McGLINCHEY STAFFORD
Where Business & Law Intersect SM

Florida Real Property and Business Litigation Report

Volume XII, Issue 35
September 3, 2019
Manuel Farach

Salcedo v. Hanna, Case No. 17-14077 (11th Cir. 2019).
Sending a single text message does not violate the Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227(b)(1)(A)(iii).

Regions Bank v. Legal Outsource PA, Case No. 17-11736 (11th Cir. 2019).
A guarantor is not an "applicant" under the under the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691(a), 1691a(b), and accordingly may not seek relief under the Act.

In Re: Standard Jury Instructions In Civil Cases and Standard Jury Instructions In Contract And Business Cases—Joint Report No. 19-01, Case No. SC19-185 (Fla. 2019).
The standard verdict form for breach of fiduciary duty is approved by the Florida Supreme Court.

Atkins North America, Inc. Tallahassee MH Parks, LLC, Case No. 1D17-2996 (Fla. 1st DCA 2016).
Reformation of a mortgage will not be permitted where doing so materially affects a creditor who recorded a judgment lien after the recordation of the inaccurate mortgage.

Suzuki Motor Corporation v. Winckler, Case No. 1D18-4815 (Fla. 1st DCA 2019).
The Apex Doctrine ("[an] agency head should not be subject to deposition, over objection, unless and until the opposing parties have exhausted other discovery and can demonstrate that the agency head is uniquely able to provide relevant information which cannot be obtained from other sources.") does not apply outside of government and thus does not apply to shield the C.E.O. of a multinational company from discovery.

Batterbee v. Roderick, Case No. 2D18-2037 (Fla. 2d DCA 2019).
A permissive use of real property may change into a non-permissive use sufficient to support a claim for adverse possession.

Hopson v. Deutsche Bank National Trust Company, Case No. 2D18-673 (Fla. 2d DCA 2019).
A defending mortgagor that wins dismissal but does not admit privity with the plaintiff is not entitled to an award of attorney's fees under Florida Statute section 57.105(7); *Harris v. Bank of New York Mellon*, 44 Fla. L. Weekly D141 (Fla. 2d DCA Dec. 28, 2018), is distinguished on its facts.

Ancla International, S.A. v. Tribeca Asset Management, Inc., Case No. 3D18-1078 (Fla. 3d DCA 2019).
The following provision both selects Florida as the jurisdiction whose law is to apply, and confers jurisdiction sufficient for long-arm purposes:

> This agreement will be governed by the laws of the State of Florida of the United States of America (USA), a jurisdiction accepted by the parties irrespective of the fact that the principal activity of the beer project will be conducted in Colombia.

Beach Towing Services, Inc. v. Sunset Land Associates, LLC, Case Nos. 3D18-1837 & 3D18-2168 (Fla. 3d DCA 2019).

Restrictive covenants are interpreted in a fashion which least restricts the use of the property, and accordingly, the following provision prohibits a garage company but not a garage:

> This property is being conveyed by the Grantor to the Grantee subject to the Grantee agreeing that the property will not be used as a parking lot, storage yard facility or for a garage or tow truck company. This covenant shall run with the land.

Valencia Reserve Homeowners Association, Inc. Boynton Beach Associates, XIX, LLLP, Case No. 4D18-1320 (Fla. 4th DCA 2019).

It is not a violation of the Florida Homeowner's Association Act for a developer to use working capital funds contributed by purchasers into a homeowner's association account to fund the developer's negative equity contributions under Florida Statute section 720.308(1)(b).

Grace and Naeem Uddin, Inc. v. Singer Architects, Inc., Case No. 4D18-2972 (Fla. 4th DCA 2019).

A supervising architect owes a duty to a contractor and may be held liable in tort for professional negligence notwithstanding the architect and contractor both have contracts with the developer. In other words, the existence of the contracts does not bar the tort duty owed by the architect to the builder.

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-14077

D.C. Docket No. 0:16-cv-62480-DPG

JOHN SALCEDO,
individually and on behalf of others similarly situated,

Plaintiff - Appellee,

versus

ALEX HANNA,
an individual,
THE LAW OFFICES OF ALEX HANNA, P.A.,
a Florida Professional Association,

Defendants - Appellants.

Appeal from the United States District Court
for the Southern District of Florida

(August 28, 2019)

Before JILL PRYOR and BRANCH, Circuit Judges, and REEVES,* District Judge.

---

* Honorable Danny C. Reeves, United States District Judge for the Eastern District of Kentucky, sitting by designation.

BRANCH, Circuit Judge:

Is receiving a single unsolicited text message, sent in violation of a federal statute, a concrete injury in fact that establishes standing to sue in federal court? To answer that question, we have examined the statute, our precedent, and—following the Supreme Court's guidance—history and the judgment of Congress, and we conclude that the allegations in this suit do not establish standing.

I. BACKGROUND

At 9:56 a.m. on August 12, 2016, John Salcedo, a former client of Florida attorney Alex Hanna and his law firm,[1] received a multimedia text message from Hanna offering a ten percent discount on his services.

Salcedo filed suit in the district court as the representative of a putative class of former Hanna clients who received unsolicited text messages from Hanna in the past four years, alleging violations of the Telephone Consumer Protection Act of 1991 ("TCPA"), 47 U.S.C. § 227(b)(1)(A)(iii).[2] He sought, among other relief, statutory damages of $500 per text message and treble damages of $1,500 per text

[1] For simplicity, and without implying any view as to Mr. Hanna's possible personal liability, throughout this opinion we will refer to both defendants—Mr. Hanna and his law firm—collectively as "Hanna."

[2] "It shall be unlawful for any person within the United States . . . to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice . . . to any telephone number assigned to a . . . cellular telephone service . . . ." 47 U.S.C. § 227(b)(1)(A)(iii).

message sent willfully or knowingly. *See* 47 U.S.C. § 227(b)(3).

Hanna moved to dismiss the complaint for lack of standing, arguing in the alternative that it should be dismissed as to Mr. Hanna for failure to state a claim against him and that certain parts of the complaint should be stricken. The district court disagreed, finding in relevant part that Salcedo had standing under *Mohamed v. Off Lease Only, Inc.*, No. 15-23352-Civ-COOKE/TORRES, 2017 WL 1080342 (S.D. Fla. Mar. 22, 2017). However, finding that its order "involves a controlling question of law as to which there is a substantial ground for difference of opinion," the court allowed Salcedo to pursue an interlocutory appeal and stayed its proceedings pending appeal. A panel of our Court granted Hanna's petition for permission to appeal under 28 U.S.C. § 1292(b). We now consider his appeal.

II. STANDARD OF REVIEW

"We review standing determinations *de novo*." *Bochese v. Town of Ponce Inlet*, 405 F.3d 964, 975 (11th Cir. 2005).

III. DISCUSSION

Our analysis proceeds as follows. We first introduce the TCPA, the statute under which Salcedo has filed suit. Next, we discuss the standing requirements of Article III of the Constitution, which help to define our limited power to resolve only cases or controversies. We then turn to Salcedo's particular allegations of harm and analyze them in view of our Circuit precedent, history, and the judgment

of Congress.

A. The Telephone Consumer Privacy Act of 1991

Because it found that "residential telephone subscribers consider automated or prerecorded telephone calls . . . to be a nuisance and an invasion of privacy," Telephone Consumer Protection Act of 1991, S. 1462, 102d Cong., Pub. L. No. 102-243, § 2, ¶ 10 (1991), in 1991 Congress enacted the TCPA to restrict interstate telemarketing. The TCPA thus prohibits using automatic telephone dialing systems to call residential or cellular telephone lines without the consent of the called party. 47 U.S.C. § 227(b)(1)(A)(iii), (B). It also prohibits sending unsolicited advertisements via facsimile machine. *Id.* § 227(b)(1)(C). It authorizes the Federal Communications Commission ("FCC") to enact implementing regulations. *Id.* § 227(b)(2). Finally for our purposes, the TCPA creates a private right of action whereby a person or entity may seek compensatory or injunctive relief against violators. *Id.* § 227(b)(3).

There have been two relevant updates to the TCPA and its enforcement regime since 1991. First, in October 1992, Congress amended the TCPA to allow the FCC to exempt free-to-receive cellular calls if it so chooses. *Id.* § 227(b)(2)(C). The FCC has not done so. Second, the statute has been silent as to text messaging, for that medium did not exist in 1991. But under its TCPA rulemaking authority, the FCC has applied the statute's regulations of voice calls to text messages. 30

FCC Rcd. 7961, 7964 n.3, 7978–79, 8016–22 (2015); 18 FCC Rcd. 14014, 14115 (2003); *see also Campbell–Ewald Co. v. Gomez*, 136 S. Ct. 663, 667 (2016) ("A text message to a cellular telephone, it is undisputed, qualifies as a 'call' within the compass of § 227(b)(1)(A)(iii)."). Thus, Salcedo's complaint facially appears to state a cause of action under the TCPA as interpreted by the FCC.

B. Article III Standing

Not every right created by Congress or defined by an executive agency is automatically enforceable in the federal courts. Our tripartite system of government recognizes that "there is no liberty if the power of judging be not separated from the legislative and executive powers." *The Federalist No. 78*, at 465 (Alexander Hamilton) (Clinton Rossiter ed. 1961). To protect this separation of powers, we must assure ourselves that our exercise of jurisdiction falls within the Constitution's grant of judicial power.

Article III vests the judicial power in the federal courts and extends that power to "Cases" and "Controversies." U.S. Const. art. III, §§ 1–2. One tool for determining that the matters before us are truly cases or controversies, as understood by Article III, is the doctrine of standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). "The law of Article III standing . . . serves to prevent the judicial process from being used to usurp the powers of the political branches." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013). Even when

those political branches appear to have granted us jurisdiction by statute and rule, we are still obliged to examine whether jurisdiction exists under the Constitution.

As the Supreme Court has explained, the "irreducible constitutional minimum" to establish Article III standing requires three elements. *Lujan*, 504 U.S. at 560. "The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (citing *Lujan*, 504 U.S. at 560–61). It is the first element—the "foremost" of the three, *id.* (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103 (1998))—that is disputed in this appeal and to which we now turn.

To establish standing, an injury in fact must be concrete.[3] *Id.* at 1548. "A 'concrete' injury must be '*de facto*'; that is, it must actually exist," as opposed to being hypothetical or speculative. *Id.* A concrete injury need be only an "identifiable trifle." *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 689 n.14 (1973) (noting that sufficiently concrete injuries have included a fraction of a vote, a $5 fine and costs, and a $1.50 poll tax). But sometimes plaintiffs allege intangible injuries that we cannot so

[3] An injury in fact must also be particularized, that is, affecting the plaintiff "in a personal and individual way." *Spokeo*, 136 S. Ct at 1548 (quoting *Lujan*, 504 U.S. at 560 n.1). It is undisputed that Salcedo's allegations are of a personal and individual nature. As the would-be class representative, Salcedo must establish his own personal, concrete injury notwithstanding whatever injuries may have been suffered by the other members of the class. *Id.* at 1547 n.6.

easily identify.

When the concreteness of an alleged injury is difficult to recognize, we look to "history and the judgment of Congress" for guidance. *Spokeo*, 136 S. Ct. at 1549. But an act of Congress that creates a statutory right and a private right of action to sue does not automatically create standing; "Article III standing requires a concrete injury even in the context of a statutory violation." *Id.*[4] "[T]he requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute." *Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009).

