal Reserve's interpretation of applicant, and we can conclude that a guarantor is not protected from marital-status discrimination by the ECOA.").

77. *Id.* at 943 ("Accordingly, we conclude that *Hawkins* and *Patterson* are not applicants under the ECOA, and thus *Community* did not violate the ECOA by requiring them to execute the guaranties.").

whether a spousal guarantor is an applicant subject to the ECOA.<sup>78</sup> Unfortunately, what was supposed to provide clarity only left more confusion surrounding the issue.<sup>79</sup> After the death of Justice Antonin Scalia, the remaining eight Justices could not reach a majority, leaving the equally divided Supreme Court to affirm the Eighth Circuit through a one sentence, per curiam decision.<sup>80</sup> As a result, *Hawkins* is only binding on the Eighth Circuit and serves merely as a reference that other federal and state courts may look to for guidance.<sup>81</sup>

#### IV. CIRCUIT SPLITS AND OTHER JURISDICTIONS' INTERPRETATIONS OF "APPLICANT"

A number of courts have heard cases regarding discrimination on the basis of marital status in violation of the ECOA.<sup>82</sup> The Seventh Circuit, like the Eighth Circuit, found the ECOA's definition of "applicant" to be unambiguous and not to include spousal guarantors.<sup>83</sup> However, the Sixth Circuit relied on Regulation B's definition of "applicant" because the court found the ECOA definition ambiguous,

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78. Petition for Writ of Certiorari, *Hawkins v. Cmty. Bank of Raymore*, 761 F.3d 937 (2014) (No. 13-3065).

79. Weinberger, *supra* note 10 ("Justice Sonia Sotomayor said that the common understanding of 'applicant' backed the government and petitioners' position. 'And they don't suggest it has to be for yourself: It could be you're asking for an extension of credit for anyone,' she said." . . . "Justice Elena Kagan asked Brian H. Fletcher, the assistant to the solicitor general arguing the government's position, whether granting spouses the right to challenge the requirement that they sign on to a loan opened up 'liability on a scale that Congress wouldn't have expected because . . . the guarantor can come in and declare the entire loan invalid and the damages would be much higher.' 'There's nothing at all unreasonable about requiring a lender that has improperly demanded a guaranty to not be able to enjoy the benefit of that guaranty,' Fletcher said.").

80. *Hawkins v. Cmty. Bank of Raymore*, 136 S. Ct. 1072, 1072 (2016); *The U.S. Supreme Court Will Return with Only 8 Justices*, FORTUNE (Sept. 30, 2016), <http://fortune.com/2016/09/30/us-supreme-court-justices/>; Adam Liptak, *Antonin Scalia, Justice on the Supreme Court, Dies at 79*, N.Y. TIMES (Feb. 13, 2016), <https://www.nytimes.com/2016/02/14/us/antonin-scalia-death.html>.

81. *See Durant v. Essex Co.*, 74 U.S. 107, 111 (1868) (explaining equally divided decisions are not "an authority for other cases of like character").

82. *Hawkins*, 136 S. Ct. at 1072 (rendering an equally divided Supreme Court per curiam); *RL BB Acquisition, LLC v. Bridgemill Commons Dev. Group, LLC*, 754 F.3d 380 (6th Cir. 2014) (ruling guarantors are considered applicants, and therefore spousal guarantors may seek protection under the ECOA); *Moran Foods, Inc. v. Mid-Atlantic Mkt. Dev. Co.*, 476 F.3d 436 (7th Cir. 2007) (holding wives are not considered applicants and therefore spouses cannot use the ECOA as protection when they are guarantors).

83. *Moran*, 476 F.3d at 436.

holding that requiring a spousal guarantee violated the ECOA.<sup>84</sup> Additionally, other circuits have deferred to Regulation B's definition of "applicant," without conducting a *Chevron* analysis to arrive at this decision.<sup>85</sup>

A. *Courts Finding the ECOA's Definition Unambiguous*

Several courts, such as the Seventh Circuit in *Moran Foods v. Mid-Atlantic Market Development Co., LLC*, have ruled that the ECOA definition of "applicant" is unambiguous and relied on the language within the ECOA to define the word.<sup>86</sup> Mid-Atlantic was a grocery store owned by defendant Roger Camp, and a franchisee of Moran Foods.<sup>87</sup> Mid-Atlantic owed Moran Foods money for groceries, but could not pay and defaulted on its loans.<sup>88</sup> Camp's wife, Susan, had guaranteed the company's debt, but refused to honor the guarantees.<sup>89</sup> Moran Foods sued for breach of contract, and Mrs. Camp counterclaimed, alleging that Moran had violated the ECOA by requiring her to guarantee loans.<sup>90</sup>

The Seventh Circuit began its analysis by noting the ECOA's express purpose was to increase the availability of credit for women, and to ensure that creditors did not deny women credit solely on the basis of

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84. *RL BB Acquisition*, 754 F.3d at 380.

85. Hletko & Stapleton, *supra* note 27 ("Since the 1985 Amendment to Regulation B, courts historically have deferred to the Board's interpretation and permitted spousal guarantors to bring claims under ECOA. The majority of state and federal courts considering this issue, including the First, Third and Fourth Circuits, have axiomatically applied the expanded definition without reaching the question of agency deference under the two-step *Chevron* framework.").

86. *Moran*, 476 F.3d at 441 ("But there is nothing ambiguous about 'applicant' and no way to confuse an applicant with a guarantor.").

87. *Id.* at 437 ("We shall simplify ruthlessly. Moran Foods franchises grocery stores under the name 'Save-A-Lot' and sells the stores many of the groceries they need. Mid-Atlantic . . . was one of the franchisees.").

88. *Id.* ("Mid-Atlantic's stores faltered, and eventually defaulted, leaving it owing Moran a considerable amount of money for groceries bought but not paid for. Mid-Atlantic later declared bankruptcy.").

89. *Id.* ("Roger Camp, the owner of Mid-Atlantic, and his wife, Susan Camp, had guaranteed the company's debts to Moran.").

90. *See id.* ("When they refused to honor their guaranties, Moran brought this suit for breach of contract against the two Camps plus Mid-Atlantic. Mid-Atlantic and Susan Camp counterclaimed. . . . Susan Camp claimed that Moran had violated the Equal Credit Opportunity Act, which so far as relates to this case forbids 'any creditor to discriminate against any applicant with respect to any aspect of a credit transaction . . . on the basis of . . . marital status.'").

their gender.<sup>91</sup> The court went on to assert that Mrs. Camp “was not an applicant for credit,”<sup>92</sup> rather she “guaranteed her husband’s debt.”<sup>93</sup> The Seventh Circuit looked at the statutory language defining “applicant” to determine whether or not it was ambiguous.<sup>94</sup> The court concluded “there is nothing ambiguous about ‘applicant’ and no way to confuse an applicant with a guarantor.”<sup>95</sup>

The court acknowledged that Congress likely would not have included guarantors as “applicants” because it would open “vistas of liability” they never intended.<sup>96</sup> The “vistas of liability” refer to the potential negative impacts of adopting Regulation B’s definition.<sup>97</sup> Among the negative impacts is the amount of debt that could be forgiven if a spousal guarantor were to succeed on an ECOA violation claim.<sup>98</sup> A violation of the ECOA would allow guarantors to void more than just their guarantee, it would also allow the guarantors to invalidate the entire loan.<sup>99</sup>

In *Moran*, the court found that the creditor was not forcing a spousal guarantee; rather, the creditor was ensuring he could seize the assets if a default occurred.<sup>100</sup> After the creditor noticed several

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91. *See id.* at 441 (explaining that a purpose of ECOA was to eliminate the assumption of a woman’s role in childcare negatively affecting their credit worthiness).

