

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 VALERIE J. HAWKINS AND :

4 JANICE A. PATTERSON, :

5 Petitioners : No. 14-520

6 v. :

7 COMMUNITY BANK OF RAYMORE. :

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9 Washington, D.C.

10 Monday, October 5, 2015

11

12 The above-entitled matter came on for oral

13 argument before the Supreme Court of the United States

14 at 11:07 a.m.

15 APPEARANCES:

16 JOHN M. DUGGAN, ESQ., Overland Park, Kan.; on behalf

17 of Petitioners.

18 BRIAN H. FLETCHER, ESQ., Assistant to the Solicitor

19 General, Department of Justice, Washington, D.C.; on

20 behalf of United States, as amicus curiae, supporting

21 Petitioners.

22 STEPHEN R. McALLISTER, ESQ., Lawrence, Kan.; on behalf

23 of Respondent.

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1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	JOHN M. DUGGAN, ESQ.	
4	On behalf of the Petitioners	3
5	ORAL ARGUMENT OF	
6	BRIAN H. FLETCHER, ESQ.	
7	On behalf of United States, as amicus curiae,	
8	supporting Petitioners	13
9	ORAL ARGUMENT OF	
10	STEPHEN R. McALLISTER, ESQ.	
11	On behalf of the Respondent	29
12	REBUTTAL ARGUMENT OF	
13	JOHN M. DUGGAN, ESQ.	
14	On behalf of the Petitioners	49
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1 P R O C E E D I N G S

2 (11:07 a.m.)

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

6 Mr. Duggan.

7 ORAL ARGUMENT OF MR. DUGGAN

8 ON BEHALF OF THE PETITIONERS

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

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

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

25 JUSTICE GINSBURG: Didn't the Federal

1 Reserve Board originally, I think, in 1977 take the
2 opposite position and said explicitly that applicant
3 excludes guarantors?

4 MR. DUGGAN: Your Honor -- Your Honor, with
5 regard to that position that was taken by the FDIC in
6 1977, they were responding to claims by the industry
7 that they did not want applicants broadly defined to
8 include guarantors for notice provisions. And in
9 response to that, the regulation was crafted in a way
10 that did, in fact, address that concern, but it was
11 never intended to eliminate the potential claims for
12 spousal guarantors.

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

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

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

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

1 applicants.

2 MR. DUGGAN: Well, I think --

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

5 MR. DUGGAN: I think the --

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

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

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

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

18 JUSTICE SCALIA: I never liked that case.

19 MR. DUGGAN: My apologies.

20 (Laughter.)

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

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

1 applicant, right?

2 MR. DUGGAN: Agreed.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 MR. DUGGAN: No.

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

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

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

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

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

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

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

3 JUSTICE SCALIA: That doesn't show --

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

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

9 JUSTICE BREYER: You don't think so?

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

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

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

17 (Laughter.)

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

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

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

1 (Laughter.)

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

5 MR. DUGGAN: Yes.

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

9 JUSTICE SCALIA: Was this corporation a
10 minor?

11 MR. DUGGAN: What?

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

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

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

18 JUSTICE BREYER: But my point --

19 JUSTICE SCALIA: Is Justice Breyer the
20 applicant?

21 MR. DUGGAN: He may.

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

25 MR. DUGGAN: Very true.

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

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

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

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

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

18 (Laughter.)

19 MR. DUGGAN: Thank you so much.

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

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

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

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

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

1 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

2 MR. DUGGAN: Thank you so much.

3 ORAL ARGUMENT OF BRIAN H. FLETCHER

4 ON BEHALF OF THE RESPONDENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

13 JUSTICE ALITO: My application was rejected.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 And if, in that case, the spouse provides

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

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

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

24 MR. FLETCHER: So I think --

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

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

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

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

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

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

9 And so if --

10 JUSTICE BREYER: So --

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

16 I'm sorry, Justice Breyer.

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

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

1 MR. FLETCHER: Right.

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

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

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

9 MR. FLETCHER: That's correct.

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

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

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

1 is what the regulation --

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

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

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

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

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

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

21 MR. FLETCHER: Right.

22 JUSTICE BREYER: And then she can sue.

23 MR. FLETCHER: She's an applicant.

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

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

3 JUSTICE KENNEDY: On that point --

4 JUSTICE BREYER: Can you give an example?

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

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

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

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

4 JUSTICE SCALIA: Which says what?

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

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

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

25 Even if you think that an applicant is only

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

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

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

22 Thank you.

23 CHIEF JUSTICE ROBERTS: Thank you, counsel.

24 Mr. McAllister.

25 ORAL ARGUMENT OF STEPHEN R. McALLISTER

1 ON BEHALF OF THE RESPONDENT

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

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

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

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

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

21 JUSTICE KAGAN: They're joint applicants.

22 MR. McALLISTER: -- covers them.

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

1 not himself --

2 MR. McALLISTER: Is not an applicant.

3 JUSTICE KAGAN: -- receiving the money.

4 MR. McALLISTER: Exactly. So --

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

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

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

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

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

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

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

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

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

25 JUSTICE KAGAN: So even though I receive no

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

10 MR. McALLISTER: So it's --

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

15 MR. McALLISTER: None of them --

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

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

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

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

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

9 And the person who has asked for --

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

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

17 JUSTICE BREYER: Because?

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

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

22 MR. McALLISTER: Okay.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

21 Or at any rate, cosigners are jointly and
22 severally --

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

25 JUSTICE KAGAN: And you want to put them in

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

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

4 JUSTICE KAGAN: It doesn't matter.

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

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

10 (Laughter.)

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

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

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

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

25 JUSTICE BREYER: -- the meaning.

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

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

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

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

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

14 MR. McALLISTER: Pardon?

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

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

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

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

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

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

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

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

18 Did -- did --

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

21 JUSTICE KENNEDY: You may disagree --

22 MR. McALLISTER: -- Justice Kennedy.

23 JUSTICE KENNEDY: Maybe I misunderstood
24 their answer.

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

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

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

10 MR. McALLISTER: For example --

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

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

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

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

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

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

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

1 JUSTICE SOTOMAYOR: So what -- what --

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

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

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

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

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

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

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

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

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

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

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

25 MR. McALLISTER: I agree with that,

1 Justice Scalia.

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

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

7 REBUTTAL ARGUMENT OF JOHN M. DUGGAN

8 ON BEHALF OF THE PETITIONERS

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

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

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

1 decide to give a loan with a spousal guaranty?

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

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

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

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

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

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

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

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

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

1 to answer any questions if there are any.

2 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

3 MR. DUGGAN: Thank you.

4 CHIEF JUSTICE ROBERTS: The case is
5 submitted.

6 (Whereupon, at 11:54 a.m., the case in the
7 above-entitled matter was submitted.)