C. Eleventh Circuit Precedent

Because Salcedo bears the burden of establishing federal jurisdiction, *Lujan*, 504 U.S. at 561, we look to the substance of his amended complaint's allegations to determine if he has standing due to a concrete injury. Salcedo alleged that receiving the one text message "caused Plaintiff to waste his time answering or otherwise addressing the message. While doing so, both Plaintiff and his cellular

[4] Recognizing that "a bare procedural violation" of a statute "may result in no harm," *Spokeo* reaffirms the proposition that we must always look for concrete harm when assessing Article III standing. *See* 136 S. Ct. at 1550. In some contexts this will mean identifying purely speculative "harm" that never actually materializes as failing to allege an injury in fact. *See, e.g.*, *Nicklaw v. CitiMortgage, Inc.*, 839 F.3d 998, 1003 (11th Cir. 2016), *reh'g en banc denied*, 855 F.3d 1265 (11th Cir. 2017) (holding that a violation of the mortgage satisfaction reporting requirements of a state law resulted in no concrete harm to the plaintiff).

But we should not ignore the Supreme Court's guidance in *Spokeo* in cases that purport to allege more than merely technical statutory violations. This appeal presents a close question in which we must determine whether Salcedo's allegations are real and concrete as opposed to figmentary. *Spokeo*'s instruction to consider history and the judgment of Congress, *id.* at 1549, helpfully guides us in our conclusion that Salcedo has not alleged a concrete injury in fact.

phone were unavailable for otherwise legitimate pursuits." He further alleged that the message also "resulted in an invasion of Plaintiff's privacy and right to enjoy the full utility of his cellular device."

These allegations are qualitatively different from those in our Circuit precedent that have been successful in establishing standing to sue over a single violation of the TCPA. In *Palm Beach Golf Center–Boca, Inc. v. John G. Sarris, D.D.S., P.A.*, 781 F.3d 1245, 1252 (11th Cir. 2015), we found standing for a plaintiff who alleged that receiving a junk fax in violation of the TCPA harmed him because, during the minute or so that it took to receive and process the fax message, his fax machine was unavailable for receiving legitimate business messages. *Accord Florence Endocrine Clinic, PLLC v. Arriva Med., LLC*, 858 F.3d 1362, 1366 (11th Cir. 2017) (considering also "the cost of printing the unsolicited fax"). To the extent we have relied on tangible costs such as the consumption of paper and ink or toner to establish injury in fact, Salcedo cannot so rely, since receiving a text message uses no paper, ink, or toner. His complaint alleges generally that some text messages cause recipients to incur costs to their wireless service providers, but he has not alleged specifically that Hanna's text cost him any money.

Salcedo's allegations of intangible costs, on the other hand, bear some facial similarities to those in *Palm Beach Golf*. But they differ in kind, rendering *Palm*

Beach Golf inapplicable. At oral argument, Salcedo asserted that receiving Hanna's message was comparable to using a minute of fax machine time, but his complaint does not so allege. Rather, it alleges time wasted only generally. In the absence of a specific time allegation, we decline to assume an equivalence to the facts of *Palm Beach Golf* when receiving a fax message is qualitatively different from receiving a text message. A fax message consumes the receiving device entirely, while a text message consumes the receiving device not at all. A cell phone user can continue to use all of the device's functions, including receiving other messages, while it is receiving a text message.

Salcedo also makes an allegation about unavailability, but that too is distinct from *Palm Beach Golf*. There, we were concerned about the fully realized opportunity cost of being unable to receive other faxes for a full minute. By contrast, Salcedo has alleged no particular loss of opportunity. A fax machine's inability to receive another message while processing a junk fax has no analogy with cell phones and text messaging. Salcedo's assertion that he and his phone were unavailable appears only to recite language we used in *Palm Beach Golf*. *Cf.* 781 F.3d at 1252 (quoting H.R. Rep. 102-317, at 10 (1991)). We are entitled to look past this conclusory recitation to the actual factual substance of Salcedo's allegations. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("we are not bound to accept as true a legal conclusion couched as a factual allegation").

Thus, Circuit precedent in *Palm Beach Golf* does not dictate the outcome of this appeal. And, for reasons we will discuss below, we find our sister circuit's decision involving this precise issue unpersuasive. *See Van Patten v. Vertical Fitness Group, LLC*, 847 F.3d 1037, 1043 (9th Cir. 2017) (holding that the receipt of two unsolicited text messages constituted an injury in fact).[5] In the absence of controlling authority, we turn our analysis to the framework outlined by the Supreme Court in *Spokeo*. We look to history and the judgment of Congress to see whether they support treating Salcedo's allegations as a concrete injury in fact. Our examination reveals little support for so doing.

D. The Judgment of Congress

We first note what Congress has said in the TCPA's provisions and findings[6] about harms from telemarketing via text message generally: *nothing*. The TCPA is completely silent on the subject of unsolicited text messages. Of course, text messaging in its current form did not exist in 1991 when the TCPA was enacted,

---

[5] Nor are we bound by the Supreme Court's holding in another TCPA text-messaging case that the case was not mooted by an unaccepted settlement offer. *See Campbell–Ewald*, 136 S. Ct. at 670. The Court did not reach the unraised question of whether the plaintiff had alleged an injury in fact, in part because the defendant apparently never asserted that the plaintiff had failed to do so. *See id.* at 667–68. "[W]e are not bound by a prior decision's *sub silentio* treatment of a jurisdictional question." *Okongwu v. Reno*, 229 F.3d 1327, 1330 (11th Cir. 2000).

[6] Context matters. We are not suggesting that legislative history should play a role in statutory interpretation. Salcedo's allegation is undisputedly a violation of the statute as interpreted by the FCC. Nonetheless, because the Supreme Court has instructed us to consider "the judgment of Congress" in assessing Article III standing, we will consider the congressionally enacted findings as informative of that judgment. *See Spokeo*, 136 S. Ct. at 1549; *cf. Palm Beach Golf*, 781 F.3d at 1252 (citing House committee report).

but Congress has amended the statute several times since then without adding text messaging to the categories of restricted telemarketing.[7] As we have mentioned, it is only through the rulemaking authority of the FCC that the voice call provisions of the TCPA have been extended to text messages. At most, we could take Congress's silence as tacit approval of that agency action.

On the other hand, Congress's legislative findings about telemarketing suggest that the receipt of a single text message is qualitatively different from the kinds of things Congress was concerned about when it enacted the TCPA. In particular, the findings in the TCPA show a concern for privacy within the sanctity of the home that do not necessarily apply to text messaging. "Unrestricted telemarketing . . . can be an intrusive invasion of privacy," and "[m]any consumers are outraged over the proliferation of intrusive, nuisance calls to their homes from telemarketers," Congress found. Pub. L. No. 102-243, § 2, ¶¶ 5, 6. By contrast, cell phones are often taken outside of the home and often have their ringers silenced, presenting less potential for nuisance and home intrusion. It is thus not surprising that, after Congress found that the FCC "should have the flexibility to design different rules for those types of automated or prerecorded calls that it finds are not

[7] Following recent amendments, however, the TCPA will expressly include text messaging in its prohibitions on transmitting false caller ID information. Consolidated Appropriations Act, 2018, H.R. 1625, 115th Cong., Pub. L. No. 115-141, div. P, § 503(a) (2018) (to be codified at 47 U.S.C. § 227(e)).

considered a nuisance or invasion of privacy," *id.* ¶ 13, within a year it instructed the FCC that it may exempt "calls to a telephone number assigned to a cellular telephone service that are not charged to the called party," 47 U.S.C. § 227(b)(2)(C).

On text messaging generally, then, the judgment of Congress is ambivalent at best; its privacy and nuisance concerns about residential telemarketing are less clearly applicable to text messaging. Any possible deference to the FCC's interpretation of the TCPA[8]—the source of its application to text messaging—is not obviously relevant where the Supreme Court has specifically instructed us to consider the judgment of *Congress*. And congressional silence is a poor basis for extending federal jurisdiction to new types of harm. We take seriously the silence of that political branch best positioned to assess and articulate new harms from emerging technologies. *See Spokeo*, 136 S. Ct. at 1549 (citing *Lujan*, 504 U.S. at 578)). With this point of caution in mind, we now turn to the judgment of Congress about the specific harms that Salcedo has alleged he suffered when he received Hanna's message.

[8] In this case, we need not reach the issue of whether the agency's interpretation of the statute is entitled to any deference. *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) (requiring deference to agency's interpretation of silent or ambiguous statute); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (allowing court to determine level of deference in proportion to agency's demonstration of persuasive reasoning); *cf., e.g.*, *Josendis v. Wall to Wall Residence Repairs, Inc.*, 662 F.3d 1292, 1320 (11th Cir. 2011) (rejecting *Chevron* deference where the statutory language was clear and unambiguous).

We consider the judgment of Congress when assessing standing because "Congress is well positioned to identify intangible harms that meet minimum Article III requirements." *Id*. As we have mentioned, Congress was concerned about "intrusive invasion[s] of privacy" into the home when it enacted the TCPA. Pub. L. No. 102-243, § 2, ¶ 5. Salcedo argues that the particular privacy interest Congress has identified is "the freedom from unwanted robocalls," but that observation is too general. As we have noted, a single unwelcome text message will not always involve an intrusion into the privacy of the home in the same way that a voice call to a residential line necessarily does. Certainly, Salcedo has not alleged that he was in his home when he received Hanna's message. As we have also noted, the 1992 amendment allowing the FCC to exempt free-to-receive calls to cell phones, 47 U.S.C. § 227(b)(2)(C), suggests less congressional concern about calls to cell phones. And by nature of their portability and their ability to be silenced, cell phone calls may involve less of an intrusion than calls to a home phone. We realize that Congress in 1991 could not have foreseen the explosion in personal cell phone use, the popularity of text messaging, and the near-extinction of the residential telephone line. But *Spokeo* instructs us to consider the judgment of Congress about the alleged harm, not to imagine what Congress might say about a harm it has not actually addressed.

We note that our sister circuit has reached the opposite conclusion in this

context. *See Van Patten*, 847 F.3d at 1043. The Ninth Circuit quoted many of these same findings, further noting Congress's purpose of "protect[ing] consumers from the unwanted intrusion and nuisance of unsolicited telemarketing phone calls and fax advertisements." *See* Pub. L. No. 102-243, § 2, ¶ 12. But that court stopped short of examining whether isolated text messages not received at home come within that judgment of Congress. Instead, it concluded that "Congress identified unsolicited contact as a concrete harm." *Van Patten*, 847 F.3d at 1043. We disagree with this broad overgeneralization of the judgment of Congress and have focused our own analysis on text messaging specifically.

Other stated concerns behind the TCPA are also inapposite to Salcedo's allegations. The congressional committee found telemarketing by fax problematic in part because "it occupies the recipient's facsimile machine so that it is unavailable for legitimate business messages while processing and printing the junk fax." H.R. Rep. 102-317, at 10 (1991), *quoted in Palm Beach Golf*, 781 F.3d at 1252. As we have noted, such a concern has little application to the instantaneous receipt of a text message. The judgment of Congress, then, provides little support for finding that Salcedo's allegations state a concrete injury in fact.[9]

[9] Congress also stated concerns not raised by either party here: concerns for public safety "when an emergency or medical assistance telephone line is seized," Pub. L. No. 102-243, § 2, ¶ 5; for the cost borne by consumers who use technology to avoid unwanted calls, *id.* ¶ 11; and for "commercial freedoms of speech and trade" that telemarketers enjoy, *id.* ¶ 9.