92. *Id.* (“Susan Camp was not an applicant for credit, and neither received credit nor was denied it.”).

93. *Id.* (“Instead she guaranteed her husband’s debt and by doing so enabled his company to buy groceries from Moran on credit.”).

94. *See id.* (including the definition of the Board before the CFPB took control of ECOA regulation).

95. *Id.*

96. *Id.* (“What is more, to interpret ‘applicant’ as embracing ‘guarantor’ opens vistas of liability that the Congress that enacted the Act would have been unlikely to accept.”).

97. *See id.* (explaining that the Congress that enacted the Act would have been unlikely to accept such vistas).

98. *See id.* (“For then, as Susan Camp (not content with the modest damages that she obtained in the district court) contends in the cross-appeal, the guaranty would be unenforceable and the creditor might lose the entire debt.”).

99. *Id.*; Mann, *supra* note 41 (“Justices Anthony Kennedy and Elena Kagan were concerned about another problem, emphasized by Judge Richard Posner in a lower court opinion on the topic: if ‘applicant’ is extended to include ‘guarantor,’ then the logical consequence would be that the guarantors have the right to invalidate the entire loan, not just their guaranties—a considerable windfall for the borrower. As Justice Kagan put it in questioning Fletcher, “this actually creates liability on a scale that Congress wouldn’t have expected because if you are right, the guarantor can come in and declare the entire loan invalid.”).

100. *See* 12 C.F.R. § 1002.7(d)(2) (2017) (“If an applicant requests unsecured credit and relies in part upon property that the applicant owns jointly with another person to satisfy the creditor’s standards of creditworthiness, the creditor may require the signature of the other

residences were listed on the husband's assets, the creditor asked questions to understand if any other individuals had rights to the listed assets.<sup>101</sup> The creditor did not engage in these questions for the sole purpose of finding out if Mr. Camp was married and to force his wife to guarantee the loan; rather, it is common practice for a creditor to inquire about jointly held assets.<sup>102</sup>

In asking these questions, the creditor was ensuring it would have access to the asset should the debtor default on payment.<sup>103</sup> If the creditor did not have the guarantee of Mr. Camp's wife, the person jointly owning the asset, then the creditor would have difficulty collecting the asset if a default occurred.<sup>104</sup> Therefore, the creditor was not forcing a spousal guarantee; rather, the creditor was merely ensuring that in the event of a default there would be no other individual claiming rights to the asset and not allowing the creditor to seize the asset.<sup>105</sup> This would be a common measure taken by a creditor regarding any jointly held asset regardless of the debtor's relationship with the co-owner.<sup>106</sup> Asking if an asset is jointly owned does not necessarily mean it is an inquiry about marriage;

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person only on the instrument(s) necessary, or reasonably believed by the creditor to be necessary, under the law of the state in which the property is located, to enable the creditor to reach the property being relied upon in the event of the death or default of the applicant."); *Moran*, 476 F.3d at 442 ("It was therefore sound commercial practice unrelated to any stereotypical view of a wife's role for Moran to require that she guarantee the debt along with her husband.").

101. *See Moran*, 476 F.3d at 441–42 ("[W]hen Moran looked at the list of assets submitted by Roger Camp, who had agreed to guarantee repayment of any debts that Mid-Atlantic incurred to Moran, it noticed that several residences were included and so it naturally and correctly assumed that Mrs. Camp had an interest in those assets.").

102. *See id.* at 442 ("The residences of a married couple are usually owned either jointly or by the spouse other than the one who included them in the list of assets that he submitted to obtain credit. Often spouses don't know the precise allocation of property between them because it has been made by their lawyer . . .").

103. *See id.*

104. *See id.* ("In fact some \$2.5 million of the \$8.2 million in assets listed on Mr. Camp's credit application were actually owned by Mrs. Camp.").

105. *See* 12 C.F.R. § 1002.7(d)(2) ("Unsecured credit. If an applicant requests unsecured credit and relies in part upon property that the applicant owns jointly with another person to satisfy the creditor's standards of creditworthiness, the creditor may require the signature of the other person only on the instrument(s) necessary, or reasonably believed by the creditor to be necessary, under the law of the state in which the property is located, to enable the creditor to reach the property being relied upon in the event of the death or default of the applicant."); *Moran*, 476 F.3d at 442 ("It was therefore sound commercial practice unrelated to any stereotypical view of a wife's role for Moran to require that she guarantee the debt along with her husband.").

106. *See Moran*, 476 F.3d at 441–42 (explaining the normalcy of securing proper collateral for a loan).

an asset could be held jointly with a family member, friend, or business partner.<sup>107</sup>

*B. Courts finding the ECOA's Definition Ambiguous and Instead Relying on Regulation B*

Prior to *Hawkins*, and after the 1985 amendment of Regulation B, the majority of courts deferred to the Regulation B definition of applicant. They have allowed spousal guarantors to file claims under the ECOA.<sup>108</sup> Some courts give such deference to agency definitions, forgoing the *Chevron* analysis and outright relying on the Board's—and now CFPB's—interpretation.<sup>109</sup>

In *RL BB Acquisition, LLC v. Bridgemill Commons Dev. Group, LLC*, the Sixth Circuit held that “applicant” could be construed to include guarantors due to the ambiguous definition within the ECOA, and therefore, individuals can raise a violation of the ECOA as an affirmative defense.<sup>110</sup> Bridgemill was one of two residential properties that Bernard Dixon invested millions of dollars into in the wake of the 2008 financial crisis, which left him nearly \$10 million in debt.<sup>111</sup> Mr. Dixon sought to refinance his debt, but the bank deemed him not independently

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107. *See id.* (“As far as appears [to the creditor], had they been unmarried but living together, whether as boyfriend and girlfriend, or as siblings, or father and daughter, or just roommates, as soon as Moran learned that Roger Camp was living with someone it would have realized that one or more of the residences on Camp’s list of assets might be owned with someone else or maybe owned entirely by someone else. And so it would have insisted on the guaranty. If so, there was no discrimination on the basis of marital status.”).

108. *See Hletko & Stapleton, supra* note 27 (“Since the 1985 Amendment to Regulation B, courts historically have deferred to the Board’s interpretation and permitted spousal guarantors to bring claims under ECOA. The majority of state and federal courts considering this issue, including the First, Third and Fourth Circuits, have axiomatically applied the expanded definition without reaching the question of agency deference under the two-step *Chevron* framework.”).