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<p>A</p> <p>a.m 1:14 3:2 53:6</p> <p>ability 33:4 52:3</p> <p>able 23:16 24:4</p> <p>above-entitled 1:12 53:7</p> <p>Absolutely 30:19</p> <p>abstract 14:17</p> <p>absurd 43:8</p> <p>absurdity 43:10,10</p> <p>abundantly 34:13</p> <p>accept 12:8 24:18</p> <p>account 33:4</p> <p>accurate 35:12</p> <p>act 14:11 17:23 20:6 25:25 29:5,6 29:10,12,21 32:6 32:6,7 44:17 45:8 51:9</p> <p>Act's 14:13</p> <p>action 25:22 26:4 30:18 45:15,16</p> <p>actual 8:3</p> <p>added 20:12</p> <p>additional 14:11 18:2 23:21</p> <p>address 4:10 12:14</p> <p>adhering 36:20</p> <p>adjustments 28:10</p> <p>administration 29:21</p> <p>admissions 38:12</p> <p>admits 26:8</p> <p>admitted 8:22 10:5 10:23 17:20</p> <p>adopted 3:19 4:15</p> <p>adverse 6:18 21:4,5 21:10 45:15,16 52:1</p> <p>adversely 22:10</p> <p>affect 22:10</p> <p>affirm 50:3</p> <p>age 35:18</p> <p>agencies 23:20 46:11</p> <p>agency 5:10 17:20</p>	<p>17:21 18:11,12 19:1,3,22 20:7 27:13,23 45:15 46:8,12</p> <p>agency's 18:20,25 19:21 20:24 23:18 46:9</p> <p>aggrieved 17:24 26:16,17</p> <p>agree 3:11 7:18 12:7 13:1 16:18 16:22 40:5 45:24 47:18 49:25</p> <p>Agreed 6:2</p> <p>agreeing 9:4</p> <p>agreement 47:3 50:18</p> <p>agreements 39:10</p> <p>agrees 5:25 21:22 21:23 50:22</p> <p>AIDS 32:6</p> <p>aligned 21:12</p> <p>Alito 5:24 6:3 16:14,22 17:5,13 21:3,8 28:24</p> <p>allow 24:7</p> <p>allowing 23:4</p> <p>allows 29:10</p> <p>altogether 24:13</p> <p>ambiguous 30:7,11</p> <p>amended 18:13 27:13</p> <p>amicus 1:20 2:7 35:3</p> <p>analogy 44:2</p> <p>answer 6:13 12:5 22:23,25 23:3,13 34:12 44:24 50:11 53:1</p> <p>answered 23:7 44:13</p> <p>anybody 9:1 12:22 14:23</p> <p>apartment 39:11 39:12</p> <p>apologies 5:19</p>	<p>appeal 12:21 42:16 42:17 47:13 52:9</p> <p>appealing 13:3 52:19</p> <p>appear 15:5</p> <p>APPEARANCES 1:15</p> <p>applicant 4:2 6:1 8:24 9:15 10:7 11:3,7,20,23 12:4 12:10,11 13:9 14:14,17,19,21,23 15:2,6,8,21 16:3,9 16:11,15,20,23 17:24 18:5,8 19:2 19:11 20:9,22 21:20 22:2 24:5 25:4,11,11,18,22 26:13,19,23,25 27:6,8,11,22,23 27:24 28:18,21,25 30:14,15 31:2,8 31:21,22 32:22,24 33:5,8,18,21 34:4 34:17,19 35:1,14 35:14 36:25 37:16 38:10 39:14,25 40:25 42:12,12 43:7,18 44:7,15 45:3,11 46:22,24 47:16,16 52:24</p> <p>applicants 3:12,17 3:21 4:7,25 5:1,3 5:7,7 8:15,17 14:9 14:16 15:19 18:2 18:21 19:1,7 20:14,19,20 23:8 27:19 30:20,21 31:9,10 36:8,21 40:8,10 46:13 49:23 51:7</p> <p>application 8:4 10:25 15:11,11 17:13,15,18 24:19 37:12 42:18 46:4 47:13 52:7</p>	<p>applied 11:13 36:4 38:5,6</p> <p>applied-for 3:12 9:14 13:1</p> <p>applies 10:14,19,23 16:12 37:1 42:13 44:16 52:10</p> <p>apply 10:5 12:20 23:23 32:20 36:25 37:2 41:5 42:15 42:19 44:9,16 45:1</p> <p>applying 8:20 9:16 9:17,19 11:16 14:25 37:6,11,11</p> <p>apprentice 30:5</p> <p>appropriate 5:14</p> <p>approval 8:3,11 9:13</p> <p>approve 8:10</p> <p>argue 32:13</p> <p>argument 1:13 2:2 2:5,9,12 3:3,7 14:3 28:23 29:25 50:7</p> <p>arrange 33:15</p> <p>articulating 17:22</p> <p>asked 10:16 27:14 37:9</p> <p>asking 16:16,21 39:1,3,15 43:12 43:18 47:7 48:3 49:14</p> <p>aspect 16:10 25:5</p> <p>assert 22:6 23:4 39:21</p> <p>asserted 6:9</p> <p>asserts 39:21</p> <p>asset 51:19</p> <p>assets 48:22 51:17</p> <p>Assistant 1:18</p> <p>assume 8:19 43:1</p> <p>authority 6:24 9:11 27:18 28:2 29:9 32:13,15</p> <p>availability 23:3</p>	<p>available 23:12</p> <p>aware 38:20,23</p> <p>B</p> <p>B 3:14,19 4:14 6:7 13:19 14:7 21:23 24:1 44:16 49:3 51:15</p> <p>back 8:7 17:5 19:23 37:4 38:12 39:7 41:9 46:16 49:12 52:6,13</p> <p>bad 48:12</p> <p>bank 1:7 3:4 8:5 23:24 24:2 34:20 35:5 46:5,17 48:6 48:8 50:25 51:4</p> <p>bank's 8:3</p> <p>banking 29:17</p> <p>banks 23:20 29:5 47:24 48:1</p> <p>based 4:19 8:11 13:5</p> <p>bases 35:19</p> <p>basis 35:14 43:24</p> <p>behalf 1:16,20,22 2:4,7,11,14 3:8 8:24 14:4 24:20 30:1 33:12 50:8</p> <p>believe 9:3 12:22 44:6 45:19</p> <p>believed 18:18</p> <p>believes 20:2 39:11</p> <p>benefit 23:16 33:1 36:22 38:25 39:11</p> <p>best 16:18 17:2 28:19</p> <p>bet 42:7</p> <p>beyond 35:10</p> <p>bilateral 49:11</p> <p>bill 11:8</p> <p>bind 49:18</p> <p>bit 20:5</p> <p>black 22:13</p> <p>board 4:1 20:7 23:19 39:24 40:1</p>
---	--	---	---	--