E. History

We now turn to history for guidance, because the case or controversy requirement of Article III "is grounded in historical practice." *Spokeo*, 136 S. Ct. at 1549. Thus, "it is instructive to consider whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts." *Id.*

With respect to his allegations of invasion of privacy, we look to the generally accepted tort of intrusion upon seclusion,[10] which creates liability for invasions of privacy that would be "highly offensive to a reasonable person." Restatement (Second) of Torts § 652B. The requirement that the interference be "substantial" and "strongly object[ionable]" instructs us that a plaintiff might be able to establish standing where an intrusion on his privacy is objectively serious and universally condemnable. *See id.* cmt. d (no liability for one, two, or three phone calls; liability "only when the telephone calls are repeated with such persistence and frequency as to amount to a course of hounding the plaintiff"). By contrast, Salcedo's allegations fall short of this degree of harm. We do not see this type of objectively intense interference where the alleged harm is isolated,

[10] Most of the accepted torts generally known as "invasion of privacy" involve privacy in the rather specific sense of one's right to be free from unwanted publicity. *See* Restatement (Second) of Torts § 652A. It is only the privacy tort of intrusion upon seclusion, *id.* § 652B, that bears any possible relationship to Salcedo's allegations.

momentary, and ephemeral.

The tort of intrusion upon seclusion also requires an intrusion "upon the solitude or seclusion of another or his private affairs or concerns." *Id.* § 652B. Although Salcedo argues that his cell phone is part of his private affairs, the Restatement contemplates a different category of intrusion into private affairs, listing examples including eavesdropping, wiretapping, and looking through one's personal documents. *See id.* cmt. b. Simply sending one text message to a private cell phone is not closely related to the severe kinds of actively intermeddling intrusions that the traditional tort contemplates. Salcedo's reasoning would equate opening your private mail—a serious intrusion indeed—with mailing you a postcard.

With respect to his allegations of nuisance, Salcedo asks us to compare the traditional torts of trespass and nuisance, but we find them also to be distinct both in kind and in degree. Trespass requires intentionally "enter[ing] land in the possession of the other," *id.* § 158(a), and private nuisance is "a nontrespassory invasion of another's interest in the private use and enjoyment of land," *id.* § 821D. Although, as we have noted, Congress was concerned about intrusions into the home when it enacted the TCPA, Salcedo has alleged no invasion of any interest in real property here. Furthermore, even in the context of nuisance to real property, in Florida, "[m]ere disturbance and annoyance as such do not in themselves

necessarily give rise to an invasion of a legal right." *A & P Food Stores, Inc. v. Kornstein*, 121 So. 2d 701, 703 (Fla. 3d Dist. Ct. App. 1960). Hanna's text message is thus not closely related to these traditional harms because it is not alleged to have infringed upon Salcedo's real property, either directly or indirectly.

Salcedo also asks us to consider the personal property torts of conversion and trespass to chattel. Conversion is an interference with chattel "which so seriously interferes with the right of another to control it that the actor may justly be required to pay the other the full value of the chattel." Restatement (Second) of Torts § 222A. Salcedo's allegations are nowhere near a complete and permanent dominion over his phone, so recourse to this serious kind of tort is unhelpful. The same is true for the tort of trespass to chattel, which involves intentionally "using . . . a chattel in the possession of another." *Id.* § 217(b). Traditionally, liability arises for this kind of trespass only when "the possessor is deprived of the use of the chattel for a substantial time" or when the trespass harms "the possessor's materially valuable interest in the physical condition, quality, or value of the chattel." *Id.* § 218(c) & cmt. e; *cf. United States v. Jones*, 565 U.S. 400, 426 (2012) (Alito, J., concurring) ("Trespass to chattels has traditionally required a physical touching of the property."). Thus, although Salcedo's allegations here bear a passing resemblance to this kind of historical harm, they differ so significantly in degree as to undermine his position. History shows that Salcedo's allegation is

precisely the kind of fleeting infraction upon personal property that tort law has resisted addressing.

We again note that our sister circuit has reached the opposite conclusion. *See Van Patten*, 847 F.3d at 1043. We decline to adopt its reasoning and instead embrace more fully the Supreme Court's instruction to look for a "close relationship" to a traditionally redressable harm. *See Spokeo*, 136 S. Ct. at 1549 (citing *Vt. Agency of Nat. Res.*, 529 U.S. 765, 775–77 (2000) (discussing traditional *qui tam* law in a case about *qui tam* relator Article III standing)). The Ninth Circuit's one-sentence review of history simply asserted, "Actions to remedy defendants' invasions of privacy, intrusion upon seclusion, and nuisance have long been heard by American courts, and the right of privacy is recognized by most states." *Van Patten*, 847 F.3d at 1043. But as we have more thoroughly explained, an examination of those torts reveals significant differences in the kind and degree of harm they contemplate providing redress for.

In sum, we find that history and the judgment of Congress do not support finding concrete injury in Salcedo's allegations.[11] Salcedo has not alleged anything

[11] Salcedo urges us to follow the reasoning that allowed us to find standing in *Perry v. Cable News Network, Inc.*, 854 F.3d 1336, 1340–41 (11th Cir. 2017). The facts here do not permit us to do so. In *Perry*, we found standing under the Video Privacy Protection Act, 18 U.S.C. § 2710, for a plaintiff suing over privacy violations involving a mobile video app. *Perry* held that the plaintiff's allegations and the 1980s-era statute involved precisely the same substantive privacy right. Not so here. As we have discussed, both the judgment of Congress and history here reveal concerns about intrusions into the privacy of the home and interferences with property that do not readily transfer to the context of cell phones.

like enjoying dinner at home with his family and having the domestic peace shattered by the ringing of the telephone. Nor has he alleged that his cell phone was searched, dispossessed, or seized for any length of time. Salcedo's allegations of a brief, inconsequential annoyance are categorically distinct from those kinds of real but intangible harms. The chirp, buzz, or blink of a cell phone receiving a single text message is more akin to walking down a busy sidewalk and having a flyer briefly waived in one's face. Annoying, perhaps, but not a basis for invoking the jurisdiction of the federal courts. All told, we conclude that Salcedo's allegations do not state a concrete harm that meets the injury-in-fact requirement of Article III.

F. Quality, Not Quantity

To be clear, we are not attempting to measure how small or large Salcedo's alleged injury is. Article III standing is not a "You must be this tall to ride" measuring stick. "There is no minimum quantitative limit required to show injury; rather, the focus is on the qualitative nature of the injury, regardless of how small the injury may be." *Saladin v. City of Milledgeville*, 812 F.2d 687, 691 (11th Cir. 1987). Our assessment today is thus qualitative, not quantitative. We have assessed how concrete and real the alleged harm is, *Spokeo*, 136 S. Ct. at 1548, and we have concluded that it is not the kind of harm that constitutes an injury in fact. Some harms that are intangible and ephemeral may do so, but Salcedo's allegations of

the harm he suffered from receiving a single text message do not.

To be sure, under our precedent, allegations of wasted time can state a concrete harm for standing purposes. We have found standing where the harm was, for example, time wasted traveling to the county registrar's office, *Common Cause/Ga. v. Billups*, 554 F.3d 1340, 1351 (11th Cir. 2009); and correcting credit reporting errors, *Pedro v. Equifax, Inc.*, 868 F.3d 1275, 1280 (11th Cir. 2017). These precedents strongly suggest that concrete harm from wasted time requires, at the very least, more than a few seconds. And on this point the judgment of Congress sheds a final ray of light. The TCPA instructs the FCC to establish telemarketing standards that include releasing the called party's line within five seconds of a hang-up, 47 U.S.C. § 227(d)(3)(B), demonstrating that, on the margin, Congress does not view tying up a phone line for five seconds as a serious intrusion.

Our responsibility to ensure that plaintiffs allege a real injury in fact requires us to look closely at their allegations in light of the statute, our precedent, history, and the judgment of Congress. Such inquiries will, of course, have differing outcomes depending on those inputs. *Compare, e.g.*, *Perry*, 854 F.3d at 1340–41 (finding standing based on intangible harm of statutory violation), *and Palm Beach Golf*, 781 F.3d at 1252 (same), *with Nicklaw v. CitiMortgage, Inc.*, 839 F.3d 998, 1003 (11th Cir. 2016), *reh'g denied*, 855 F.3d 1265 (11th Cir. 2017) (en banc)

(finding no standing because plaintiff alleged "neither a harm nor a material risk of harm"). We acknowledge that Congress, as a political entity, is well positioned to assess new harms in light of developments in technology and society, and to respond to the concerns of the American people about novel encroachments on life, liberty, and property. *See Spokeo*, 136 S. Ct. at 1549. The federal courts are not similarly tasked. We have only the power "to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). And when a plaintiff comes to us without alleging a concrete harm, a real injury that states a case or controversy, we cannot do even that much.

IV. CONCLUSION

We **REVERSE** the decision of the district court that Salcedo has standing to sue and **REMAND** with instructions to dismiss without prejudice the amended complaint.[12]

[12] Hanna has asked us to instruct the district court to dismiss Salcedo's amended complaint with prejudice. But a jurisdictional dismissal is entered without prejudice. *Stalley ex rel. United States v. Orlando Reg'l Healthcare Sys., Inc.*, 524 F.3d 1229, 1232 (11th Cir. 2008). "A dismissal 'without prejudice' refers to the fact that the dismissal is not on the merits." *Grayson v. K Mart Corp.*, 79 F.3d 1086, 1094 n.7 (11th Cir. 1996). Although refiling may prove futile (Salcedo has already amended his complaint once in attempt to shore up his allegations), we and the district court presently lack jurisdiction to make that merits determination.

JILL PRYOR, concurring in judgment only:

Plaintiff John Salcedo sued defendants Alex Hanna and the Law Offices of Alex Hanna, P.A. (together, "Hanna") under the Telephone Consumer Protection Act of 1991 ("TCPA"), 47 U.S.C. § 227(b)(1)(A)(iii), after they sent him a single unwanted text message advertisement. I agree with the majority opinion that we lack subject matter jurisdiction because Salcedo has no standing to bring a TCPA claim. I write separately to emphasize my understanding that the majority's holding is narrow and the conclusion that Salcedo lacks standing is driven by the allegations in his complaint that Hanna sent him only one text message. The majority opinion—appropriately, in my view—leaves unaddressed whether a plaintiff who alleged that he had received multiple unwanted and unsolicited text messages may have standing to sue under the TCPA. With this understanding, I concur in the majority's judgment.

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-11736

D.C. Docket No. 2:14-cv-000476-PAM-MRM

REGIONS BANK,
an Alabama state-chartered bank,

Plaintiff–Counter Defendant–Appellee,

versus

LEGAL OUTSOURCE PA,
a Florida professional association,
PERIWINKLE PARTNERS, LLC,
a Florida limited liability company,
CHARLES PAUL-THOMAS PHOENIX,
individually, a.k.a. Charles PT Phoenix,
LISA M. PHOENIX,
individually,

Defendants–Counter Claimants–Appellants.

Appeal from the United States District Court
for the Middle District of Florida

(August 28, 2019)

Before WILLIAM PRYOR, and ROSENBAUM, Circuit Judges, and MOORE,[*] District Judge.