109. *See Hletko & Stapleton, supra* note 27; *see, e.g.,* *Mayes v. Chrysler Credit Corp.*, 167 F.3d 675, 677 (1st Cir. 1999) (looking to Regulation B’s definition of applicant without applying *Chevron*); *Silverman v. Eastrich Multiple Inv’r Fund, L.P.*, 51 F.3d 28, 30–31 (3d Cir. 1995) (accepting guarantors as applicants as the Regulation B definition described without using *Chevron*’s two-prong approach); *Ballard v. Bank of America*, 734 F.3d 308, 310 n.1 (4th Cir. 2013) (deferring to the agency definition of applicant without using *Chevron*); *but see Moran*, 476 F.3d (rendering the Seventh Circuit as the only federal circuit court not to treat Regulation B’s definition of applicant as applicable prior to *Hawkins*).

110. *RL BB Acquisition, LLC v. Bridgemill Commons Dev. Group, LLC*, 754 F.3d 380, 381 (6th Cir. 2014) (“We hold that a violation of ECOA and Regulation B can be asserted as an affirmative defense of recoupment.”).

111. *Id.* at 381–82.

creditworthy.<sup>112</sup> The bank suggested he find additional collateral to be able to receive a large enough loan to refinance the properties.<sup>113</sup> Mr. Dixon pledged a large amount of stock and a corporate debenture, and also offered his personal guarantee.<sup>114</sup> Furthermore, his wife, agreed to pledge the same number of shares, which she owned individually.<sup>115</sup> In addition to pledging her shares as collateral, Mrs. Dixon too executed a personal guarantee.<sup>116</sup> Suit was brought against Mr. and Mrs. Dixon for defaulting on the loan.<sup>117</sup> Mrs. Dixon answered and claimed the guarantee was void because it violated the ECOA.<sup>118</sup>

The Sixth Circuit held the ECOA's definition of "applicant" was ambiguous and that guarantors could be considered applicants.<sup>119</sup> The court reasoned the ECOA's definition could include individuals that are not personally applying for credit.<sup>120</sup> The court reached this decision by looking to the terms "applies" and "credit" in the statutory definition.<sup>121</sup> While applying *Chevron*, the court referenced the dictionary to provide

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112. *Id.* at 382 ("Based on [Mabry Farms development owing \$3.2 million to United Community Bank and Bridgemill Commons development owing \$6.4 million to Regions Bank], BB&T concluded that Bernard and BCDG were not independently creditworthy for a loan large enough to refinance both the Regions Loan and the UCB Loan.").

113. *Id.* ("[The loan officer] suggested that BB&T could refinance the Regions Loan, so long as Bernard could find additional collateral.").

114. *Id.* ("To shore up the application, Bernard executed a personal guaranty, meaning that he would be personally liable in the case of a default by the borrower.").

115. *Id.*

116. *Id.* ("BB&T produced a summary of the requirements for the loan, which [the loan officer] gave to Bernard on May, 2, 2008. Item one in the summary reads: '[Starr] will be required to co-sign the notes with her future release subject to negotiation.'"); *id.* at 382–83 ("They also each executed a guaranty which made them individually liable for the amount owed on the BCDG Note.").

117. *Id.* ("On August 12, 2011, Plaintiff filed suit in the U.S. District Court for the Eastern District of Tennessee on the basis of diversity jurisdiction. Plaintiff asserted five causes of action, including breach of guaranty against Starr.").

118. *Id.* ("Starr asserted that her guaranty was unenforceable since it violated the ECOA and Regulation B—specifically, Regulation B's prohibition on requiring spouses to guarantee loans."); *see* 12 C.F.R. § 1002.7(d) (2017).

119. *See RL BB Acquisition*, 754 F.3d. at 384–85 (rendering a decision by the Sixth Circuit that the ECOA definition of "applicant" is ambiguous under a *Chevron* analysis).

120. *Id.* (interpreting the definition to mean it could "include third parties who do not initiate an application for credit, and who do not seek credit for themselves").

121. *See id.* ("'[A]pplying the ordinary tools of statutory construction,' we hold that the statutory definition is ambiguous because it could be read to include third parties who do not initiate an application for credit, and who do not seek credit for themselves—a category that includes guarantors. We reach this conclusion based on two broad terms in the definition, 'applies' and 'credit.'").

more clarity.<sup>122</sup> The court acknowledged that there were multiple ways to interpret “applies.”<sup>123</sup> While it is likely “applies” would only refer to the individual applying for credit, an acceptable interpretation would also encompass guarantors.<sup>124</sup>

The Sixth Circuit further stated that the word “credit” as it is used in the statutory definition adds even more ambiguity.<sup>125</sup> The ambiguity exists because the definition explains “an ‘applicant’ requests credit, but a ‘debtor’ reaps the benefit.”<sup>126</sup> By using two different terms, the ECOA allows the possibility that the applicant and the debtor are different people.<sup>127</sup> Therefore, the court concluded “[i]f an applicant is not necessarily the debtor, it would be reasonable to conclude that the applicant could be a third party, such as a guarantor.”<sup>128</sup>

After determining that the ECOA’s statutory definition of “applicant” was ambiguous, the court moved on to the second prong of the *Chevron* test.<sup>129</sup> This step questions whether the regulation arises from an acceptable interpretation of the statute.<sup>130</sup> In answering the

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122. *Id.* at 385; *Applies*, WEBSTER’S THIRD NEW INT’L DICTIONARY 105 (1993) (“[V]erb: to make an appeal or request esp. formally and often in writing and usu. For something of benefit to oneself.”); *Applies*, OXFORD ENGLISH DICTIONARY (3d ed. 2008), <http://www.oed.com/view/Entry/9724> (“[T]o make an approach to (a person) for information or aid; to have recourse or make application to, to appeal to; to make a (formal) request for.”).

123. *RL BB Acquisition*, 754 F.3d. at 385. (regarding the term “applies,” the court found that while “one permissible reading of this term is that only the initial applicant can be deemed to ‘apply’ for credit,” it is not the only way the statutory definition could be read).

124. *Id.* (reasoning that another interpretation of “applies” could be “all those who offer promises in support of an application,” meaning the definition could also include guarantors since they “make formal requests for aid in the form of credit for a third party”).

125. *Id.*

126. *Id.*

127. *Id.* (citing *Sosa v. Alvarez-Machain*, 542 U.S. 692, 711 n.9 (2002)) (suggesting there is a possibility that “the applicant and the debtor are not always the same person.”)

128. *Id.*

129. *See id.* (citations omitted) (“Moving from the text to ECOA’s larger context, we see no reason to artificially limit the possible meanings of ‘applicant.’ ECOA prohibits discrimination ‘with respect to *any aspect* of a credit transaction,’ and we have previously notes that the statute has ‘broad remedial goals.’ This context confirms what the plan language reveals—ECOA’s definition of ‘applicant’ could be construed to cover a guarantor. The statute is therefore ambiguous and we move on to *Chevron* step two.”).