44:16	business 3:16 6:20 6:23 7:24	child 10:4,5,23,23 10:24 11:4 17:6	52:13	contractually 9:14 52:15
bolster 39:12	businesses 6:17	39:13 45:22	common 21:20	contrary 38:9 45:7
books 23:20	buy 33:16	choose 32:10	38:15 39:5,15,19	convince 17:1
borrow 34:23		chooses 49:19	39:20	Corbin 40:20,24 41:8
borrower 8:1 15:12	C	chose 32:9	Community 1:7 3:4	corporation 3:23 11:9,12
16:2,6 21:5,9 22:2	C 2:1 3:1 51:15	Circuit 50:4	company 3:23,24	correct 21:3,6 25:9
22:22 24:23,24	call 12:3 14:21	circumstances 5:14	7:25 9:18 32:21	cosigner 15:15
31:16 32:1 35:1	15:21,21 16:2	24:2 51:5	comparable 32:4	31:13,15,23 33:18
41:10,12 46:5,17	45:21 49:22	cite 20:16 29:16	comply 51:14,24	34:5,10 41:20
46:21 49:10,11	capacity 13:4	civil 32:5	concedes 44:5	cosigner's 22:14
50:13 52:11,12	car 33:16	claim 4:20 6:4,9,10	concern 4:10 10:21	cosigners 14:8
borrowers 30:17	card 32:19,20,21	6:12 13:20,20	condition 7:19 9:12	15:10 18:22 30:24
36:22	32:21	22:5 32:8 35:1,9	51:11	39:8,9 41:21,23
borrowing 7:21,22	carry 28:6	claims 4:6,11	conduct 23:20	costs 48:17
8:9	case 3:4 4:13 5:9,13	class 28:10	confers 17:23	counsel 14:1 29:23
box 42:1	5:15,18,22 6:6	classifications 28:8	confusion 40:5	50:5 53:2
breach 9:25	7:23 9:20 12:21	clear 4:18 6:8 20:1	Congress 16:7	counsel's 50:25
Breyer 10:4,9,12	13:8,22 21:20,25	20:13 39:25 40:17	22:18 32:9,16	count 31:5,7
10:18,22 11:2,6	23:13 24:12 30:4	clearly 3:17 40:24	35:10	counter 44:9
11:18,19,22 12:1	41:18 46:4 53:4,6	41:5	connection 29:15	couple 40:12
17:4 24:10,16,17	cases 6:13 7:3,22	clients 3:13	46:7	couples 48:20
25:2,6,10,23 26:6	21:14 22:5 23:24	close 46:18	consequences 6:18	course 38:10 43:8
26:16,22,24 27:4	40:21	co-borrowers	consideration 47:4	49:24
28:12,20 35:22	category 34:11	46:14	47:5,19	
36:7,11,16,24	35:25	co-signer 30:24	construe 15:8	
37:5,10,17,20,23	cause 5:16 25:21	collateral 8:12,13	contain 28:8	court 1:1,13 3:10
38:5 42:7,11,25	30:18	8:14	contemplate 31:10	5:12 8:5 14:6
Breyer's 52:13	caused 20:1 25:19	colleague 40:6	contemplates 33:11	18:16 22:7 30:3
BRIAN 1:18 2:6	causes 26:4	colleagues 38:19	contemplating 32:1	32:4 44:10 50:2
14:3	certain 18:14 35:5	collect 48:12 51:23	33:14	50:10
brief 15:9 20:17	35:6	52:18	contemporaneou...	courts 18:16,23
22:11 23:17 28:20	certainly 15:24	college 8:21 11:7	51:8	cover 35:21 43:2
28:21 29:4	16:4 31:9 36:21	collegiate 42:8	contention 10:11	covers 30:11,22
briefs 35:4	46:20	Colloton 16:16	context 9:4 11:24	35:17,17
bring 4:20 6:8,12	change 11:15 12:13	come 9:13 17:5,25	12:2,3,9,12 14:18	crafted 4:9
13:12,19,20 18:24	18:13 45:2 47:21	22:20 36:12 37:4	15:24 16:7 28:15	crash 47:23
32:8 51:12	charge 33:4	39:7 41:8 46:16	52:19	create 27:12 51:18
bringing 49:5	Chevron 30:4	51:6	contingent 41:14	created 40:5
broad 9:11 14:13	42:22	comes 35:4 40:22	continuation 16:13	creates 22:18
16:8 27:17 32:13	Chief 3:3,9 12:15	48:6 51:10	contract 12:22	creating 19:5
broader 34:24	12:16 13:23 14:1	coming 47:23	41:11,12,14 47:3	credit 3:21 6:18,23
broadly 4:7	14:5,15 15:4,17	comment 40:15	47:8 49:9,10,11	7:20 8:4 13:3
brought 18:10	29:23 30:2 38:15	commentary 46:11	49:14,18	14:9,10 16:10,13
browbeating 45:23	46:16,16 50:5,9	commenter 46:9	contracts 40:20,21	20:6,19 22:9,10
bunch 36:14	53:2,4	comments 27:14,17	40:24 49:10,21,24	22:14 25:5,12
bureau 28:5			49:24	

28:23 29:3,4,6,7,7 29:8,9,11,12,13 29:14,19,21 31:11 31:19,20,22 32:19 32:20,21,21 33:1 33:12,20,25 34:15 34:20 36:23,23 37:6,7,7 38:2,6 39:1,3,13,15 40:22 41:1,5 43:16 46:24 47:5 47:9 48:7,9 49:1,6 51:8,10,11 52:1,3 52:10,11,12,20 credit-specific 41:4 creditor 16:9,12 20:20 creditors 20:18 50:16 criticized 38:18 curiae 1:20 2:7 curiosity 5:24	47:21 declare 22:20 declared 13:14,15 13:17 deemed 13:18 default 22:12 24:3 41:19 45:21 49:20 defaults 47:23 49:17 defense 47:24 defer 31:22,24 33:20 37:7 define 30:7 45:5 defined 4:7 5:14 16:11 23:9 31:20 32:11 38:15 defines 30:13 37:6 defining 19:6 definition 12:20 14:13 18:5 19:9 20:9 29:7 30:12 31:18,20,22 32:3 32:16 34:19 36:20 37:5 38:11,15,15 39:20 41:4 42:16 43:2,7 44:9,15 definitions 45:3 52:7 deliberately 32:9 32:16 demand 24:14 demanded 23:15 denied 17:16,18 34:16 Department 1:19 depends 11:23 12:9 12:12 describe 14:24 32:8 32:12 described 18:12 detail 29:17 developed 6:7 20:6 Development 5:25 6:3 dictionary 38:16,18 38:21 42:8 52:7	difference 9:6 34:10 47:15 different 5:16,17 18:3 31:13 36:14 43:23 46:13,19 49:11,21 differentiation 28:9 differently 15:25 44:13 45:5 direct 33:1 38:25 direction 48:12 directly 12:6 16:12 25:24 36:23 disagree 16:14 18:10 44:21 discovered 49:5 discretion 27:22,24 discriminate 16:9 24:22 25:4 43:23 discriminated 4:19 35:13 49:2 discrimination 14:10 22:4 25:20 32:7 34:22 discriminatory 34:24 distinction 27:7 divorce 6:19 21:11 divorced 8:16 52:4 Doc 8:2 document 8:4 41:9 documents 19:15 doing 18:15 39:12 door 47:20 49:4 dramatic 49:6 Duggan 1:16 2:3,13 3:6,7,9 4:4,23 5:2 5:5,9,12,19,21 6:2 6:6,14 7:8,13,18 8:25 9:3,9,20 10:8 10:10 11:5,11,14 11:21,25 12:5,14 12:19 13:15 14:2 50:6,7,9 51:2,5 53:3	Duke 5:13 duty 13:10 <hr/> E <hr/> E 2:1 3:1,1 e.g 42:19 earlier 17:4 21:15 earnings 52:2 easiest 51:14 EOCA 3:12,14,18 32:9,14 35:9 47:21 48:25 economic 21:19 22:6 edge 26:25 effect 33:5 34:5 effective 29:20 effectively 33:7 Eighth 50:3 either 4:25 31:12 44:20 52:3 eliminate 4:11 Employment 32:7 encompassed 32:3 Energy 5:13 enforceable 47:4 enforcing 23:18 engaged 48:16 English 9:2 38:7 enjoy 23:16 ensure 24:3 enter 47:8 entering 49:9 enters 49:10,11 entire 22:20 47:2 48:4 52:18 entities 7:23 entitled 14:9 entity 7:21 8:7,9 Equal 14:10 20:6 equivalent 46:18 46:21,22 era 32:5 Especially 42:18 ESQ 1:16,18,22 2:3 2:6,10,13	essential 29:20 essentially 34:7 event 24:3 everybody 5:25 evident 34:13 exact 31:15 exactly 7:8 31:4,17 34:6 41:14 43:5 examinations 23:20 example 6:19 16:18 24:23,23 25:14 27:4 28:13,13,19 33:14 45:7,10,14 examples 17:2 exceptions 28:10 exclude 30:8 39:25 40:2 excluded 18:18 19:5,22 excludes 4:3 17:1 40:1 execute 51:22 exempt 27:18 exempted 27:16 exercise 27:17 exist 13:16 expanded 35:21 expected 22:19 explain 15:9 22:11 24:17 29:3 explained 17:22 23:17 explains 29:17 explicitly 4:2 31:21 expressly 18:14,21 19:2,21 32:11 extend 21:21 extended 13:3 16:5 39:16 extending 51:11 extension 7:20 16:12 28:22 29:2 29:8,14,19 39:1,3 43:16 52:10,20 extensive 48:16
--	---	--	---	---