WILLIAM PRYOR, Circuit Judge:

The main issue presented by this appeal has divided our sister circuits: whether a guarantor constitutes an "applicant" under the Equal Credit Opportunity Act. *See* 15 U.S.C. §§ 1691(a), 1691a(b). *Compare Hawkins v. Cmty. Bank of Raymore*, 761 F.3d 937 (8th Cir. 2014), *aff'd by an equally divided Court*, 136 S. Ct. 1072 (2016) (holding that a guarantor unambiguously is not an "applicant" under the Act), *and Moran Foods, Inc. v. Mid-Atl. Mkt. Dev. Co.*, 476 F.3d 436 (7th Cir. 2007) (opining the same), *with RL BB Acquisition, LLC v. Bridgemill Commons Dev. Grp.*, 754 F.3d 380 (6th Cir. 2014) (holding that the term "applicant" is ambiguous and applying *Chevron* deference to an agency interpretation that a guarantor is an "applicant"). Legal Outsource PA, a law firm wholly owned by Charles Phoenix, defaulted on a loan from Regions Bank, which triggered the default of a loan and mortgage that Regions issued to Periwinkle Partners, LLC, an entity wholly owned by Charles's wife, Lisa Phoenix. After the obligors refused to cure the defaults, Regions sued to enforce its rights under the loans and mortgage. The obligors filed several counterclaims asserting that Regions violated the Equal Credit Opportunity Act by discriminating against Lisa

[*] Honorable K. Michael Moore, United States District Chief Judge for the Southern District of Florida, sitting by designation.

and Charles based on their marital status when it demanded that they and Legal Outsource guarantee the Periwinkle loan. The district court granted summary judgment in favor of Regions. The district court ruled that Lisa Phoenix's counterclaims failed because she lacked standing as an "applicant" when she was instead a guarantor. Because we conclude that a guarantor is not an "applicant" under the Equal Credit Opportunity Act, we affirm the summary judgment in favor of Regions. But the parties agree that we must remand to correct an error in the judgment.

I. BACKGROUND

Beginning in 2005, Regions Bank extended a $450,000 line of credit to Legal Outsource PA, a law firm owned by Charles Phoenix. Legal Outsource renewed the loan on a yearly or semi-yearly basis, and it was last renewed in May 2013 with a maturity date in February 2014. Charles Phoenix also guaranteed the 2013 Outsource loan.

In 2011, Regions lent nearly $1.7 million to Periwinkle Partners, LLC, for the purchase of a shopping center on Sanibel Island, Florida. At that time, the sole member of Periwinkle Partners was a company owned by Charles Phoenix's wife, Lisa Phoenix. Charles Phoenix, Lisa Phoenix, and Legal Outsource all guaranteed the Periwinkle loan. Under the Periwinkle loan, a default by any of the parties,

including the guarantors, on any other loans that they had with Regions constitutes a default under the Periwinkle loan.

In August 2013, Regions concluded that the Outsource and Periwinkle loans were in default based on the obligors' failure to provide requested financial information and based on Periwinkle's failure to pay its property taxes. Regions then warned the obligors several times that it would accelerate the loans if the obligors failed to cure the default. In February 2014, the Outsource loan matured and Legal Outsource, which was no longer in operation, failed to pay it. Two months later, Regions declared the Outsource loan in default and demanded its full and immediate payment. According to the obligors, this declaration was a bad-faith attempt by Regions to coerce Lisa Phoenix into securing the Outsource loan with Periwinkle as collateral, but she refused to do so. After the Outsource loan default, Regions also declared the Periwinkle loan in default and demanded its full and immediate payment. The obligors never cured any of the defaults.

In August 2014, Regions filed a complaint against Charles and Lisa Phoenix, Legal Outsource, and Periwinkle Partners for breach of the Legal Outsource promissory note and guaranty, breach of the Periwinkle promissory note and guaranties, foreclosure of the Periwinkle mortgage, and receivership. The obligors answered the complaint and interposed 73 affirmative defenses and eight counterclaims.

The obligors twice amended the answer and added four new counterclaims that each asserted a violation of the Equal Credit Opportunity Act. The counterclaims—three of which were individually brought by Charles Phoenix, Lisa Phoenix, and Legal Outsource respectively, and one of which was brought by Lisa Phoenix and Periwinkle Partners—alleged that Regions discriminated on the basis of marital status when it required the Phoenixes and Legal Outsource to guarantee the Periwinkle loan. Regions then moved to dismiss the newly added counterclaims, and the district count granted that motion in part. The district court ruled that the guarantors of the Periwinkle loan all lacked statutory standing because they were not "applicant[s]" under the Equal Credit Opportunity Act. But the court also ruled that one of the counterclaims, which was brought on behalf of Lisa Phoenix and Periwinkle Partners, had sufficiently alleged that Lisa Phoenix and Periwinkle Partners were "applicants" under the Act, so it denied the motion as to that count.

After Regions moved for summary judgment, the district court granted summary judgment in favor of Regions both for its claims for breach of the promissory notes and guaranties and against the obligors' counterclaims. The district court ruled that the obligors "do not dispute that they were in default under the relevant notes and guaranties," and it ruled that the counterclaims had "no merit." With respect to the remaining counterclaim under the Equal Credit

Opportunity Act—the joint claim by Lisa Phoenix and Periwinkle—the district court ruled that Periwinkle's claim of discrimination was "frivolous" because, as an entity, it had no marital status. And the district court ruled that "[t]he claim fails as to Lisa Phoenix as well because, aside from the lack of any evidence to establish any alleged discrimination on the basis of marital status, she was not an 'applicant' for the Periwinkle loan[;] she was a guarantor." The district court referred to its earlier order ruling that guarantors were not "applicants."

The district court later issued a second summary judgment order granting foreclosure on the Periwinkle mortgage. The court then dismissed the matter with prejudice and directed the clerk to enter the judgment. The clerk entered the judgment, and the obligors filed their notice of appeal.

Regions moved to amend the judgment to state, among other things, the amounts due to Regions from the obligors. The district court granted Regions' motion in part, instructing the clerk to enter an amended judgment providing for the following relief:

> [T]he Court will order the Clerk to amend the Judgment to provide that Regions Bank prevails on its claims against Defendants. The Judgment will further provide that Regions Bank is entitled to recover $540,054.24 *from Defendants* for the Legal Outsource loan . . . .

The clerk then entered the amended judgment, and the obligors amended their notice of appeal to include the order granting Regions' motion to clarify and the amended judgment among the items subject to their appeal.

II. STANDARD OF REVIEW

We review a grant of summary judgment *de novo*. *Moore ex rel. Moore v. Reese*, 637 F.3d 1220, 1231 (11th Cir. 2011).

III. DISCUSSION

This appeal presents several issues about whether the obligors are liable for the default of the Legal Outsource loan and the Periwinkle loan and mortgage. Although the obligors raise a host of issues that seek to obscure the nature of their defaults, all but one of them lack any merit, and some border on being frivolous. We decline to address them any further.

We divide our discussion of the remaining issues in two parts. First, we explain that Lisa Phoenix's counterclaims under the Equal Credit Opportunity Act fail because a guarantor does not qualify as an "applicant" under the Act. Second, we explain that a limited remand to correct erroneous language from the amended judgment is warranted.

A. The District Court Correctly Granted Summary Judgment Against the Equal Credit Opportunity Act Counterclaims by Lisa Phoenix.

The district court did not err when it granted summary judgment against the counterclaims by Lisa Phoenix under the Equal Credit Opportunity Act. As an initial matter, although the obligors briefly mention Periwinkle's counterclaim in their argument about the Equal Credit Opportunity Act, they have failed to argue or cite caselaw in either the district court or on appeal to rebut the conclusion that

its status as an entity defeats its claim, as the district court ruled, so we consider that issue abandoned. *See Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 680 (11th Cir. 2014) ("[A]n appellant must convince us that every stated ground for the judgment against him is incorrect."). We discuss only our reasons for concluding that the district court correctly granted summary judgment against Lisa Phoenix's counterclaims on the ground that a guarantor is not an "applicant" for credit within the meaning of the Act, *see* 15 U.S.C. § 1691a(b).

The Equal Credit Opportunity Act makes it unlawful for "any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction . . . on the basis of . . . marital status." *Id.* § 1691(a)–(a)(1). The Act defines an "applicant" as "any person who *applies* to a creditor directly for . . . credit, or *applies* to a creditor indirectly by use of an existing credit plan for an amount exceeding a previously established credit limit." *Id.* § 1691a(b) (emphases added). The Act initially required the Federal Reserve Board to promulgate regulations to enforce the Act. *See* 15 U.S.C. § 1691b (1974). And the Federal Reserve Board promulgated Regulation B, which defines an applicant as "any person who requests or who has received an extension of credit from a creditor," which includes "any person who is or may become contractually liable regarding an extension of credit." 12 C.F.R. § 202.2(e). That regulation further provides that the term "applicant" includes "*guarantors*, sureties, endorsers, and similar parties." *Id.*

(emphasis added). Regulation B also prohibits a creditor from requiring the signature of an applicant's spouse, other than a joint applicant, on any credit instrument if the applicant independently qualifies as creditworthy. *Id.* § 202.7(d)(1).

The obligors rely on the definition of "applicant" in Regulation B to argue that Lisa Phoenix has statutory standing under the Act, so we must determine whether we should defer to this regulation under the two-step framework announced in *Chevron, U.S.A., Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837 (1984). *See Arevalo v. U.S. Att'y Gen.*, 872 F.3d 1184, 1187–88 (11th Cir. 2017). First, we ask whether, after applying the "traditional tools of statutory construction," we can determine whether Congress has spoken clearly on the issue. *Barton v. U.S. Att'y Gen.*, 904 F.3d 1294, 1298 (11th Cir. 2018) (quoting *Fajardo v. U.S. Att'y Gen*., 659 F.3d 1303, 1307 (11th Cir. 2011)). If the statute is unambiguous, we apply it according to its terms and give no deference to the administrative interpretation. *Arevalo*, 872 F.3d at 1188. Second, "if the statute is silent or ambiguous with respect to the specific issue presented, we must then determine whether the agency's interpretation is reasonable or based on a permissible construction of the statute." *Id*. An interpretation is reasonable if it is "rational and consistent with the statute." *Id.* (quoting *Sullivan v. Everhart*, 494 U.S. 83, 89 (1990)).

In applying the "traditional tools of statutory construction," we begin "with the statutory text, and proceed from the understanding that unless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary meaning." *Barton*, 904 F.3d at 1298 (quoting *Sebelius v. Cloer*, 569 U.S. 369, 376 (2013)); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* § 6, at 69 (2012) ("Words are to be understood in their ordinary, everyday meaning—unless the context indicates that they bear a technical sense."). And we interpret the words of a statute based on their meaning at the time of enactment. *See New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 539 (2019); Scalia & Garner, *Reading Law* § 7, at 78 ("Words must be given the meaning they had when the text was adopted.").

The Act, which was adopted in 1974, defines an applicant as "any person who *applies* to a creditor directly for . . . credit, or *applies* to a creditor indirectly by use of an existing credit plan for an amount exceeding a previously established credit limit." 15 U.S.C. § 1691a(b) (emphases added). English-language dictionaries both before and after the enactment define the term "apply" to refer to a request for something. *See Apply*, 1 *The Oxford English Dictionary* 407 (corr. reprint 1961) (1933) ("To address oneself for information or aid, to have recourse, to make application to"); *Apply*, 1 *The Oxford English Dictionary* 577 (2d ed. 1989) (same); *Apply*, *Webster's New International Dictionary of the English*

Language (*Webster's Second*) 132 (2d ed. 1961) ("To make request; to have recourse with a view to gain something; to solicit"); *Apply*, *Webster's New Collegiate Dictionary* 55 (1977) ("[T]o make an appeal or request esp[ecially] in the form of a written application."). So too do legal dictionaries. *See Apply*, *Black's Law Dictionary* 128 (rev. 4th ed. 1968) ("To make a formal request or petition, usually in writing, to a court, officer, board, or company, for the granting of some favor, or of some rule or order, which is within his or their power or discretion"); *Application*, *id.* at 127 ("The act of making a request for something"). The Sixth and Eighth Circuits have also both cited a definition of the term "apply" as meaning "a request . . . *usually for something of benefit to oneself*." *See Hawkins*, 761 F.3d at 941 (alteration adopted) (emphasis added) (quoting *Webster's Third New Int'l Dictionary* 105 (2002)); *RL BB*, 754 F.3d at 385 (quoting *Webster's Third New Int'l Dictionary* 105 (1993)); *see also Apply*, *Webster's Third New Int'l Dictionary* 105 (1971) (defining "apply" as "to make an appeal or a request esp[ecially] formally and often in writing and usu[ally] for something of benefit to oneself"). So, taken together, these definitions suggest that the ordinary meaning of the term "applicant" is one who requests credit to benefit himself.