130. *Id.* (assessing the definition through *Chevron* requires asking “whether the regulation stems from a permissible construction of the statute”); *see Chevron U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 842–43 (1984) (“[I]f the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, we would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.”).

question, the court did not need to find that the Regulation B definition was the only possible definition to have upheld the purpose of the statute.<sup>131</sup> Rather, the court can defer to Regulation B's definition if it finds it is a reasonable interpretation of the statute.<sup>132</sup> Since "at least one of the natural meanings" of applicant includes guarantors, the court held that the Regulation B definition including guarantors as applicants was permissible.<sup>133</sup>

C. *Legal Claims Available for Guarantors Based on the Definition of "Applicant" Adopted*

Further adding to the circuit split regarding whether guarantors are applicants, both the Seventh and Eighth Circuits have chosen to follow the ECOA language rather than the definition including guarantors in Regulation B.<sup>134</sup> However, in circuits that have deferred to the CFPB's interpretation, Regulation B language controls.<sup>135</sup> Beyond whether or not a guarantor is an applicant, this differing language controls whether a guarantor can file a claim or is limited only to an affirmative defense.<sup>136</sup> Filing a claim means guarantors could file suit at any point they felt their rights had been violated.<sup>137</sup> Availability of only an affirmative defense

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131. *RL BB Acquisition*, 754 F.3d at 385 (citing *Alliance for Cmty. Media v. F.C.C.*, 529 F.3d 763, 778 (6th Cir. 2008)) ("[W]e need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even that the reading [the court] would have reached if the question initially has arisen in a judicial proceeding.").

132. *See id.* (using an agency definition requires the court to determine that "the agency's interpretation [ ] represents a permissible one entitled to deference.").

133. *Id.* (citing *Harris v. Olszewski*, 442 F.3d 456, 467 (6th Cir. 2006)).

134. *See Moran Foods, Inc. v. Mid-Atlantic Mkt. Dev. Co.*, 476 F.3d 436 (7th Cir. 2007); *Hawkins v. Cmty. Bank of Raymore*, 761 F.3d 937, 937 (8th Cir. 2014).

135. *See Hletko & Stapleton*, *supra* note 27 (explaining the First, Third and Fourth Circuits have historically deferred to Regulation B's definition of applicant and allowed spousal guarantors to bring claims under the ECOA).

136. *See Riggs Nat'l Bank of Wash., D.C. v. Linch*, 829 F. Supp. 163, 169 (E.D. Va. 1993) (explaining violations of the ECOA cannot be raised as an affirmative defense, they may only be raised as a claim or counterclaim); *but see RL BB Acquisition*, 754 F.3d at 384 (recognizing that ECOA claims can be raised as an affirmative defense of recoupment; *Bank of the W. v. Kline*, 782 N.W.2d 453, 462–63 (Iowa 2010) (holding defendants may assert violations of the ECOA as the affirmative defense of illegality)).

137. *Abraham*, *supra* note 3, at 487 (explaining that the downside of only having an affirmative defense available would mean that defendants must wait until a legal action was brought against them to defend themselves).

means that guarantors must wait until a lawsuit has been filed against them to assert a defense.<sup>138</sup>

Under the statute, “applicants” have the ability to sue or counterclaim for ECOA violations.<sup>139</sup> If the ECOA does not consider guarantors to be applicants, then the ECOA does not provide a basis for guarantors to sue.<sup>140</sup> With this, several courts have decided that ECOA violations are not affirmative defenses, and can only be raised in the form of a claim or a counterclaim.<sup>141</sup>

Regulation B, however, gives guarantors the opportunity to sue for violations of the spousal guarantor rule.<sup>142</sup> Some courts have applied Regulation B’s definition and allowed ECOA violations to be used as an affirmative defense of illegality, which will completely invalidate the guarantee.<sup>143</sup> Yet still, other courts use the Regulation B definition to serve as a defense of recoupment.<sup>144</sup> Recoupment “allows a defendant to defend against a claim by asserting—up to the amount of the claim—the

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138. See Abraham, *supra* note 3, at 487 (“[I]f the FRB’s definition of ‘applicant’ was not read into the ECOA, it would require spousal guarantors to wait until the commencement of legal action against them to assert an affirmative defense as to the legality of the guaranty. By requiring the guarantor to wait, the guarantor might ‘experience financial difficulty to obtain individual credit because of these large contingent liabilities, and suffer mental and emotional distress resulting from the inability to obtain credit.’”).

139. See 15 U.S.C. § 1691e(c) (2016) (“Action for equitable and declaratory relief. Upon application by an aggrieved applicant, the appropriate United States district court or any other court of competent jurisdiction may grant such equitable and declaratory relief as is necessary to enforce the requirements imposed under this title.”).

140. See *id.* (giving these rights only to “applicants” as defined in the ECOA).

141. See *Riggs Nat’l Bank*, 829 F. Supp. at 169 (“[T]he ECOA cannot be asserted as an affirmative defense.”).

142. *RL BB Acquisition, LLC v. Bridgemill Commons Dev. Group, LLC*, 754 F.3d 380, 384 (6th Cir. 2014) (“Regulation B, however, contains its own definition of ‘applicant,’ [in section 1002.2(e)] and that definition allows guarantors to sue for violations of the spouse-guarantor rule.”); see 12 C.F.R. § 1002.16(b)(2) (2017) (“As provided in section 706(f) of the Act, a civil action under the Act or this part may be brought in the appropriate United States district court without regard to the amount in controversy or in any other court of competent jurisdiction within five years after the date of the occurrence of the violation, or within one year after the commencement of an administrative enforcement proceeding or of a civil action brought by the Attorney General of the United States within five years after the alleged violation.”).

143. See, e.g., *Bank of the W. v. Kline*, 782 N.W.2d 453, 462–63 (Iowa 2010) (“The basis for allowing [the defendants] to assert the bank’s ECOA violation as affirmative defenses is that their unlimited personal guaranties arose out of an illegal act and enforcement would be contrary to public policy.”).

144. See *Bolduc v. Beal Bank, SSB*, 167 F.3d 667, 672 (1st Cir. 1999) (“[T]he common law doctrine of recoupment, which allows a defendant to ‘defend’ against a claim by asserting—up to the amount of the claim—the defendant’s own claim against the plaintiff growing out of the same transaction. Recoupment is allowed even where the defendant’s claim would be barred, if asserted in a separate action, by the statute of limitations.”).

defendant's own claim against the plaintiff growing out of the same transaction."<sup>145</sup>

Creditors are aware of these repercussions and have become fearful of potential consequences associated with lending to married couples. For example, if a creditor violates the ECOA, then the husband and wife may not have to pay back the debt at all since it would be considered void. Another risk is that the credit-lending institution could be sued and be forced to return the money gained from the asset.<sup>146</sup>

#### V. WHAT TWO DIFFERENT DEFINITIONS MEAN FOR ECOA DISCRIMINATION CLAIMS

Creditors, debtors, courts, and regulators were all looking to the Supreme Court opinion in *Hawkins* for a definitive rule.<sup>147</sup> Unfortunately, no such rule was established.<sup>148</sup> As long as the circuit split remains,<sup>149</sup> it is permissible for lower courts outside of the Sixth, Seventh, and Eighth Circuits to continue forming their own opinions.<sup>150</sup>

The ECOA is subject to the concurrent jurisdiction of both state and federal courts, meaning it is permissible for state and federal courts to decide differently on the issue.<sup>151</sup> In states like Missouri, for example, the fate of the verdict is ultimately dependent upon what court system the

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145. *RL BB Acquisition*, 754 F.3d at 387 (quoting *Bolduc*, 167 F.3d at 672).