extent 13:21 24:2	25:1,3,9,21 26:2 26:12,21,23 27:10 28:1,5,19 40:6	glad 18:9	18:14,16,18,22,24 19:5,14,22 20:14 21:2 23:8,12 27:14,16 29:18 30:9 33:13 35:6,7 35:8 36:13 39:25 40:1,11,14,17 41:6,9 46:5,13 48:24	hurt 25:13,16,17 26:11 husband 7:2,6,20 9:17 34:3,5 51:17 husband's 6:22 husbands 6:17 13:20 51:6 husbands' 3:16 6:16 hypothesis 12:8,8
F				I
fact 4:10 7:24 15:9 28:15 29:20 44:6 47:5 51:22 52:14	flowing 36:23 focused 46:3 folks 41:15 foots 11:8 forbidden 25:19 35:25 form 42:18 formed 3:22 7:25 forward 9:13 22:14 51:10 four 50:6 frankly 45:18,18 FRB 30:4 fulfill 50:18 full 10:2 12:25 50:23 52:16 functional 33:23 fundamental 34:12 49:3 further 13:25 50:2 further 48:25 future 6:18 52:2,3	go 9:19 31:10 38:6 38:12 42:15 47:9 52:20 goes 21:14 33:15 48:11 going 6:17,22 16:23 22:6,13,13,14 24:4,11 27:25 29:14 33:17 44:4 45:21,22 47:6 48:19 good 17:4 49:17,20 gotten 22:3 26:18 government 30:7 34:23 44:5,13 government's 30:12 grant 9:11 28:2 guaranties 6:4 9:20 13:18 40:20 42:3 50:12,13 guarantor 12:2 13:9,11 14:19,21 14:22 15:1,3,5,7,8 15:15,22 19:2 20:10,23 21:5,10 21:18 22:8,14,20 23:4 24:24 27:6,8 27:11 28:16 29:2 29:11 31:23 34:11 36:1,4 40:22,25 41:17,18,19 42:17 44:15 45:9,16,20 46:18,21,25 47:6 49:9,13,15 50:15 50:15,16,17,19,20 50:22 guarantor's 29:11 41:12 guarantors 3:15,24 4:3,8,12,22 8:1,12 8:14,15 9:22 13:11,12,19,22 14:8 15:10,19	guaranty 7:19 10:1 12:24 21:19 23:5 23:16,17,24 29:8 36:2,3 40:21 47:3 47:3,19 48:2,4,9 48:10,11,22 50:15 50:22,23 51:1,20 52:17,22 guarantying 49:16 guess 33:5,22,22 gun 7:6	idea 26:19 47:2 ignore 27:25 illegal 13:18 illegally 23:5 imagine 35:3 immediately 22:10 22:11 impact 49:6 implementing 32:14 important 6:14 7:2 7:21 9:10 14:17 21:9,13 23:25 improper 23:24 improperly 19:15 21:18 23:15 include 4:8 18:14 18:22 20:3 25:7 27:8,11,14 30:17 44:15 included 21:2 33:14 36:19 40:14 40:18 includes 29:8 including 41:5 income 52:2 incorporated 20:8 21:1 independent 9:21 9:25 12:23 13:6 50:14,21 51:10 52:16,22 industry 4:6 14:20 14:20 15:7,13,18
fail 12:25 fails 50:20 Fair 29:4,6,9,12,21 32:6 fall 36:8 fancy 17:10 far 6:7 26:18 35:10 52:21 farther 8:2 fashion 43:20 favorable 10:13 FDIC 4:5 23:19 Fed 32:13 40:9,12 Federal 3:25 20:7 23:19 39:24 40:1 file 31:15 fill 15:10 filled 17:15 37:20 filling 33:9 fills 37:25 finance 28:14 financial 8:8,12 9:7 9:22 13:4 28:15 50:17 find 23:21 28:14 42:7 fine 34:18 first 6:15 19:25 20:8,24 23:3 33:16 five 13:11,12 47:22 fix 17:25 19:6 fixed 15:7 fixing 19:9 Fletcher 1:18 2:6 14:3,5 15:4,23 16:4,22 17:11,14 17:19 18:9 19:13 19:20 20:4 21:8 22:24 23:2 24:11	G G 3:1 gamut 52:8 gateway 32:12 gender 34:1 general 1:19 40:13 42:21 generically 52:12 getting 39:10 47:8 Ginsburg 3:25 39:23 40:5 give 4:21 5:4 6:19 16:18 20:4,18,20 20:22 24:13 27:4 37:2 38:2 40:8,10 41:15 45:6 48:11 51:1 given 33:1 35:12 gives 25:22 26:12 giving 40:22 45:14		H H 1:18 2:6 14:3 half 47:22 hand 22:8 hands 34:15 49:1 happened 5:21 happens 22:1 happy 52:25 harbor 51:18 harbors 51:7,15,24 hard 10:25 26:10 harm 22:2 25:18 26:7 Hawkins 1:3 3:4 head 7:6 34:2 hear 3:3 helpful 42:12 higher 22:21 hire 43:3 history 8:6 20:5 34:15 Honor 4:4,4,23 5:22 35:16 47:20 honoring 9:24 Housing 32:6	