A guarantor does not fit within this definition. At the time of enactment, English-language dictionaries defined "guaranty" to mean a promise by a guarantor to answer for the payment of some debt if the person liable in the first

instance is unable to pay. *See Guaranty*, 4 *The Oxford English Dictionary* 477 (corr. reprint 1961) (1933) ("a written undertaking made by a person (called the *guarantor*) to be answerable for the payment of a debt or the performance of an obligation by another person, who is in the first instance liable to such payment or obligation"); *Guaranty*, 6 *The Oxford English Dictionary* 912 (2d ed. 1989) (same); *Guaranty*, *Webster's Second* 1110 ("An undertaking to answer for the payment of some debt, or the performance of some duty, of another, in case of the failure of such other to pay or perform"); *Guaranty*, *Webster's New Collegiate Dictionary* 509 ("[A]n undertaking to answer for the payment of a debt or the performance of a duty of another in case of the other's default or miscarriage"). Legal dictionaries defined "guaranty" the same way. *See Guaranty*, *Black's Law Dictionary* 833 (rev. 4th ed.) ("A promise to answer for payment of debt or the performance of obligation if person liable in the first instance fails to make payment or perform obligation"); *Guarantor*, *Black's Law Dictionary* 634 (5th ed. 1979) ("One who becomes secondarily liable for another's debt or performance"). Although a guarantor makes a promise related to an applicant's request for credit, the guaranty is not itself a request for credit, and certainly not a request for credit for the guarantor. *See Hawkins*, 761 F.3d at 942 ("We find it to be unambiguous that assuming a secondary, contingent liability does not amount to a request for credit.").

To be sure, as the dissent points out, a guarantor's promise supports a would-be debtor's loan application and ordinarily stems from the guarantor's desire that the application be granted. *See* Dissenting Op. at 62–63. But to say that a guarantor requests credit by supporting another's request for credit is to push the bounds of ordinary usage—at the very least, it is to use one word in two obviously different senses. And to say that the guarantor *applies* for credit by supporting *another's* application is to leave ordinary usage behind entirely.

An example should make this point clear. Suppose a high-school senior is applying to her parents' alma mater, and her parents—who happen to be wealthy donors—promise the school that they will make a large gift if their daughter is admitted. The parents' promise supports the daughter's application for admission, just as a guarantor's promise supports a loan applicant's application for credit. The parents will be grateful if their daughter is admitted, as a guarantor ordinarily is grateful when the debtor's application for credit is granted. But it would be unnatural to say that the parents have "applied" for their daughter's admission or to call them "applicants" for admission. Under any ordinary use of the word, the student is the only "applicant" in this scenario.

Applying the whole-text and consistent-usage canons to the Act further confirms that the term "applicant" excludes guarantors. The whole-text canon refers to the principle that a "judicial interpreter [should] consider the entire text, in

view of its structure and of the physical and logical relation of its many parts," when interpreting any particular part of the text. Scalia & Garner, *Reading Law* § 24, at 167. "Properly applied, it typically establishes that only one of the possible meanings that a word or phrase can bear is compatible with use of the same word or phrase elsewhere in the statute . . . ." *Id.* at 168. Closely related to the whole-text canon is the principle that "[a] word or phrase is presumed to bear the same meaning throughout a text" unless context requires otherwise. *Id.* § 25, at 170; *accord Atl. Cleaners & Dyers v. United States*, 286 U.S. 427, 433 (1932) ("Undoubtedly, there is a natural presumption that identical words used in different parts of the same act are intended to have the same meaning.").

As Judge Colloton explained in his concurring opinion in *Hawkins*, three aspects of the statutory text strongly suggest that the term "applicant" is only compatible with "a first-party applicant who requests credit to benefit herself." *Hawkins*, 761 F.3d at 943 (Colloton, J., concurring). First, the Act uses the term "applicant" in several provisions that can only refer to a first-party applicant. For example, section 1691 speaks of a "completed application for credit," 15 U.S.C. § 1691(d)(1), and of a creditor taking action in connection with the "applicant's application for a loan," *id.*§ 1691(e)(1). We agree that "it would be unnatural to conclude that a third party who offers a promise in support of an applicant thereby submits what the statute describes as an 'application for a loan,' and a 'completed

application for credit.'" *Hawkins*, 761 F.3d at 943–44 (Colloton, J., concurring) (citations omitted). Similarly, the Act provides that within thirty days "after receipt of a completed application for credit, a creditor shall notify *the applicant* of its actions on the application." 15 U.S.C. § 1691(d)(1) (emphasis added). "The statute's use of the definite article shows that applicant is the single person to whom credit would be extended, not a third party asking on behalf of the putative debtor." *Hawkins*, 761 F.3d at 943 (Colloton, J., concurring). In contrast with these provisions, we are aware of no instance in which the Act refers to an "applicant" in a context that would naturally suggest that a third-party guarantor could qualify.

Second, the statutory definition of "adverse action" on a credit application excludes from that phrase "a refusal to extend additional credit *under an existing credit arrangement where the applicant is delinquent or otherwise in default*." 15 U.S.C. § 1691(d)(6) (emphasis added). This provision suggests that "the applicant" has received credit and is responsible for making payments on an existing loan. "A guarantor or other third-party requestor does not in ordinary usage become 'delinquent' or 'in default' on a loan or other existing credit arrangement." *Hawkins*, 761 F.3d at 944 (Colloton, J., concurring). And "if a guarantor could be an 'applicant,' then the creditor's refusal to extend additional credit to a delinquent borrower would be an 'adverse action' on the *guarantor's* 'application,' thus entitling the third-party guarantor to a statement of reasons that the creditor need

not furnish to the first-party applicant. [15 U.S.C.] § 1691(d)(2)." *Id.* As Judge Colloton concluded, "This is not a natural reading of the text." *Id.*

Third, the Act recognizes that third parties can be involved in requesting an extension of credit to a first-party applicant, but it "distinguishes between the third-party requestor and the 'applicant.'" *Id.* The Act provides that "[w]here a creditor has been *requested by a third party* to make a specific extension of credit directly or indirectly *to an applicant*, the notification and statement of reasons required by this subsection may be made directly by such creditor, or indirectly *through the third party*, provided in either case that the identity of the creditor is disclosed." *Id.* (alterations adopted) (quoting 15 U.S.C. § 1691(d)(4)). That Congress chose to use the term "applicant" to refer to the party receiving the credit and "third party" to refer to a separate party who requests an extension of credit for the "applicant" is telling. In short, after examining the term "applicant" in the context of the statute as a whole, we conclude that there is ample evidence that the term bears the ordinary meaning of a person who requests a benefit for himself.

Two of the three of our sister circuits that have considered whether the administrative interpretation of the term "applicant" deserves *Chevron* deference have also concluded that the Act unambiguously excludes guarantors. *See Hawkins*, 761 F.3d at 942 (rejecting *Chevron* deference and explaining "[w]e find it to be unambiguous that assuming a secondary, contingent liability does not

amount to a request for credit"); *Moran*, 476 F.3d at 441 ("[T]here is nothing ambiguous about 'applicant' and no way to confuse an applicant with a guarantor."). *But see RL BB*, 754 F.3d at 385 (applying *Chevron* deference to section 202.2(e) on the theory that the term "applies" is ambiguous and that guarantors qualify as requesting credit because they "make formal requests for aid in the form of credit for a third party"). Because we agree with the Seventh and Eighth Circuits that the ordinary meaning of "applicant" does not encompass a guarantor, we hold that no deference is due section 202.2(e). So the district court correctly granted summary judgment against the counterclaim by Lisa Phoenix's because she was not an "applicant" under the Act.

The dissenting opinion disagrees with our analysis of the meaning of the term "applicant" under the Act on three grounds. First, the dissent argues that the ordinary meaning of the word "applicant" reasonably includes guarantors. Dissenting Op. at 60–63. Second, the dissent contends that our analysis fails to reflect the "overriding national policy against discrimination that underlies the [ECOA]." *Id.* at 76 (alteration in original) (internal quotation marks omitted). Along the way to that conclusion, the dissent relies on two favorites of purposivists: the notion that the Act, as a remedial statute, must be construed broadly, *id.* at 49–51, 61, 65–71, 76, and the notion that the words of the Act must be construed in the light of the Act's overall purpose, *id.* at 76. Finally, the dissent

contends that Congress acquiesced to the Board's definition of "applicant" by failing to amend the Act to expressly preclude the Board's definition. *Id.* at 79–82. None of these reasons is persuasive.

The dissent's analysis begins by focusing on how the word "any" appears four times in two relevant sentences of the Act. *Id.* at 60–61 (quoting 15 U.S.C. § 1691(a)(1) (making it "unlawful for *any* creditor to discriminate against *any* application, with respect to *any* aspect of a credit transaction . . . ." (emphases added)); *id.* § 1691a(b) (defining "applicant" to mean "*any* person who applies to a creditor directly for . . . credit" (emphasis added))). The dissent argues that the repeated use of the word "any" suggests that Congress intended for the statute to have expansive reach and that we should not "engraft artificial limitations" to curb the "expansive remedial purposes" of the Act. *Id.* at 61 (quoting *Blue Shield of Va. v. McCready*, 457 U.S. 465, 472 (1982)). If all the dissent is arguing is that we should not go beyond the ordinary meaning of the term "applicant" to narrow it artificially, we agree entirely.

But the use of the word "any" does not change the meaning of the term "applicant." We have repeatedly explained that when Congress uses the word "any" without "language limiting the breadth of that word, 'any' means all." *CBS Inc. v. PrimeTime 24 Joint Venture*, 245 F.3d 1217, 1223 (11th Cir. 2001) (alteration adopted) (quoting *Merritt v. Dillard Paper Co.*, 120 F.3d 1181, 1186

(11th Cir. 1997)). So when the Act speaks of an applicant as "*any* person who applies to a creditor directly for . . . credit," the word "any" signifies only that *all* persons who apply to a creditor directly for credit qualify. The word or term that is modified by "any" is still defined by its ordinary meaning. *See, e.g.*, *id.* (using dictionary definitions to interpret the word "termination" from "any termination"). So the relevant question remains what the ordinary meaning of the term "person who applies to a creditor directly for . . . . credit" includes.

The dissent's attempt to answer this question leans heavily on the definition of "apply" as "to make an appeal or request . . . *usually for something of benefit to oneself*." Dissenting Op. at 62 (emphasis altered) (quoting *Hawkins*, 761 F.3d at 941 (quoting *Webster's Third New Int'l Dictionary* at 105 (1993)). The dissent reasons, "[o]bviously, if something is '*usually* for something of benefit to oneself,' it must *sometimes* be for something of benefit to another." *Id.* (emphasis altered). So, the dissent concludes, the word "applicant" can fairly be interpreted to include a guarantor.

Yet the definition the dissent relies on proves the opposite. As Judge Colloton pointed out in his concurrence in *Hawkins*, "under th[e] usual meaning, an 'applicant' who 'applies for credit' is one who requests credit to benefit herself, not credit to benefit a third party. That there are unusual meanings of 'apply' that encompass making a request on behalf of another is not sufficient to make a term

ambiguous for purposes of *Chevron*." 761 F.3d at 943 (Colloton, J., concurring). The only circumstance in which it is reasonable to construe a term according to an unusual meaning is when the context makes the unusual meaning a natural one. But, as we have explained, there is nothing natural about calling a guarantor an applicant for credit, and the whole text of the Act makes that usage even less plausible.