146. *See Moran Foods, Inc. v. Mid-Atlantic Mkt. Dev. Co.*, 476 F.3d 436 (7th Cir. 2007) ("Where the guaranty is rendered legally unenforceable, the creditor may be forced to lose the entire debt."); *RL BB Acquisition*, 754 F.3d at 386 (emphasis added) ("Furthermore, we are not troubled by the prospect of guarantors being made whole after a creditor violates the law. A creditor will only lose its entire debt if the borrower immediately defaults and the pledged collateral turns out to be worthless. We will not strike down a valid regulation to salvage bad underwriting.").

147. *See Edge*, *supra* note 11 ("Until this issue is resolved by the Supreme Court, if ever, banks in the 8th Circuit will wonder whether they should listen to the judiciary or Federal Reserve Examiners who frequent their banks.").

148. *Hawkins v. Cmty. Bank of Raymore*, 136 S. Ct. 1072, 1072 (2016).

149. *See Hawkins*, 136 S. Ct. at 1072 (rendering an equally divided Supreme Court per curiam).

150. *See, e.g., RL BB Acquisition*, 754 F.3d at 380 (ruling guarantors are considered applicants, and therefore spousal guarantors may seek protection under the ECOA); *Moran*, 476 F.3d at 436 (holding wives are not considered applicants and therefore spouses cannot use the ECOA as protection when they are guarantors).

151. 15 U.S.C. § 1691e(c) (2016) ("Upon application by an aggrieved applicant, the appropriate United States district court or any other court of competent jurisdiction may grant such equitable and declaratory relief as is necessary to enforce the requirements imposed under this sub chapter.").

action is filed in.<sup>152</sup> Since there is no binding authority for all to adhere to, creditors in different jurisdictions must abide by different rules, and some have to guess which law to follow.<sup>153</sup> The lack of guidance poses a challenge for regional areas, as neighboring states and circuits have different determinations and the confusion has also become a major obstacle for different courts within the same state.<sup>154</sup>

If lenders remain unsure of what they can and cannot do, and continue to face negative repercussions in some jurisdictions, it may result in more difficulty for a married person to receive a loan.<sup>155</sup> A creditor is unlikely to continue loaning large credit lines to married borrowers knowing that if the loan was guaranteed by a spouse, there is a chance the creditor will not receive payment from the guaranteed assets.<sup>156</sup> This would require those seeking credit to find another guarantor.<sup>157</sup> Some individuals may have a business partner or other

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152. See *Arvest Bank v. Uppalapati*, 2013 WL 85336, at \*4 (W.D. Mo. Jan 7, 2013) (adopting the view expressed in *Moran* that a guarantor is not an applicant); *Champion Bank v. Reg'l Dev., LLC*, 2009 WL 1351122 at \*3 (E.D. Mo. May 13, 2009) (following *Moran*'s decision that guarantors are not applicants); *Frontenac Bank v. T.R. Hughes, Inc.* 404 S.W.3d 272, 291 (Mo. Appl. E.D. 2012) (denying *Moran*'s reasoning and instead deciding that guarantors are applicants); *Boone Nat'l Sav. & Loan Ass'n v. Crouch*, 47 S.W.3d 371, 376 (Mo. Banc. 2001) (finding that guarantors are applicants).

153. See *Edge*, *supra* note 11 (“For banks that do business across state lines, this could be an interesting issue.”); see *Hletko & Stapleton*, *supra* note 27, at n.50 (“[C]reditors outside of the Eighth and Seventh Circuits should assume that the Sixth Circuit rule applies to avoid potential liability for impermissibly requiring spousal guarantees.”); but see *Chris Bruce, Deadlocked Justices Back Bank on ECOA, Guarantors*, BNA (Mar. 22, 2016), <https://buckleysandler.com/news/2016-03-25/valerie-hletko-quoted-bloomberg-bna-article-deadlocked-justices-back-bank-ecoa-guarantors> (“[B]anks have a reasonable degree of assurance that they may obtain guaranties from spouses of married business owners.”).

154. See *Edge*, *supra* note 11 (“Our neighbors in Arkansas will have one definition of ‘applicant’ for ECOA purposes, and Tennessee, another.”).

155. See *Edge*, *supra* note 11 (“Until this issue is resolved by the Supreme Court, if ever, banks in the 8th Circuit will wonder whether they should listen to the judiciary or Federal Reserve Examiners who frequent their banks.”).

156. See *Moran Foods, Inc. v. Mid-Atlantic Mkt.Dev. Co.*, 476 F.3d 436 (7th Cir. 2007) (“Where the guaranty is rendered legally unenforceable, the creditor may be forced to lost the entire debt.”); *RL BB Acquisition, LLC v. Bridgemill Commons Dev. Group, LLC*, 754 F.3d 380, 386 (6th Cir. 2014) (“Furthermore, we are not troubled by the prospect to guarantors being made whole after a creditor violates the law. A creditor will only lose its entire debt if the borrower immediately defaults and the pledged collateral turns out to be worthless. We will not strike down a valid regulation to salvage bad underwriting.”).

157. See SMALL BUS. ADMIN., SMALL BUS. RES.: FOR NORTHERN CAL. 2 (Mar. 20, 2017), [https://www.sba.gov/sites/default/files/resource\\_files/SBA\\_one\\_pager\\_for\\_digital\\_distribution\\_-\\_03-2017.pdf](https://www.sba.gov/sites/default/files/resource_files/SBA_one_pager_for_digital_distribution_-_03-2017.pdf) (“Each person who owns 20% or more of the business must provide a personal guaranty of the loan, and must have satisfactory personal credit. When evaluating applications for approval, lenders often consider the applicant’s character and credit, management capability, collateral, and the owner’s equity contribution.”).

individual willing to sign for them, however, many individuals rely on spouses to guarantee their debts.<sup>158</sup> Not allowing creditors to accept spousal guarantees could limit the amount of credit a person could receive.<sup>159</sup> This would effectively mean that the ECOA, which was enacted to disallow credit-lending discrimination on the basis of marital status, constricts opportunities for credit based on one's marital status.<sup>160</sup>

A. *Positive and Negative Impacts of Spousal Guarantors*

Creditors requiring spousal guarantors conflicts with Congress' express intent in passing the ECOA.<sup>161</sup> Requiring a spouse to guarantee a debt is essentially forcing a wife to become liable for everything the husband would be liable for should he default.<sup>162</sup> This is a much larger undertaking than requiring a wife to grant a lien on her interest in jointly held property.<sup>163</sup> The scope would be broadened to include everything

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158. See Bill Fay, *Loan Agreements with Family and Friends*, DEBT.ORG, <https://www.debt.org/credit/loans/friends-family/> (last visited Jan. 22, 2018) (“According to the Federal Reserve Board Survey of Consumer Finances, loans from family and friends amount to \$89 billion each year in the United States. The most popular reasons for asking family members or friends for a loan are to start a business or purchase a home. A national survey by Fundable said 38% of startup businesses relied on money from family or friends.”).