15:20 46:14 49:7 information 41:16 41:17 initially 39:24 initiate 33:19 injured 25:25 injury 21:19 instance 3:20 21:11 instrument 24:15 insurance 28:17 intend 27:1 intended 4:11 34:18 intent 4:17 interest 49:12 51:19,21 interested 23:11 interests 21:6,10,12 internal 8:6 interpretation 9:11 14:13 20:24 22:17 45:8 interpretations 46:10 interpreted 25:7 invalid 22:21 invalidate 23:5 48:4 invested 26:9 investor 6:25 involved 6:24 issue 21:4	30:25 41:19,21,24 51:16 52:15 jointly-owned 51:21,22 Jones 37:24 Judge 16:16 22:17 23:13 39:22 48:5 judgment 8:23 Justice 1:19 3:3,9 3:25 4:21,24 5:3,6 5:10,18,24 6:3,11 7:4,10,15 8:18 9:1 9:6,16 10:3,4,9,12 10:15,18,20,22 11:2,6,9,12,15,18 11:19,19,22 12:1 12:7,15,16 13:7 13:23 14:1,5,15 15:4,17 16:1,14 16:22 17:4,5,13 17:19 18:4,9 19:8 19:17,24 20:1 21:3,8,15 22:16 22:25 24:10,16,17 25:2,6,10,23 26:6 26:14,16,18,22,24 27:3,4,5,21 28:1,4 28:12,20,24 29:23 30:2,16,21,23 31:3,5,14 32:18 32:25 33:7,22 34:12 35:11,22 36:7,11,16,24 37:5,10,17,20,23 38:5,14,21,24 39:8,19,23 40:5 40:19 41:13,25 42:4,7,11,25 43:1 43:6,10,12,15,22 43:24 44:2,12,21 44:22,23 45:6,11 45:18 46:2,20 47:1,2 49:8 50:1,5 50:9,24 51:3 52:13 53:2,4 Justice's 46:17	K Kagan 6:11 17:19 18:9 21:15 22:16 22:25 30:16,21,23 31:3,5,14 32:18 32:25 33:7,22 34:12 40:19 41:13 41:25 42:4 46:20 47:2 Kan 1:16,22 Kennedy 13:7 26:14,18 27:3,5 44:12,21,22,23 45:6,11 key 39:18 kids 39:10 kind 17:25 31:15 42:21 kindergarten 17:7 17:10 24:19 know 13:2 14:24 25:23 33:23 39:14 41:4 45:20,23 47:12	23:15 24:14 29:10 33:25 34:2 35:24 41:11 48:15,16 49:19,19 50:17,19 51:9,16 52:19 lender's 34:2 lenders 29:5 48:19 Lending 32:6 let's 8:18,18,18 13:8 40:16 letter 8:19,22 29:16 43:2 liability 3:22 7:25 22:18 24:6 liable 3:16 6:21 9:5 12:24 30:25 34:8 41:10,18,20,24 42:6 52:15 liked 5:18 limited 3:22 7:25 13:24 24:15 28:8 line 8:23 9:8,8 13:5 listed 34:3,5 litigation 48:17 little 20:5 loan 7:7,16 8:10,11 8:16 12:2 13:5,14 13:15 14:24 15:12 16:5 19:15 21:21 22:3,12,20 24:8 24:13 33:15 34:8 36:2,5 51:1 52:12 52:21 loans 48:21 long 44:10 46:8 longer 21:12 48:22 longstanding 14:12 23:18 look 8:2 16:6 29:11 34:14 46:9,10 looking 15:20 lot 25:15 33:24 41:15,16 lottery 26:9	M M 1:16 2:3,13 50:7 magazine 28:13 making 18:13 32:2 42:14 man 11:16 marital 4:19 35:14 35:17,20 51:21 mark 22:13 marriage 25:8 married 24:25 25:7 32:19 34:1 48:6 48:20 massive 47:23 matter 1:12 6:11,13 21:16 35:23 42:1 42:4 53:7 matters 21:4,13,17 McALLISTER 1:22 2:10 29:24 29:25 30:2,16,19 30:22 31:2,4,7,17 32:23 33:3,10 34:9 35:16,22 36:6,10,15,18 37:4,15,18,22 38:3,8,20,23 39:7 39:18 40:4,19 41:7,23 42:2,5,24 43:4,9,14,17 44:1 44:4,19,22,25 45:10,14 46:1,23 47:18 49:25 mean 4:25 5:16 15:19 19:10,18 22:22 27:22 29:6 35:17 36:24 37:23 38:6 39:4,14 41:3 41:15,17 43:19 45:15 47:16 48:22 48:23 meaning 12:11,12 17:2 42:25 45:23 meanings 15:7 means 12:9,9,10 31:22 36:22,25 37:16 41:4
J J 1:3 JANICE 1:4 job 42:19,20,20 JOHN 1:16 2:3,13 50:7 join 15:11 joint 30:20,21 31:10 33:5,8 34:4 34:8 36:21,21 42:5 46:13 51:7,8 jointly 3:11,15 6:16 6:21 9:4 12:24		L language 3:18 9:2 20:25 34:14 38:25 40:9 Laughter 5:20 10:17 11:1 12:18 38:22 42:10 law 4:13 6:5,7 8:20 8:24 11:16 19:18 19:19 24:22 25:2 26:3 Lawrence 1:22 laws 13:16 lawyers 49:4 leads 48:1,19 left 19:14 legislative 34:14 lend 7:20 35:24 36:2 48:20 49:13 49:16 lender 9:24 21:21	M	