The dissent charges that our reading of the Act fails to apply the whole-text canon, Dissenting Op. at 65–66, 66 n.20, but the dissent's assertion is notably lacking in references to the text. According to the dissent, if we viewed the Act as a whole, we would see that "'[t]he overriding national policy against discrimination that underlies the [Act]' means that 'we cannot give' words in that statute a 'narrow interpretation.'" *Id.* at 76 (quoting *Bros. v. First Leasing*, 724 F.2d 789, 793 (9th Cir. 1984)). But apart from its logically irrelevant reliance on the word "any," the dissent fails to point to any other provisions of the Act that suggest that the term "applicant" includes a third party who requests a benefit for the first-party applicant. And it is hornbook abuse of the whole-text canon to argue "that since the overall purpose of the statute is to achieve *x*, any interpretation of the text that limits the achieving of *x* must be disfavored." Scalia & Garner, *Reading Law* § 24, at 168.

The dissent also contends that we fail to reconcile our reading of the text with the "familiar canon of statutory construction that remedial legislation should be construed broadly to effectuate its purposes." Dissenting Op. at 65 (internal quotation marks omitted) (quoting *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967)). Indeed, we do not apply this so-called canon because it is of dubious value. An eight-member majority of the Supreme Court has ridiculed it as "th[e] last redoubt of losing causes," *Dir., Office of Workers' Comp. Programs, Dep't of Labor v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 135 (1995), and the Court has rejected applying it in a number of other decisions since 1995. *See, e.g.*, *CTS Corp. v. Waldburger*, 573 U.S. 1, 12 (2014) ("The Court of Appeals supported its interpretation of [section] 9658 by invoking the proposition that remedial statutes should be interpreted in a liberal manner. The Court of Appeals was in error when it treated this as a substitute for a conclusion grounded in the statute's text and structure."); *Norfolk S. Ry. Co. v. Sorrell*, 549 U.S. 158, 171 (2007) (rejecting argument based on remedial-purpose canon and explaining that although a statute's remedial purpose was to benefit employees, "this remedial purpose [does not] require[] us to interpret every uncertainty in the Act in favor of employees"); *Household Credit Servs., Inc. v. Pfennig*, 541 U.S. 232, 237, 244 (2004) (reversing court of appeals that relied on remedial-purpose canon to broadly interpret the term "finance charge" from the Truth in Lending Act); *Inyo Cty. v.*

Paiute-Shoshone Indians of the Bishop Cmty. of the Bishop Colony, 538 U.S. 701, 710–12 (2003) (rejecting argument based on the remedial-purpose canon that the term "person" should be construed broadly under a statute to include Native American tribes). As the Supreme Court has recently explained, the fundamental problem with this so-called canon is its indeterminate coverage, as "almost every statute might be described as remedial in the sense that all statutes are designed to remedy some problem." *CTS Corp.*, 573 U.S. at 12. And the "canon" too is of indeterminate effect because, "even if the Court [has] identified some subset of statutes as especially remedial, [it] has emphasized that no legislation pursues its purposes at all costs." *Id.* (citation and internal quotation marks omitted).

Indeed, it is hard to imagine a more widely criticized "canon" of interpretation. A leading treatise has labeled it a "false" canon and has explained that it is "an open invitation to engage in 'purposive' rather than textual interpretation, and generally to engage in judicial improvisation." Scalia & Garner, *Reading Law* § 64, at 364–66. And jurists as varied as Antonin Scalia and Richard Posner share the same view. *See* Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 Case W. Res. L. Rev. 581, 581 (1990) (calling the canon one of "the prime examples of lego-babble"); Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. Chi. L. Rev. 800, 809 (1983) (explaining that the canon is "unrealistic about legislative

objectives" because it assumes that legislatures pursue a single remedial purpose, when in reality a "statute [often] is a compromise between one group of legislators that holds a simple remedial objective but lacks a majority and another group that has reservations about the objective"). We agree with these authorities that we should not employ this false canon to contravene the text of the Act.

The dissent also insists that we must "construe the literal language of the [Act]" in the light of the "overriding national policy against discrimination that underlies the [Act]." Dissenting Op. at 76 (quoting *First Leasing*, 724 F.2d at 793). We take no issue with the dissent's explanation of the vital role that women have played in our nation's history, of the discrimination they have faced in obtaining credit, and that one of the purposes of the Act was to remedy this discrimination. *See* Dissenting Op. at 51–60. But the dissent ignores that "[n]o legislation pursues its purposes at all costs," and that "it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 646–47 (1990) (quoting *Rodriguez v. United States*, 480 U.S. 522, 525–26 (1987)). When a statute includes limiting provisions, those provisions "are no less a reflection of the genuine 'purpose' of the statute than the operative provisions, and it is not the court's function to alter the legislative compromise." Scalia & Garner, *Reading Law* at 21. Here, Congress created a right that runs only to

"applicants." And as the Seventh Circuit explained in *Moran*, because the term "applicant" unambiguously does not encompass "guarantors," reading the statute in the way the dissent does would frustrate the limitations that Congress imposed on statutory standing and "opens vistas of liability" that Congress did not envision. 476 F.3d at 441.

The dissent's final substantive argument is that Congress has impliedly adopted the Board's definition of "applicant" by amending the Act without changing the statutory definition during the 30 years since Regulation B was first promulgated. Dissenting Op. at 79–82. Although the Supreme Court has recognized that congressional inaction can, in limited circumstances, support an inference that Congress has acquiesced to an agency or judicial interpretation, it has explained that "[l]egislative silence is a poor beacon to follow" in construing a statute. *Zuber v. Allen*, 396 U.S. 168, 185 (1969). And it has repeatedly warned that congressional silence alone is ordinarily not enough to infer acquiescence. *See Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 169 (2001) ("Although we have recognized congressional acquiescence to administrative interpretations of a statute in some situations, we have done so with extreme care."); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 137 (1985) ("[W]e are chary of attributing significance to Congress' failure to

act . . . .”); *Bob Jones Univ. v. United States*, 461 U.S. 574, 600 (1983) (“Nonaction by Congress is not often a useful guide . . . .”).

The dissent cites *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507 (2015), in arguing that we should infer congressional acquiescence, Dissenting Op. at 79–80, but this reliance is misplaced. There, the Supreme Court held that when Congress amended the Fair Housing Act in 1988, it was aware of and adopted the unanimous view of nine circuits that had considered the matter and concluded that the statute authorized disparate-impact claims. *See Texas Dep’t of Hous*., 135 S. Ct. at 2519.

The dissenting opinion contends that until 2014, the “vast majority of courts” that had “examined” the issue held that guarantors had standing under the Equal Credit Opportunity Act, Dissenting Op. at 80 (quoting *RL BB*, 754 F.3d at 386), but this argument is misleading. Before 2007, several federal and state courts applied Regulation B, but they did so without discussing whether it was entitled to deference. *See, e.g.*, *Silverman v. Eastrich Multiple Inv’r Fund, L.P.*, 51 F.3d 28, 30–31 (3d Cir. 1995) (assuming without discussion that the Board’s interpretation was valid); *Fed. Deposit Ins. Corp. v. Medmark, Inc.*, 897 F. Supp. 511, 514 (D. Kan. 1995) (same); *see also United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952) (explaining that a decision is not precedential with respect to an issue “not there raised in briefs or argument nor discussed in the opinion of the

Court"). To our knowledge, the first court to "examine[]" whether the Board's definition deserved deference was the Seventh Circuit in *Moran*, in 2007, and it concluded that it did not. *See* 476 F.3d. at 441. By the time Congress next amended the Act in July 2010, the only other courts to opine on the issue were a federal district court, which agreed with *Moran* and ruled that guarantors lack statutory standing, *see Champion Bank v. Reg'l Dev., LLC*, No. 4:08-cv-1807-CDP, 2009 WL 1351122, at *3 (E.D. Mo. May 13, 2009) (reasoning that "a guarantor does not, by definition, apply for anything"), and the Supreme Court of Iowa, which applied Regulation B without considering *Moran* or whether it was entitled to deference, *see Bank of the West v. Kline*, 782 N.W.2d 453, 458 (Iowa 2010). So when Congress amended the Act in 2010, the weight of reasoned authority was *against* the Board's definition of applicant. And Congress's prior amendments to the Act took place before any court had considered the validity of Regulation B. This situation obviously is nothing like the unanimous, reasoned precedent of nine circuits in favor of an agency interpretation featured in *Texas Department of Housing*. We can hardly infer congressional acquiescence in this circumstance.

The dissent advances one other objection to our analysis: that it "opine[s] on an issue that . . . Lisa Phoenix and Periwinkle . . . never raised on appeal." Dissenting Op. at 35. As the dissent sees it, Lisa Phoenix has abandoned both of

her counterclaims by failing to raise them "plainly and prominently" enough in the obligors' initial brief. *Id.* at 38 (quoting *Sapuppo*, 739 F.3d at 681). We disagree.

To be sure, the obligors' briefing could most charitably be described as clumsy. We emphatically "do not condone the unartful way in which [the obligors] ha[ve] stated and argued the issues on this appeal." *Fed. Sav. & Loan Ins. Corp. v. Haralson*, 813 F.2d 370, 373 n.3. (11th Cir. 1987). Even so, reading their initial brief in the light of the record, the other briefs in this appeal, and the principle that "briefs should be read liberally to ascertain the issues raised on appeal," *Allstate Ins. Co. v. Swann*, 27 F.3d 1539, 1542 (11th Cir. 1994), we have no doubt that Lisa Phoenix has fairly presented the argument that the district court erred when it dismissed at least one of her counterclaims relating to the Periwinkle loan based on her status as a guarantor.

Consider what happened in the district court. The obligors pleaded four counterclaims under the Equal Credit Opportunity Act based on the Periwinkle loan: one by Charles Phoenix, one by Legal Outsource, one by Lisa Phoenix and Periwinkle Partners jointly, and one by Lisa Phoenix individually. Citing *Hawkins* for the proposition that guarantors are not applicants, the district court dismissed the claims by Charles Phoenix, Legal Outsource, and Lisa Phoenix individually on the ground that those claims rested solely on guarantor standing. But the district court withheld judgment on the joint claim by Lisa Phoenix and Periwinkle

because that claim—counterclaim 11—appeared to allege that both Lisa Phoenix and Periwinkle were applicants. After further considering the matter, the district court granted summary judgment against counterclaim 11 on the grounds that Lisa Phoenix lacked standing and that Periwinkle had no marital status. The district court also mentioned "the lack of any evidence to establish any alleged discrimination on the basis of marital status," which was a sufficient alternative basis for the summary judgment, although the district court did not clearly designate it as such.

Now consider the briefs. In a discrete section of their initial brief, the obligors protest the district court's "reli[ance] . . . on the Eighth Circuit's ruling in *Hawkins*" "to substantiate dismissing Lisa Phoenix's and Periwinkle's claims" under the Equal Credit Opportunity Act. Initial Br. of Appellants at 30. And they argue that the regulation defining the term "applicant" to include guarantors, *see* 12 C.F.R. § 202.2(e), is a valid exercise of regulatory power to implement the Act. Initial Br. of Appellants at 31–32. They conclude that the claims by "Lisa Phoenix and Periwinkle" "fall squarely within ECOA's protections." *Id.* at 32.