159. See Justin Pritchard, *Personal Guarantee Basics*, THE BALANCE, <https://www.thebalance.com/personal-guarantee-basics-315207> (last updated Feb. 14, 2017) (“Lenders always evaluate borrowers to predict whether or not they’ll repay. For *consumer* loans, there are credit scores and numerous other sources of information to help with the decision. However, businesses—especially new businesses and operations that have never borrowed—probably don’t have a business-specific credit history. With limited information it’s hard for lenders to make a decision. They would be more comfortable if they could see that you’ve borrowed money in the past and consistently repaid loans. When they can’t make a decision based on historical information, they require *some* sort of security (or they charge an extremely high interest rate). That security often comes in the form of a personal guarantee, although other approaches such as pledging business assets as collateral, can be used.”).

160. See Equal Credit Opportunity Act, Pub. L. 93-495, § 502, 88 Stat. 1521, 1521 (1974) (codified at 15 U.S.C. § 1691 (2016)) (“The Congress finds that there is a need to insure that the various financial institutions and other firms engaged in the extensions of credit exercise their responsibility to make credit available with fairness, impartiality, and without discrimination on the basis of sex or marital status.”).

161. *Id.*

162. See Sam Thacker, *Personal Guarantees Required in Small Business Loans*, ALLBUS., <https://www.allbusiness.com/personal-guarantees-required-in-small-business-loans-10753236-1.html> (last visited Jan. 22, 2018) (“An individual being asked to sign an unlimited personal guarantee is being asked to sign a guarantee that a lender will recover from the guarantor 100% of any outstanding loans made and any and all legal fees associated with the loan.”).

163. *Id.*

the wife owns independently as well.<sup>164</sup> Requiring a spousal guarantee, rather than allowing a spouse to choose to guarantee, means a spouse is bound to a debt solely due to their spouse's independent decision to take out a loan.<sup>165</sup> This results in forcing individuals to be guarantors due to their marital status.<sup>166</sup> The other alternative is for individuals to decide against borrowing when faced with the reality that both spouses will have to guarantee the debt, which would in-turn negatively impact the availability of credit.<sup>167</sup>

While it should not be permissible for a creditor to force a spouse to guarantee a loan, it may be necessary for a creditor to inquire about a debtor's marital status.<sup>168</sup> In many states spouses may jointly hold assets, such as holding property through tenancy by the entirety.<sup>169</sup> Some

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164. *See Id.*; JUSTIN M. LEWIS, WARD AND SMITH, P.A, CLIENT ALERT: HOW SHOULD TWO OR MORE PEOPLE OWN PROPERTY? DOES IT MATTER (Sept. 12, 2011), <http://www.wardandsmith.com/articles/how-should-two-or-more-people-own-property-does-it-matter> (“[A] lien or judgment docketed against one spouse will not attach to property owned as tenants by the entirety because the property is not owned by the husband or the wife, but by the marital entity.”).

165. NORMAN J. LEONARD, WARD AND SMITH, P.A, CLIENT ALERT: SPOUSAL GUARANTIES—CLARIFYING THE RULES OF GOVERNING PERSONAL GUARANTIES FROM SPOUSES (Apr. 15, 2015), <https://www.wardandsmith.com/articles/personal-guaranties-from-spouses-of-borrowers> (“[C]ourts have frequently held that it is illegal for a lender to require a spousal guaranty if the sole reason the lender is requiring it is that the spouse happens to be married to the person seeking the loan.”).

166. *Id.*

167. *See* Fay, *supra* note 158 (explaining most individuals require a guarantee from someone else to be eligible for credit).

168. *See* 12 C.F.R. § 1002.7(d)(2) (2017) (“Unsecured credit. If an applicant requests unsecured credit and relies in part upon property that the applicant owns jointly with another person to satisfy the creditor's standards of creditworthiness, the creditor may require the signature of the other person only on the instrument(s) necessary, or reasonably believed by the creditor to be necessary, under the law of the state in which the property is located, to enable the creditor to reach the property being relied upon in the event of the death or default of the applicant.”); 12 C.F.R. § 1002.7(d)(3) (“If a married applicant requests unsecured credit and resides in a community property state, or if the applicant is relying on property located in such a state, a creditor may require the signature of the spouse on any instrument necessary, or reasonably believed by the creditor to be necessary, under applicable state law to make the community property available to satisfy the debt . . .”).

169. *See* Julie Garber, *Property Titles and Tenants by the Entirety*, THE BALANCE, <https://www.thebalance.com/tenants-by-the-entirety-3505608> (May 12, 2017) (“[In a tenancy by the entirety each] spouse individually own[s] the entire property as a tenant by the entirety. Husband and wife are treated as a single legal entity.”); *Joint Property and Concurrent Ownership*, NOLO, <https://www.nolo.com/legal-encyclopedia/joint-property-concurrent-ownership-32229.html> (last visited Jan. 22, 2018) (“In some states that do recognize tenancies by the entirety, a creditor is allowed to collect a spouse's debts from the interests of the property as a whole (as long as the debtor spouse is still alive). Other states have banned this practice and only allow a collector to foreclose on a tenancy if both spouses are liable for the underlying debt.”).

married persons do not have enough individually-owned assets to serve as adequate collateral to banks. If they are unable to list jointly-owned assets, then it may not be possible for them to receive credit.<sup>170</sup>

While there are benefits to allowing spousal guarantors, there are also downsides. One downside is couples attempting to beat the system by later claiming a spousal guarantee was an ECOA violation.<sup>171</sup> For example, many married couples have joint assets, and not having a spouse guarantee the assets as collateral may mean the creditor could not seize the assets.<sup>172</sup> If a creditor sues a debtor to collect on the debt and some of the debtor's assets are owned jointly with the spouse, they may be free of the creditor's claim.<sup>173</sup> Thus, the creditor needs the debtor *and* their spouse to be guarantors so that the jointly owned assets are available to

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170. See Fay, *supra* note 158 (“According to the Federal Reserve Board Survey of Consumer Finances, loans from family and friends amount to \$89 billion each year in the United States. The most popular reasons for asking family members or friends for a loan are to start a business or purchase a home. A national survey by Fundable said 38% of startup businesses relied on money from family or friends.”).

171. See *Moran Foods, Inc. v. Mid-Atlantic Mkt. Dev. Co.*, 476 F.3d 436 (7th Cir. 2007) (“Where the guaranty is rendered legally unenforceable, the creditor may be forced to lose the entire debt.”); Alexander Hurst, *Reg. B Is No Guaranty: Missouri Courts’ Openly Divergent Views on the Enforceability of Coerced Spousal Guaranties in Commercial Lending*, 79 MO. L. REV. 467, 468 (2014) (“[R]elying on Reg. B’s ostensible protection, married individuals can attempt to avoid liability for their spouse’s default after having been forced to personally guarantee the obligation.”).