<p>meant 19:11,12 millionaire 26:10 minimum 48:15 minor 11:10,13 minute 47:25 minutes 40:12 50:6 mischaracterizat... 42:3 misinterpreted 4:16 mistaken 4:16 misunderstood 44:23 modification 5:16 modify 4:17 Monday 1:10 money 26:9 31:3 34:23 37:2 43:13 49:12,13,16 months 40:15 mortgage 28:16 multiple 20:20 40:8 46:5</p> <hr/> <p style="text-align: center;">N</p> <hr/> <p>N 2:1,1 3:1 names 41:16 narrower 32:10 natural 17:21 18:8 need 4:17 8:2 20:2 35:2,5,6 Neither 44:19 never 4:11 5:18 6:23,24 7:24 15:8 31:23 nonapplicable 8:8 8:9 normal 11:2,6 notice 4:8,21 5:4 20:18,20,22 40:8 40:10,14 45:15 notify 46:7 number 35:19 51:6</p> <hr/> <p style="text-align: center;">O</p> <hr/> <p>O 2:1 3:1</p>	<p>obligated 9:14 10:1 obligation 9:25 22:9 31:12 46:6 obligations 9:24 12:23 50:18 52:16 52:22 obligor 15:15 20:23 obligors 29:19 40:11,17 obvious 10:13 Obviously 14:23 occurred 3:13 34:21 October 1:10 offer 40:21 oftentimes 22:8 oh 27:24 34:20 40:15 44:25 okay 26:15 37:22 old 10:24 once 51:9 ones 6:9 36:8 opens 47:19 49:4 operating 8:6 operational 6:24 operator 6:20 Opportunity 14:11 20:6 opposite 4:2 oral 1:12 2:2,5,9 3:7 14:3 29:25 ordinary 16:15,19 17:3 38:9 organizations 7:24 original 35:19 originally 4:1 outside 36:1 Overland 1:16 owned 51:16</p> <hr/> <p style="text-align: center;">P</p> <hr/> <p>P 3:1 page 2:2 8:3 20:16 28:20 29:3 papers 31:15 33:9 37:25</p>	<p>Pardon 43:14 parent 10:14,18,22 11:3,7,8 17:7,9 33:15,18,19 parents 39:9 Park 1:16 parlance 39:15,20 39:20 part 8:4 10:10 13:13 20:9 27:9 30:13,14 31:17,21 particular 3:20 12:21 18:11 32:5 34:16 40:7 particularly 21:9 parties 14:8,11 18:2,23 parts 30:13 party 41:12 47:10 47:12,14 party's 23:21 pass 19:25 passed 20:6,8 PATTERSON 1:4 pay 8:7 9:5 10:6,7 10:24 49:12 50:15 52:3,23 paying 9:23 payment 31:23,24 33:20 37:7 payments 32:2 pays 22:15 people 25:14,15 34:16 49:1 perfectly 17:17 44:17 perform 12:23,25 13:6 50:20 52:17 52:22,23 performance 9:21 50:13,14,21,23 period 40:7 permitted 21:24 51:23 person 9:4 12:3,10 13:2 14:16,21</p>	<p>15:2,2 16:11,23 25:8,13,16 28:17 32:2,8 34:20,22 35:4,12,23 36:5 36:11 37:1,3,9,20 39:17 42:13 43:3 46:23 48:6 49:16 49:17 52:18 personal 24:6 personally 16:21 persons 3:11,23 4:18 Pete's 11:17 Petitioner 15:21 26:3 Petitioners 1:5,17 1:21 2:4,8,14 3:8 50:8 PHC 5:25 6:3 place 27:11 placed 7:13,19 9:12 places 27:5 plain 20:25 playing 15:16 please 3:10 14:6 30:3 35:24 38:1,1 38:1 50:10 pluck 14:22 point 6:6 11:14,18 11:22 23:25 24:18 27:3 30:9 33:6,23 34:15 46:3,17 48:5 50:25 pointing 18:24 points 52:6 policy 23:18 position 4:2,5 8:13 44:14 Posner 22:17 Posner's 23:13 48:5 pot 40:16 potential 4:11 6:18 8:7 52:1 precise 8:10 precisely 3:13 32:17</p>	<p>prescribe 28:6 presumptions 44:10 pretty 41:3,5 prevail 13:9 44:14 previous 19:4 primary 6:20 22:1 24:5 50:11 principal 40:23 41:1 prior 19:11,21 private 10:6 problem 17:23 19:6 19:9,10,10,12,14 19:18,18,20 27:2 27:12 37:24 49:3 process 38:13 profile 6:23 progress 42:14 prohibit 24:1 prohibited 35:19 projections 8:8 promise 49:12,13 promises 49:15 proper 24:12 property 24:4,7 51:21,23 proposed 40:13 prospective 29:10 protection 14:10 protects 19:1 prove 26:10 proved 26:11 provide 21:18 28:9 33:25 50:16 provided 14:7 20:21 provides 21:25 providing 9:22 provision 20:13,15 20:17 28:9 29:12 32:12 49:5 provisions 4:8 27:15,19 34:24 public 10:5 pull 29:13</p>
---	---	---	---	---