Logically, this argument can relate only to counterclaim 11—the joint claim by Lisa Phoenix and Periwinkle—or counterclaim 12—Lisa Phoenix's individual claim as a guarantor of the Periwinkle loan. That the brief refers to both Lisa Phoenix and Periwinkle suggests that the obligors might have counterclaim 11 in

mind, but the district court did not rely on *Hawkins* to dismiss any claim by Periwinkle. But, with respect to Lisa Phoenix, the argument responds squarely to the primary basis on which the district court dismissed her share of counterclaim 11 and the sole basis on which it dismissed her counterclaim 12. In this circumstance, we cannot agree with the dissent that "no claim is properly before us on appeal." Dissenting Op. at 35.

Consider the consequences if we accepted the obligors' argument—that is, if the obligors convinced us that the district court erred when it "relied . . . on the Eighth Circuit's ruling in *Hawkins* to substantiate dismissing Lisa Phoenix's and Periwinkle's claims" because, contrary to *Hawkins*, guarantors are applicants under the Act. Initial Br. of Appellants at 30. In that case, they necessarily would have convinced us that "every stated ground for the judgment against [counterclaim 12] is incorrect," which is exactly what we have said an appellant must do "[t]o obtain reversal of a district court judgment." *Sapuppo*, 739 F.3d at 680. They also would have convinced us that the primary and arguably the only "stated ground for the judgment against [counterclaim 11] is incorrect." *Id.* So, unless some alternative ground for affirmance appeared from Regions' brief or from the record, accepting the obligors' argument would require us to reverse the dismissal of counterclaim 12 at least and perhaps counterclaim 11 as well.

We consider it telling that Regions agrees with us, at least in part, that the obligors have raised the issue of guarantor standing. In its brief, Regions contends that the obligors "have waived or abandoned any issue or argument with respect to the dismissal of [counterclaims] IX, X, and XII." Br. of Appellee Regions Bank at 34. But Regions does *not* contend that the obligors have abandoned counterclaim 11 or the general issue of guarantor standing. On the contrary, it reads the obligors' brief to "contend . . . that summary judgment for Regions on Counterclaim count XI was in error because, under the definition of 'applicant' supplied in Regulation B [the governing regulation], Mrs. Phoenix possessed standing to sue in her capacity as a guarantor of the Periwinkle loan." *Id.* Regions proceeds to argue on the merits that the district court correctly granted summary judgment against counterclaim 11 because the obligors have produced no evidence of discrimination and because guarantors are not applicants. *See id.* at 35–42.

That Regions does not share the dissent's view that Lisa Phoenix "indisputably abandoned" counterclaim 11 is relevant in two respects. Dissenting Op. at 41. First, even if Lisa Phoenix waived or forfeited counterclaim 11 in her initial brief, Regions has waived or forfeited the waiver or forfeiture by conceding in its own brief that she raised it. And nothing Regions said at oral argument can undo that concession. *See APA Excelsior III L.P. v. Premiere Techs., Inc.*, 476 F.3d

1261, 1269 (11th Cir. 2007) ("[W]e do not consider claims not raised in a party's initial brief and made for the first time at oral argument.").

The second way in which Regions' concession matters is that the main principle that animates the abandonment rule is fair notice. As we have explained, "an appellee is entitled to rely on the content of an appellant's brief for the scope of the issues appealed." *Access Now, Inc. v. Sw. Airlines Co.*, 385 F.3d 1324, 1330 (11th Cir. 2004) (quoting *Pignons S.A. de Mecanique v. Polaroid Corp.*, 701 F.2d 1, 3 (1st Cir. 1983)); *accord Haralson*, 813 F.2d at 373 n.3. That Regions thought the obligors raised counterclaim 11 in their brief—even as it concluded that they had abandoned other claims—suggests that the obligors' brief gave Regions fair notice that counterclaim 11 was an issue.

To be sure, an appellee's assertions about what is or is not abandoned do not bind us. Claims of abandonment may often be overstated; in this appeal, we are not sure we agree with Regions that Lisa Phoenix has abandoned counterclaim 12. And there are many reasons why appellees may fail to raise meritorious abandonment arguments. But the point remains: that Regions understood the obligors' brief to present a live argument about counterclaim 11 and the general issue of guarantor standing is surely evidence that it is reasonably understood to do so.

Consider also that both amicus briefs—one by the Consumer Financial Protection Bureau and one by five bankers associations—fully briefed the issue of

Lisa Phoenix's guarantor standing under the Act. Neither brief ever hinted at the possibility that Lisa Phoenix abandoned her counterclaims. That all of the amici, like Regions, consider Lisa Phoenix to have adequately raised the issue of her statutory standing reinforces our conclusion that Lisa Phoenix did not abandon her argument about counterclaims 11 and 12.

Our dissenting colleague's contention that Lisa Phoenix has abandoned her counterclaims turns on her reading—which we respectfully submit is an overreading—of three sentences in the obligors' brief, each of which seems to suggest that the Equal Credit Opportunity Act claim on appeal is that Regions violated the Act when it allegedly demanded that Lisa Phoenix guarantee the Outsource loan. *See* Dissenting Op. at 38–39. The obligors' statement of the issues presents the question, "Does a wife who refuses to collateralize loans or guaranty *her husband's unsecured business debt* have Equal Credit Opportunity Act (ECOA) standing as an 'applicant' . . . ?" Initial Br. of Appellants at 1 (emphasis added). Then, in their argument section, the obligors protest that excluding guarantors from the definition of "applicant" "gives lenders an untethered license to require spouses to collateralize and sign *for their husbands' loans* with impunity," and they contend that Lisa Phoenix was required "to sign for and collateralize *her husband's business debts*." *Id.* at 30, 32 (emphases added). As the dissent sees it, these phrases can mean only that Lisa Phoenix has replaced her

counterclaims based on the Periwinkle claim with a wholly novel claim based on Regions' alleged demand that she guarantee the Outsource loan, even though the obligors never pleaded such a claim in the district court and no such claim is concerned in the judgment on appeal, and even though it would be nonsensical for Lisa Phoenix to assert guarantor standing with respect to a loan she never guaranteed.

Although we certainly agree that the obligors' brief is no model of clarity, we do not think that its references to the Outsource loan nullify Lisa Phoenix's challenge to the ground on which her counterclaims were dismissed. In the obligors' telling of the facts, Regions demanded that Lisa Phoenix collateralize the Outsource loan, she refused, and Regions punished her refusal by declaring falsely that the Periwinkle loan was in default. We read the phrases on which the dissent leans as highlighting the crucial narrative role of Regions' demand and Lisa Phoenix's refusal in the obligors' version of the facts, not as obliterating her legal theory. And we do not see how we can read them any other way without violating the rule that "briefs should be read liberally to ascertain the issues raised on appeal." *Swann*, 27 F.3d at 1542. The abandonment rule would swell to a scope previously unimagined if we were to hold that an appellant abandons her legal theory whenever she places undue emphasis on one part of her factual narrative over another. We conclude that Lisa Phoenix has preserved at least one of her

counterclaims under the Equal Credit Opportunity Act and that the issue of guarantor standing is before us. And, for the reasons we have explained, we hold that the district court correctly granted summary judgment against those counterclaims because a guarantor is not an "applicant" for credit under the Act.

B. The Amended Judgment Must Be Corrected on Remand.

The amended judgment states "that Regions Bank is entitled to recover $540,054.24 *from Defendants* for the Legal Outsource loan." As both parties agreed at oral argument, the counts regarding the Legal Outsource loan name only Charles Phoenix and Legal Outsource as defendants, so the judgment erroneously states that Lisa Phoenix and Periwinkle Partners are also liable for the Outsource loan. We remand with instructions to correct the judgment to state that only Charles Phoenix and Legal Outsource are liable for the damages owed for the default of the Outsource loan.

IV. CONCLUSION

We **AFFIRM** the summary judgment in favor of Regions, and we **REMAND** with instructions to correct the judgment.

ROSENBAUM, Circuit Judge, concurring in part and dissenting in part:

Today we opine on an issue that Appellants Lisa Phoenix and Periwinkle Partners LLC ("Periwinkle") never raised on appeal. Courts have noted that deciding an issue no appellant raised is generally unwise. But the Majority Opinion nevertheless insists that we do so. And in following this course, it purports to constrict the Equal Credit Opportunity Act ("ECOA") to preclude it from accomplishing one of its primary remedial goals: disentangling spouses' financial intertwinement when such intertwinement is not necessary. I therefore feel it necessary to explain the problems with the Majority Opinion's analysis.

Section I of this dissent demonstrates that no claim is properly before us on appeal. And Section II responds to the Majority Opinion's incorrect conclusion that guarantors lack standing as "applicants" under the ECOA.

I.

At different points in this litigation, Defendants-Counterclaimants-Appellants Lisa Phoenix and Periwinkle have arguably raised two ECOA claims possibly relevant to this appeal.[1] Each claim involves a separate Regions Bank loan.

[1] The other Defendants-Counterclaimants-Appellants' claims are not relevant to the ECOA analysis the Majority Opinion has chosen to conduct, so I do not address them here.

The Majority Opinion construes the claim on appeal to concern a loan Regions made to Periwinkle, a company Lisa Phoenix indirectly owns. As the Majority Opinion interprets this claim, Lisa Phoenix invokes the ECOA to contest Regions's demand that her husband, Charles Phoenix, and his law firm, Legal Outsource PA, guaranty the Periwinkle loan ("Periwinkle Loan Claim").

The second potential ECOA claim possibly relevant on this appeal involves a loan Regions made to Legal Outsource. Under this potential claim, Lisa[2] asserts that Regions violated the ECOA when it required her (through her company Periwinkle) to guaranty a loan it had made to her husband Charles's business, Legal Outsource ("Legal Outsource Loan Claim").

But neither the Periwinkle Loan Claim nor the Legal Outsource Loan Claim is properly presented on appeal.

To understand why, it makes sense to start by looking at the sole ECOA claim Lisa identified in the issues she presented on appeal: "Does a wife who refuses to collateralize loans or *guaranty* ***her husband's*** *unsecured business debt* have [ECOA] standing as an 'applicant' to sue if the lender then forces over a dozen technical defaults as pretense to falsely accelerate and foreclose on her separate secured loan?" Appellants' Br. at 1 (emphasis added). This language unambiguously seeks to assert Lisa's status as an "applicant" on the Legal Outsource

[2] To avoid confusion, I refer to Charles and Lisa Phoenix by their first names.

Loan Claim, as a result of Periwinkle's legal status as a guarantor for that loan, since only the Legal Outsource Loan Claim involved an alleged demand by Regions to guaranty Lisa's husband's business debt. The language of the issue as Lisa has phrased it on appeal does not implicate the Periwinkle Loan Claim, since that was a loan involving Lisa's own business, not her husband's business.

Lisa's actual argument in support of her ECOA claim also leaves no doubt that she challenges only Regions's demand that she (through her company Periwinkle) guaranty her husband's Legal Outsource Loan. Her argument is short; it's less than three pages. But in that space she repeatedly argues that Regions violated the ECOA by trying to make her guaranty her husband's loans. Appellants' Br. at 30, 32. Unfortunately for Lisa, though, she did not raise the Legal Outsource Loan Claim in the district court.

As for the Periwinkle Loan Claim, Lisa never once argues it in this appeal. True, the loan to Periwinkle comes up in her briefs, but only in the context of arguments that the Majority Opinion (correctly) decides are meritless, if not "frivolous." Maj. Op. at 7. Significantly, she never argues that the district court was wrong in finding she lacked standing as a guarantor to contest the Periwinkle Loan Claim.

So what exactly is properly on appeal?

Nothing.