172. See 1 JOYCE PALOMAR & ROBERT WILCOX, PATTON & PALOMAR ON LAND TITLES § 224 (3d ed. 2002) (“[A]ny conveyance or encumbrance of tenancy by the entirety property must be signed by both spouses in order to be effective. Also, a creditor of one spouse may not be able to reach property or proceeds from property held in tenancy by the entirety.”); *Tenancy By The Entirety States and Community Property States*, ASSET PROTECTION PLANNERS, <https://www.assetprotectionplanners.com/planning/tenancy-by-the-entirety-states-and-community-property-states/> (last visited Jan. 22, 2018) (“Tenancy by the Entirety ownership lets spouses own property together as a legal unit. It does not permit the creditors of an individual spouse to seize and sell the interest of the debtor spouse. Therefore, it can be thought of as a small part of an overall asset protection plan. Only creditors who have judgments against both the husband and the wife may attach and sell property held in this manner.”).

173. See 12 C.F.R. § 1002.7(d)(2) (“If an applicant requests unsecured credit and relies in part upon property that the applicant owns jointly with another person to satisfy the creditor’s standards of creditworthiness, the creditor may require the signature of the other person only on the instrument(s) necessary, or reasonably believed by the creditor to be necessary, under the law of the state in which the property is located, to enable the creditor to reach the property being relied upon in the event of the death or default of the applicant.”); 12 C.F.R. § 1002.7(d)(4) (“If an applicant requests secured credit, a creditor may require the signature of the applicant’s spouse or other person on any instrument necessary, or reasonably believed by the creditor to be necessary, under applicable state law to make the property being offered as security available to satisfy the debt in the event of default, for example, an instrument to create a valid lien, pass clear title, waive inchoate rights, or assign earnings.”).

satisfy the judgment for an unpaid debt.<sup>174</sup> Using Regulation B's language as a shield is a tactic married couples have used to ensure they could escape some or all liability should a default occur.<sup>175</sup> If a court were to decide that requiring the spouse to guarantee the loan was in fact a violation of the ECOA on the creditor's behalf, it could mean that some or all of the loan would not have to be paid back in the event of a default.<sup>176</sup>

#### VI. RECOMMENDATIONS FOR FUTURE ACTION BY CONGRESS AND THE CFPB

Due to judicial stalemate, Congress must legislate to answer whether or not spousal guarantors are afforded the same rights and remedies as applicants under the ECOA. If Congress members do legislate on the issue, they should be very intentional and explicit in their language to eliminate similar confusion arising in the future. Similar to how the ECOA goes into detail about who is considered an applicant, Congress should elaborate further to explain who exactly is a guarantor, as well as explain who is not.<sup>177</sup> The revised statute should consider spousal guarantors as applicants.<sup>178</sup> Similar to Regulation B, the ECOA definition should include a section about spouses.<sup>179</sup> This section should

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174. See PALOMAR & WILCOX, *supra* note 172 (“[A] creditor of one spouse may not be able to reach property or proceeds from property held in tenancy by the entirety.”).

175. See Hurst, *supra* note 171, at 468 n.3 (citing Andrew B. Lustigman & Alicia M. Serfaty, *The Equal Credit Opportunity Act as a Defense Against Payment: How Lenders Can Strike Back*, 111 BANK. L. J. 444, 445 (1994)) (“[Debtors will] seek, through any separation of an ECOA claim, to declare the underlying note or guaranty obligation void and unenforceable.”).

176. *Moran Foods, Inc. v. Mid-Atlantic Mkt. Dev. Co.*, 476 F.3d 436 (7th Cir. 2007) (“Where the guaranty is rendered legally unenforceable, the creditor may be forced to lose the entire debt.”).

177. See 15 U.S.C. § 1691a(b) (2016) (defining 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”); *contra* 12 C.F.R. § 1002.2 (e) (2017) (defining applicant as any person who requests or who has received an extension of credit from a creditor, and includes any person who is or may become contractually liable regarding an extension of credit. For purposes of § 1002.7(d), the term includes guarantors, sureties, endorsers, and similar parties.).

178. See Bruce, *supra* note 153 (“In May, the U.S. Solicitor General filed a brief urging the Supreme Court to reverse the Eighth Circuit, saying the CFPB deserves deference on the question.”).

179. See Bruce, *supra* note 153 (suggesting others are worried about spousal guarantors not being considered applicants); *RL BB Acquisition, LLC v. Bridgemill Commons Dev. Group, LLC*, 754 F.3d 380, 383 (6th Cir. 2014) (“[A] portion of Regulation B . . . refer[red]

include language explaining that spouses are permissible guarantors so long as it is an option and not a requirement.<sup>180</sup> The statute should explicitly state that a bank cannot force a spouse to sign as a guarantor, or refuse a loan solely because a spouse will not guarantee it, meaning a creditor cannot present a spouse with an ultimatum of sign this or your spouse will not receive credit.<sup>181</sup> Spousal guarantors should be considered applicants under the statute so that in the event a creditor violates the ECOA and requires a spousal guarantee, the guarantor spouse can raise an affirmative defense under the ECOA.<sup>182</sup>

While modifying the definition within the ECOA would be the best option to eliminate confusion, it does not seem likely Congress will amend the language.<sup>183</sup> This issue has been questioned in numerous courts, and there have been several amendments to the ECOA since the Board included guarantors in the definition of applicant, with no further indication if guarantors are considered applicants under the language of the ECOA.<sup>184</sup>

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to as the ‘spousal-guarantor rule,’ which prohibits a creditor from requiring an applicant’s spouse to guarantee a credit instrument, even if the creditor requires *someone* to execute a guaranty.”).

180. See *RL BB Acquisition*, 754 F.3d at 383 (“[A] portion of Regulation B . . . refer[red] to as the ‘spousal-guarantor rule,’ which prohibits a creditor from requiring an applicant’s spouse to guarantee a credit instrument, even if the creditor requires *someone* to execute a guaranty.”); 12 C.F.R. § 1002.7(d)(5) (2017) (“The applicant’s spouse may serve as an additional party [supporting the application], but the creditor shall not require that the spouse be the additional party.”).

181. See *RL BB Acquisition*, 754 F.3d at 383 (“[A] portion of Regulation B . . . refer[red] to as the ‘spousal-guarantor rule,’ which prohibits a creditor from requiring an applicant’s spouse to guarantee a credit instrument, even if the creditor requires *someone* to execute a guaranty.”).

182. See 15 U.S.C. § 1691e(c) (2016) (“Action for equitable and declaratory relief. Upon application by an aggrieved applicant, the appropriate United States district court or any other court of competent jurisdiction may grant such equitable and declaratory relief as is necessary to enforce the requirements imposed under this title.”); 71 FED. RES. BULL., REVISION OF THE BOARD’S EQUAL CREDIT REGULATION: AN OVERVIEW 919 (1985) (“[E]nforcement through private lawsuits. . . gives the guarantor the right to bring a lawsuit or to file a counterclaim against a creditor.”).

183. See *RL BB Acquisition*, 754 F.3d at 385 (“Congress has also been unmoved by [a creditor losing an entire debt if spousal-guarantors are considered applicants]. ECOA has undergone several amendments since the Federal Reserve included guarantors within the definition of ‘applicant’—including an extensive amendment to the statute after *Moran* was decided—and none has clarified that the term ‘applicant’ cannot include guarantors.”).