<p>punitive 13:13</p> <p>purpose 5:7 18:6 34:13 44:8 45:5 46:12 48:25</p> <p>purposes 18:15 20:15,17 27:19 28:6 29:4</p> <p>pushing 26:25</p> <p>put 7:6 8:23 9:8 32:17 40:9 41:25 48:22</p> <p>puts 37:25</p> <p>putting 9:7 13:4</p> <hr/> <p>Q</p> <p>qualifies 3:17</p> <p>qualify 14:9</p> <p>quarreling 39:4</p> <p>quasi-admissions 18:7</p> <p>question 6:13 10:13 12:5 13:14 20:10 21:15 23:7,11,13 30:10 34:12 43:19 44:13 46:22 47:11 47:15 49:8</p> <p>questions 12:14 13:25 50:2 53:1</p> <p>quickly 24:18</p> <p>quite 35:12 49:10 49:21</p> <hr/> <p>R</p> <p>R 1:22 2:10 3:1 29:25</p> <p>race 35:6,18</p> <p>raised 21:15</p> <p>rate 41:21</p> <p>rationale 45:24</p> <p>rationales 52:4</p> <p>Raymore 1:7 3:5</p> <p>reach 24:4,7</p> <p>read 18:8 19:18</p> <p>reading 17:21 27:11 29:5</p> <p>real 3:21 8:15</p>	<p>reality 8:17</p> <p>really 7:25 8:21 18:5 25:16 38:9 40:16 41:14 42:1 45:7</p> <p>reason 8:10 18:17 21:17 33:13</p> <p>reasonable 5:22 9:10 12:3 14:12 14:13 29:18</p> <p>reasonably 15:14 23:8 29:2</p> <p>reasons 6:15</p> <p>rebuttal 2:12 13:25 50:7</p> <p>receive 16:24 29:14 32:25</p> <p>receiving 28:22 29:19 31:3 36:22</p> <p>recipient 33:20</p> <p>recommend 8:11</p> <p>recommendation 8:19,22</p> <p>recommending 43:15</p> <p>record 8:5</p> <p>refer 11:3,7 16:20 32:4</p> <p>reference 28:17</p> <p>references 28:16</p> <p>referred 18:12</p> <p>refers 16:23 29:7 31:8</p> <p>reflects 14:12</p> <p>reg 40:6 49:3</p> <p>regard 4:5 15:14 29:18</p> <p>regarded 20:14 23:8 28:22 29:2</p> <p>regs 31:9 46:11</p> <p>regular 32:2</p> <p>regularly 49:6</p> <p>regulation 3:14,19 4:9,14,17 6:7 13:19 14:7,12 18:1,3,14,21,25</p>	<p>19:4,5,11,21,25 20:2,5,16,18,21 21:1,23 24:1 26:1 27:13,15 51:7,13 51:14,16,17</p> <p>regulations 20:8 28:6,7</p> <p>regulators 3:19 4:15 5:13,23 7:9 9:10 29:17</p> <p>rejected 17:6,10,12 17:13 24:19</p> <p>related 23:11</p> <p>release 23:24</p> <p>relevant 20:9</p> <p>reliance 39:5</p> <p>relied 24:8</p> <p>relief 48:3</p> <p>religion 35:6,18</p> <p>rely 29:5 48:9,10 48:24</p> <p>relying 4:14 24:5 51:16</p> <p>remainder 13:24</p> <p>remedies 23:12</p> <p>remedy 19:16 23:4 23:23 24:12</p> <p>renewal 16:13 52:10</p> <p>rental 39:9</p> <p>repay 3:12,16 6:21 9:14 10:1 12:25 13:1,5 50:22 52:15</p> <p>repaying 9:23</p> <p>repayments 31:12</p> <p>repeal 52:10</p> <p>repeat 37:21</p> <p>repeatedly 44:11</p> <p>report 22:9 29:12 29:13</p> <p>reported 47:21</p> <p>Reporting 29:4,6,9 29:12,21</p> <p>reputation 8:23 9:8</p> <p>request 8:11 12:21</p>	<p>17:16 42:16,17 47:13 52:9</p> <p>requesting 13:3 40:22 52:20</p> <p>requestor 40:25</p> <p>requests 33:12</p> <p>require 23:23 24:5 34:3,4</p> <p>required 3:14 6:15 7:1,5,5,11,11,17 9:12 13:22 19:15 20:18 21:18 23:5 46:9 48:14 50:14</p> <p>requirement 7:13 13:6 34:7</p> <p>requirements 9:21 50:21</p> <p>requiring 6:4 23:15</p> <p>reserve 4:1 13:24 20:7 23:19 39:24 40:1</p> <p>resolve 48:17</p> <p>resolved 23:6</p> <p>respect 16:10 25:4 30:11 49:22</p> <p>respects 32:14</p> <p>respond 50:25</p> <p>Respondent 1:23 2:11 14:4 30:1</p> <p>responding 4:6 8:5</p> <p>response 4:9 27:16</p> <p>responsible 31:25 31:25</p> <p>result 13:21 25:19 25:19,25 43:18</p> <p>rewrite 30:6 32:15</p> <p>rewriting 18:19</p> <p>right 4:20 6:1 12:16 18:15 22:19 24:14 25:1,10,22 26:5,6,13,21 31:22,24 33:20 35:13 37:7 38:19 42:2,13 43:5,17 44:3 47:3,6</p> <p>rights 32:5</p>	<p>road 46:3</p> <p>ROBERTS 3:3 12:16 14:1,15 15:17 29:23 50:5 53:2,4</p> <p>rule 14:11 17:22 23:21 40:13 48:1 48:5</p> <p>ruled 5:13 18:16</p> <p>rulemaking 27:18 28:2</p> <p>run 25:14 52:7</p> <p>runs 44:9</p> <hr/> <p>S</p> <p>S 2:1 3:1</p> <p>safe 51:7,15,18,24</p> <p>sake 11:17</p> <p>saying 5:6 20:2 24:23 47:7 49:15 52:19</p> <p>says 12:23 17:8 18:4,25 21:21 24:22 25:2,3 27:22,23,24 28:4 28:5 29:13 30:14 33:15 34:20 35:5 35:23,24 36:1 37:5,7 38:1 41:8 42:11 48:10 51:10 51:11,19 52:9,12 52:16</p> <p>scale 22:18</p> <p>Scalia 4:21,24 5:3,6 5:10,18 7:4,10,15 8:18 9:1,6,16 10:3 10:15,20 11:9,12 11:15,19 12:7 18:4 19:8,17 20:1 27:21 28:1,4 38:21 43:1,6,10 49:8 50:1,24 51:3</p> <p>scenarios 35:3</p> <p>school 8:21,24 10:6 10:6,24 11:17</p> <p>scores 22:11</p>
--	--	---	--	---

second 42:15 51:13 secondary 15:15 20:23 28:23 29:18 32:20,21 40:11,17 Section 17:23 28:3 secure 48:21 secured 48:9 security 51:19 see 13:23 37:23 42:21 seeking 15:12 29:2 43:19 seeks 29:1 48:6 sense 14:23 22:4,5 33:24 35:9 38:9 52:5 sensible 17:17 45:8 separate 13:12 14:25 41:11 50:14 50:23 set 6:12 setting 40:8 seven 10:24 seven-year-old 11:16 severally 3:11,15 6:16,21 9:5 12:24 30:25 34:8 41:19 41:22,24 42:6 52:15 sex 34:1 35:18,20 share 10:20 shaving 11:17 short 40:7 show 10:3 shows 34:20 side 16:25 sign 6:16 7:1,5,5,11 7:12,16,17 19:15 25:8 39:9 41:9,16 signature 21:22 22:1 24:6 37:25 signatures 24:1 35:2 signed 7:18 41:15 signs 12:22 34:21	37:25 similar 14:8 18:22 simple 51:24 simpleminded 42:9 simply 6:25 30:10 35:7 50:12 51:20 single 9:25 50:20 sitting 35:23 36:11 37:13 situation 16:19 48:18 situations 33:11 small 7:24 Smith 37:13,16 38:2,6 Solicitor 1:18 solve 19:9 solvency 9:7 somebody 6:12 7:6 13:2 14:20 15:1 30:25 43:2,3 52:14 someone's 45:20 son 33:16,16 sorcerer 30:6 sorcerer's 30:5 sorry 24:16 38:14 sort 8:23 15:16 40:16 Sotomayor 16:1 19:24 35:11 38:14 38:24 39:8,19 43:12,15,22 44:2 45:18 46:2 47:1 sought 16:24 48:3 speak 20:10 specific 9:21 24:4 27:15 51:18 52:8 specifically 39:24 40:2 speech 16:15,19 17:3 spins 35:4 spousal 3:15 4:12 13:18 24:1 48:2 48:10 51:1	spouse 7:1 21:22,25 24:6 25:8,16 32:20 33:2 34:7 34:21 48:10,13,24 51:10,12,20 52:1 52:4 spouses 6:8,9,15 48:13 spouses' 21:12 stand 3:23 49:20 52:21 standing 6:8 17:24 start 19:24 25:11 45:22,22 50:12 starting 30:9 State 26:3,6 stated 44:10 statements 9:23 50:17 52:8 States 1:1,13,20 2:7 status 4:19 35:15 35:18,20 statute 5:15 15:5 16:8 18:6,19,19 18:25 20:25 26:7 26:12 27:1,6,9,20 27:23 30:6,8,10 30:20 31:8,9 32:11,17 33:10 34:13,17,25 35:17 35:19 36:20 37:6 37:16 39:21 43:23 44:5,7,10 45:4,19 46:7 48:15 51:18 52:9 statute's 31:18,20 statutes 32:5 statutory 20:9 25:21 30:12 32:3 32:16 37:5 38:11 step 19:22 30:4 42:22 STEPHEN 1:22 2:10 29:25 stepping 47:7 stereotypes 34:2	stirred 40:16 straightforward 3:18 36:20 strap 51:25 strapped 6:22 strength 8:12 subchapter 28:7 subject 45:16 submit 15:12 submitted 53:5,7 subsection 28:3 subsections 5:17 substantive 20:13 sue 6:4 17:24 25:18 25:22,24 26:11,13 26:22 suffer 13:21 suffered 21:20 22:2 22:4 26:7 suffers 21:19 suffices 48:23 suggest 8:15 39:2 suggested 26:3 36:19 40:7 suggesting 45:2 suit 13:12 18:24 supplement 46:10 support 24:8 supporting 1:20 2:8 14:24 suppose 17:6 32:18 32:18 33:25 Supreme 1:1,13 sure 33:23 51:2 sureties 36:13 surety 20:23 28:16 synonymous 45:12	takes 30:7 talk 7:10 28:22 40:20 50:11 talked 31:19 talking 14:16 39:19 42:22,24 45:12 talks 18:2 46:12 tarnish 22:13 tell 47:25 telling 19:1 term 5:15,15 14:14 15:1,5,6 16:6,7,19 17:21 45:8 terms 14:18 15:25 17:2,3 26:4 30:7 terrible 38:21 Thank 12:19 14:1,2 14:5 29:22,23 50:5,9 52:25 53:2 53:3 theory 13:8 thing 13:17 16:24 36:24 37:2 42:21 43:23 48:8 51:13 things 5:16 14:18 22:16 34:6 36:14 38:1 43:9,21 46:15,19 think 4:1 5:2,5,12 6:14 7:8 9:9 10:8 10:9,10 11:22 15:6,9,13,17,23 16:4,6,25 17:3,11 17:14,15,17 18:4 18:11 19:13,13 21:8,12,13 22:24 23:2,13,25 24:12 26:2,4 27:20 28:25 29:1 32:23 33:13 34:9,10,14 35:3 38:3,8 40:4 41:13 43:4 44:20 44:25 46:14 47:11 50:11 51:13 thinks 40:24 third 38:17,18 47:9
---	---	--	---	---

<p>47:12,14 third-party 33:12 41:1 47:6 thought 10:13 36:17 44:12,14 ticket 26:8 time 6:6 9:24 10:25 13:23 20:13 33:6 40:7 45:4 48:12 49:2 50:16 52:25 times 44:8,16 to-be 3:22 7:25 today 13:16 17:8,9 23:7 26:10 told 35:2 ton 52:5 totality 13:1 train 25:15 transaction 3:22 8:14 16:10 25:5 28:11 29:15 33:19 46:8 transactions 3:21 8:16 14:9 28:15 treat 27:18 trial 8:5 true 8:17 11:25 15:6 35:17 44:20 Truth 32:6 try 48:17 trying 30:6 tuition 9:5 10:7 turns 46:5 two 14:18 15:25 18:3 30:13,14,17 34:6 43:9,9,21,21 46:15,18 49:10,21 51:24 52:8 typifies 7:23</p> <hr/> <p>U</p> <p>ultimately 22:15 33:17 unambiguously 17:1 18:18 30:8 uncertain 24:18</p>	<p>underlying 22:12 understand 7:2,22 13:8 23:10 understanding 15:14,18 39:5 understandings 38:10 understood 12:11 16:15 undertake 6:17 unenforceable 13:14,16,17 unfortunately 11:8 unilateral 49:14,18 unique 21:19 United 1:1,13,20 2:7 university 38:12 unlawful 16:8 25:25 unnecessary 40:2 unreasonable 23:14 unworkable 45:19 45:25 upset 17:16 urging 43:3 use 9:1 11:23 15:24 16:2,5 28:21 32:7 34:19 38:24 45:8 52:2 uses 38:16 44:5,7 45:1 usual 41:17 Usually 46:3</p> <hr/> <p>V</p> <p>v 1:6 3:4 VALERIE 1:3 version 19:4 40:18 view 13:8 27:8,10 30:7,12 32:1 35:8 37:15 39:20 46:6 viewed 18:11 violation 3:14 6:5 13:10 21:23 34:21</p>	<p>48:14 51:9 violations 23:21 virtue 7:19 void 24:13 48:4 voided 48:2</p> <hr/> <p>W</p> <p>wait 7:4,4,4 10:12 10:12,12,22 15:17 waive 51:20 walks 36:1 wall 25:15 want 4:7 19:6 31:11 33:15,25 35:25 36:2 37:13 37:21 38:17 41:25 45:20 48:4,11,20 51:8,10,12,25 wanted 7:6 22:3 34:23 wants 24:3 46:24 Washington 1:9,19 wasn't 6:25 7:5 way 4:9 9:2 14:19 18:8,12 20:10 23:6,6 34:17,25 38:16,17 41:10 ways 17:20 We'll 3:3 we're 4:13 18:15 27:25 42:13,22,22 42:24 45:12 we've 4:16 14:15 38:11 40:15 Webster's 38:17,18 weren't 15:20 wherewithal 13:4 wife 6:21 51:17 wish 34:23 wives 13:21 51:6 woman 8:20 34:1 women 34:16 wonder 14:22 word 11:23 12:12 12:20 16:2 18:8 26:25 28:18,21</p>	<p>32:8 38:10 39:6 44:7,15 words 27:7 work 17:8 27:12 34:18 44:2 workable 44:17 worked 14:20 works 34:18,25 world 13:2 52:14 wouldn't 15:21 16:1,2 17:11 22:19 24:12 25:23 27:12 46:20 write 8:19 write-up 8:6 writes 42:19 writing 10:25 37:12 written 8:22 12:22 42:18 wrong 25:12 30:9 wrote 16:7</p> <hr/> <p>X</p> <p>x 1:2,8 XYZ 10:5</p> <hr/> <p>Y</p> <p>yeah 5:9 19:17 27:24 year 20:12 years 10:24 14:7 23:9 47:22 48:12 Yep 43:5 young 8:20 11:16</p> <hr/> <p>Z</p> <hr/> <p>0</p> <hr/> <p>1</p> <p>1 8:3 51:15 10,000 35:24 36:2 11:07 1:14 3:2 11:54 53:6 13 2:8 14-520 1:5 3:4 15 35:6,7,8</p>	<p>1691(b) 28:3 1691(d) 51:18 1974 20:7 1975 20:8 1976 20:12,14 35:20 40:18 1977 4:1,6,14 18:20 1985 4:15 5:23 18:13,20 19:3 47:21</p> <hr/> <p>2</p> <p>2 51:15 2001 29:16 2008 47:23 2015 1:10 24 28:20 29:3 29 2:11</p> <hr/> <p>3</p> <p>3 2:4 8:3 51:15 30 14:7 23:9</p> <hr/> <p>4</p> <p>49 2:14 45:3</p> <hr/> <p>5</p> <p>5 1:10 50 42:7 44:7,16 45:1</p> <hr/> <p>6</p> <p>60 47:20</p> <hr/> <p>7</p> <p>7 20:16 70 47:20 706 17:23 79-7 8:2</p> <hr/> <p>8</p> <hr/> <p>9</p>
---	---	---	---	--