184. *Id.*; see Aimee L. Ezzell, *The CFPB Finalizes Amendments to ECOA Regulations and Seeks Public Comment on HMDA Policy Guidance*, LEXOLOGY (Sept. 27, 2017), <https://www.lexology.com/library/detail.aspx?g=a680ee2d-1b89-4955-b5a0-68fada145f15.american-economy-part-i-consumer-demand-for-credit/>

Alternatively, the CFPB can amend Regulation B if Congress refuses to act. Although it does not seem that an amendment to Regulation B would solve the overarching issue, it is possible that a nine-member Supreme Court could hear another case regarding spousal guarantors and decide the ECOA language pertaining to applicants is ambiguous.<sup>185</sup> If the Court found the language was ambiguous, they would defer to the definitions contained in Regulation B.<sup>186</sup> If the CFPB amended Regulation B's language, it would be wise to add in "spousal guarantors" to the list of persons that qualify as applicants in 12 C.F.R. § 1002.2(e).<sup>187</sup> Additionally, the CFPB should further elaborate what exactly it means to *require* a spouse to guarantee a loan and describe more specifically what a creditor is forbidden from doing in 12 C.F.R. § 1002.7(d)(5).<sup>188</sup> The clarification should add that creditors cannot present ultimatums and state that should a spouse of an otherwise creditworthy individual not guarantee a loan, then there will be no line of credit extended.<sup>189</sup> An amended Regulation B could resolve issues like these as well as provide guidance to creditors and borrowers in the future.<sup>190</sup>

## VII. CONCLUSION

While there is much confusion and discussion surrounding ECOA violations due to marital status, using the *Chevron* test, it appears both the Seventh and Eighth Circuits have come down correctly based on

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?utm\_term=.510c93cab79c (describing the most recent amendments to the ECOA which does not include an addition of guarantors to the definition of applicant).

185. See *RL BB Acquisition*, 754 F.3d at 384–85 (“[A]pplying the ordinary tools of statutory construction, we hold that the [ECOA] definition [of applicant] is ambiguous.”).

186. See *Chevron U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837 (1984) (“[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.”).

187. 12 C.F.R. § 1002.2(e) (2017) (“Applicant means any person who requests or who has received an extension of credit from a creditor, and includes any person who is or may become contractually liable regarding an extension of credit. For purposes of § 1002.7(d), the term includes guarantors, sureties, endorsers, and similar parties.”).

188. § 1002.7(d)(5) (“The applicant’s spouse may serve as an additional party, but the creditor shall not require that the spouse be the additional party.”).

189. *Id.*; *RL BB Acquisition*, 754 F.3d at 383 (suggesting that forcing a spouse to guarantee a loan by using an ultimatum would not be permissible because the spousal-guarantor rule “prohibits a creditor from requiring an applicant’s spouse to guarantee a credit instrument”).

190. See 12 C.F.R. § 1002.2(e) (adding guarantors into the definition of applicant has already taken a step to clearing up that spousal-guarantors should have rights under the ECOA).

statutory interpretation.<sup>191</sup> Based on the plain language, a guarantor is *not* an applicant under the strict statutory definition of applicant in the ECOA.<sup>192</sup> While there is a valid argument as to *why* we would want to include spousal guarantors as applicants to afford them protection under the ECOA, under the current statutory language, there is no ambiguity, and therefore no room for spousal protection under the ECOA as it reads.<sup>193</sup>

Just because a court has to interpret statutes as written does not mean they are the correct decision; it only means that they are the judicially appropriate interpretation.<sup>194</sup> The best-case scenario to eliminate this confusion would be for Congress to speak on the matter and give closure to the issue of whether or not a guarantor, or specifically a spousal guarantor, will be considered an applicant.<sup>195</sup> While that would be ideal, it does not seem likely that Congress will step in to eliminate the confusion if it has not already.<sup>196</sup> Although perhaps seeing that the U.S. Solicitor General filed a brief urging a reversal of *Hawkins* and the fact that the issue remains unsolved by the Supreme Court will provide the motivation necessary to resolve this issue.<sup>197</sup>

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191. *Hawkins v. Cmty. Bank of Raymore*, 136 S. Ct. 1072, 1072 (2016); *see Hawkins v. Cmty. Bank of Raymore*, 761 F.3d 937, 943 (8th Cir. 2014) (explaining that guarantors are not considered applicants based on the definition within the statute itself); *Moran Foods, Inc. v. Mid-Atlantic Mkt. Dev. Co.*, 476 F.3d 436 (7th Cir. 2007) (excluding guarantors from the category of applicant due to a strict statutory reading).

192. 15 U.S.C. § 1691a(b) (2016) (“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.”).

193. *Id.*

194. *See* Leon Friedman, *Overruling the Court*, THE AMERICAN PROSPECT (Dec. 19, 2001), <http://prospect.org/article/overruling-court> (“One of the myths of our political system is that the Supreme Court has the last word on the scope and meaning of federal law. But time and time again, Congress has shown its dissatisfaction with Supreme Court interpretations of laws it passes—by amending or re-enacting the legislation to clarify its original intent and overrule a contrary Court construction.”).

195. *Id.*

196. *See* *RL BB Acquisition, LLC v. Bridgemill Commons Dev. Group, LLC*, 754 F.3d 380, 385 (6th Cir. 2014) (“Congress has also been unmoved by [a creditor losing an entire debt if spousal-guarantors are considered applicants]. ECOA has undergone several amendments since the Federal Reserve included guarantors within the definition of ‘applicant’—including an extensive amendment to the statute after *Moran* was decided—and none has clarified that the term ‘applicant’ cannot include guarantors.”).

197. *See* Bruce, *supra* note 150 (“In May, the U.S. Solicitor General filed a brief urging the Supreme Court to reverse the Eighth Circuit, saying the CFPB deserves deference on the question.”); Brief of Defendant-Appellant, *Regions Bank v. Legal Outsource*, No. 17-11736 (11th Cir. Sept. 11, 2017) (rising to another circuit court is the issue of spousal guarantors and

If Congress does not amend the statutory definition and speak to the issue of marital status violations of the ECOA, all we can do is wait. Creditors, debtors, and courts alike will all have to wait until this issue is again heard by the Supreme Court to provide binding authority as the supreme law of the land, and provide one unifying decision for all lower courts to abide by.<sup>198</sup>

It would be best for Congress to amend the ECOA to ensure it is aligned with what they intended as well as to fulfill the necessary current goals of the Act. Absent Congressional action, those engaged in credit transactions outside the Sixth, Seventh, and Eighth Circuits will be uncertain as to the application of the ECOA to spousal guarantees unless and until the Supreme Court takes another look at this issue on which the circuit courts are split.

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the definition of applicant; this demonstrates there is still a need for a definitive answer on whether guarantors are applicants).

198. See *Hawkins*, 136 S. Ct. at 1072 (rendering an equally divided Supreme Court per curiam); *RL BB Acquisition*, 754 F.3d at 380 (finding the ECOA definition to be ambiguous and instead relying on the Regulation B definition and ultimately ruling spousal guarantors are considered applicants); *Moran Foods, Inc. v. Mid-Atlantic Mkt. Dev. Co.*, 476 F.3d 436 (7th Cir. 2007) (holding wives are not considered applicants and therefore spouses cannot use the ECOA as protection when they are guarantors).