We have repeatedly explained that "[a]ny issue that an appellant wants the Court to address should be specifically and clearly identified in the brief." *Access Now, Inc. v. Sw. Airlines Co.*, 385 F.3d 1324, 1330 (11th Cir. 2004).[3] Not only that, but "[a] party fails to adequately brief a claim when he does not plainly and prominently raise it, for instance by devoting a discrete section of his argument to those claims." *Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 681 (11th Cir. 2014) (citation and internal quotation marks omitted). When that happens, "the issue—even if properly preserved at trial—will be considered abandoned." *Access Now*, 385 F.3d at 1330 (citation and internal quotation marks omitted).

Here, Lisa's briefs certainly do not "plainly and prominently raise" her Periwinkle Loan Claim. For starters, her opening brief does not "devot[e] a discrete section of [the] argument" to it. In fact, as I have noted, it does not even identify the claim in an issue on appeal or ever expressly mention the Periwinkle Loan Claim in its ECOA arguments. And her reply brief does not address the issue at all.

Nor, contrary to the Majority Opinion's suggestion, does Lisa's mention of the district court's reliance on *Hawkins v. Community Bank of Raymore*, 761 F.3d 937 (8th Cir. 2014), *aff'd by an equally divided Court*, 136 S. Ct. 1072 (2016), justify the Majority Opinion's determination of an issue that Lisa did not raise on appeal.

[3] The Federal Rules of Appellate Procedure similarly require an appellant's brief to "contain, under appropriate headings and in the order indicated . . . a statement of the issues presented for review." Fed. R. App. P. 28(a)(5).

To be sure, the district court did invoke *Hawkins* to dismiss counterclaims relating to the Periwinkle Loan Claim. Maj. Op. at 27. But Lisa's brief leaves no doubt that she raised the district court's reliance on *Hawkins* for only an altogether different and unrelated point: she cited the district court's mention of *Hawkins* solely to support her argument concerning the Legal Outsource Claim.[4]

In fact, in the very next paragraph following the general reference to *Hawkins* the Majority Opinion cites, *see* Maj. Op. at 27, Lisa characterized *Hawkins* as "grant[ing] lenders an untethered license to require spouses to collateralize and sign for their ***husbands' loans*** with impunity." Appellants' Br. at 30 (emphasis added). And while Lisa argued that she and Periwinkle "fall squarely within ECOA's protections," Maj. Op. at 28 (quoting Appellants' Br. at 32), she made clear that she meant that the ECOA protected her (through her ownership of Periwinkle) and Periwinkle *as guarantors of the Legal Outsource Loan*: she said that "Regions required [her through Periwinkle] to sign for and collateralize ***her husband's*** business debts hence violating ECOA prohibitions." Appellants' Br. at 32 (emphasis added).

There's no doubt that Lisa argued that guarantors have standing under the ECOA, but her brief makes clear that she made this argument in the context of the

[4] Lest there be any question about what Lisa argued on appeal, I have included as an appendix to this opinion the statement of issues from Lisa's opening brief, as well as the entirety of her ECOA argument.

Legal Outsource Loan Claim—that is, that under the ECOA, Regions could not require her individually or through her company to guarantee her husband's company Legal Outsource's loan. But as I have noted, the problem with that argument is Lisa never raised it in the district court.

As for the Periwinkle Loan Claim she did raise in the district court, the most we can say about that is that Lisa's brief on appeal nakedly cites her Counterclaim 11, which in turn, alleged the Periwinkle Loan Claim in the district court. But significantly, Lisa's brief cites Counterclaim 11 in the context of arguing the Legal Outsource Loan Claim, in an apparent effort to suggest that the Legal Outsource Loan Claim was properly raised in the district court. (It was not.)

And even if we ignore the context of the citations to Counterclaim 11, (literally) bare citations alone do not preserve an argument on appeal. We have found abandonment when litigants have done more to preserve their claims, such as "when [at least] passing references appear in the argument section of an opening brief," and when "they are buried within . . . arguments." *Sapuppo*, 739 F.3d at 682. As this Court has recently "remind[ed] the . . . bar[,] . . . *specific* factual and legal argumentation at every stage of . . . proceedings" is "importan[t]" to preserving issues on appeal. *United States v. Corbett*, 921 F.3d 1032, 1043 (11th Cir. 2019)

(W. Pryor, Newsom, Vratil, JJ.).[5] So under our unequivocal precedent, Lisa's briefing indisputably abandoned the Periwinkle Loan Claim.

Lisa's counsel likewise did not raise the Periwinkle Loan Claim issue at all during his initial oral argument. And during his rebuttal, while Lisa's counsel briefly addressed the "ECOA issue," he argued only that Lisa had raised a triable issue of fact that Regions had required Lisa "to provide collateral ***for her husband's loan***." Oral Argument at 24:04, 24:25, *Regions Bank v. Legal Outsource PA, et al.* (No. 17-11736), http://www.ca11.uscourts.gov/oral-argument-recordings?title=17-11736&field_oar_case_name_value=&field_oral_argument_date_value%5Bvalue%5D%

[5] Indeed, this Court has consistently enforced the abandonment rule. *See, e.g.*, *Quality Auto Painting Ctr. of Roselle, Inc. v. State Farm Indem. Co.*, 917 F.3d 1249, 1259 n.9 (11th Cir. 2019) (en banc); *Nance v. Warden, Ga. Diagnostic Prison*, 922 F.3d 1298, 1302 n.2 (11th Cir. 2019) (Tjoflat, E. Carnes, W. Pryor, JJ.); *Hornsby-Culpepper v. Ware*, 906 F.3d 1302, 1306 n.1 (11th Cir. 2018) (W. Pryor, Branch, Anderson, JJ.); *United States v. Wenxia Man*, 891 F.3d 1253, 1275 (11th Cir. 2018) (W. Pryor, J. Pryor, Black, JJ.); *Feldman v. Am. Dawn, Inc.*, 849 F.3d 1333, 1345 (11th Cir. 2017) (W. Pryor, Jordan, Baldock, JJ.); *United States v. Stein*, 846 F.3d 1135, 1151 n.15 (11th Cir. 2017) (W. Pryor, J. Pryor, Story, JJ.); *Jeune v. U.S. Att'y Gen.*, 810 F.3d 792, 797 n.2 (11th Cir. 2016) (W. Pryor, J. Carnes, Siler, JJ.); *Sorrels v. NCL (Bah.) Ltd.*, 796 F.3d 1275, 1283 (11th Cir. 2015) (W. Pryor, Jordan, Jones, JJ.); *In re McFarland*, 790 F.3d 1182, 1191 n.10 (11th Cir. 2015) (Tjoflat, W. Pryor, Baldock, JJ.); *Perez v. U.S. Bureau of Citizenship & Immigration Servs.*, 774 F.3d 960, 964 (11th Cir. 2014) (per curiam) (Marcus, W. Pryor, Fay, JJ.). But puzzlingly, today, the Majority Opinion selectively applies the abandonment rule to correctly decline ruling on whether a corporation can be an "applicant" under the ECOA, since "the obligors briefly mention Periwinkle's counterclaim in their argument about the Equal Credit Opportunity Act, [but] they have failed to argue or cite caselaw in either the district court or on appeal to rebut the conclusion that its status as an entity defeats its claim, as the district court ruled . . ." Maj. Op. at 7–8. Yet the Majority Opinion incorrectly stretches to "resolve" a specific claim Lisa does not even raise at all in her briefs on appeal—whether Lisa may rely on the ECOA to contest Regions's demand that her husband, Charles, and his law firm, Legal Outsource PA, guaranty the loan to Periwinkle.

5Byear%5D=&field_oral_argument_date_value%5Bvalue%5D%5Bmonth%5D= ("Oral Argument").

The only time during this appeal that either party raised Lisa's role as a guarantor of the Periwinkle Loan was in Regions's opposition brief. Appellee's Br. at 39–42. According to the Majority Opinion, this makes the argument fair game. Maj. Op. at 30–31. But here's the problem: Lisa never took the bait. She didn't adopt Regions's characterization of her argument. She didn't respond to Regions's argument in her reply brief. Her counsel did not agree with it during oral argument. And by the time Regions's counsel got to oral argument, Regions argued—over no claim to the contrary—that Lisa had abandoned the Periwinkle Loan Claim.[6] So on appeal, no one ever argued in favor of Lisa and Periwinkle's position on the Periwinkle Loan Claim.

To recap, Lisa never argued in her opening brief that she had standing as a guarantor to challenge the loan made to Periwinkle. Regions raised that argument in its opposition brief, but Lisa did not respond to it in her reply brief. Lisa's counsel did not raise the argument during oral argument. Regions's counsel then argued that

[6] *See* Oral Argument at 13:48 ("If you look at the counterclaim that was brought before the district court and what has been argued here in the briefs, ***it's [a] completely different factual situation***. They haven't even advanced the right argument in our position. . . .") (emphasis added), 18:02 ("[T]hey're arguing that there was discrimination because ***when the Legal Outsource loan matured*** and Regions Bank said we can't extend the maturity on this because Legal Outsource is defunct, it's not credit-worthy, you need to provide an additional source of repayment collateral—something to that effect—they're saying in the brief, which they never raised in front of Judge Magnuson, that *that* is the ECOA violation.") (emphasis added).

Lisa had abandoned this argument. And Lisa's counsel never disputed this. It's not on appeal.

Perhaps for this reason, the Majority Opinion introduces the novel suggestion that amici can decide what issues are before us. Maj. Op. at 31–32. Amici frequently provide valuable insight to the court by "supplementing the efforts of private counsel and by drawing the court's attention to law that might otherwise escape consideration[.]" *Shoemaker v. City of Howell*, 795 F.3d 553, 562 (6th Cir. 2015) (quoting 3-28 Moore's Manual—Federal Practice and Procedure § 28.84 (2014)). We are grateful for their contribution. But we don't let them select the issues.[7] *See Cellnet Commc'ns, Inc. v. F.C.C.*, 149 F.3d 429, 443 (6th Cir. 1998) ("To the extent that the amicus raises issues or make[s] arguments that exceed those properly raised by the parties, we may not consider such issues.").

[7] And besides, the Majority Opinion is wrong when it suggests that the amicus briefs support its conclusion that Appellants raised the ECOA standing issue in the context of the Periwinkle Loan claim. *See* Maj. Op. at 31–32. On the contrary, the banking associations' amicus brief plainly understood Appellants to have raised the ECOA standing issue as it relates to only the Legal Outsource Loan Claim on appeal. Their brief describes the issue Appellants raise as follows: "Appellants incorrectly argue that the Equal Credit Opportunity Act affords 'Lisa Phoenix and Perwinkle [sic] [Partners, LLC]' a claim that Regions [Bank] required them to sign for and collateralize ***her husband's business debts***[.]" Bankers' Br. at 10 (emphasis added) (alterations in original). Clearly, this pertains to only the Legal Outsource Loan Claim on appeal. It does not reference the Periwinkle Loan Claim. To be sure, the Bankers briefed the issue of whether a guarantor has standing, but according to their own words, they did so in the context of the Legal Outsource Loan Claim because that's what they understood Appellants to argue in their brief. The Bankers obviously did not understand Appellants to raise the guarantor-standing issue as it relates to the Periwinkle Loan Claim. For good reason: on appeal, Appellants never argued that issue in the context of the Periwinkle Loan Claim. As for the other amicus brief, submitted by the Consumer Financial Protection Bureau, it focused on what it disagreed with in the district court's opinion, as opposed to characterizing Appellants' argument on appeal.

Other courts have identified only very limited circumstances warranting a court's decision to overlook abandonment of an argument or issue and decide it, anyway. None applies here.

In *Silber v. United States*, 370 U.S. 717, 717–18 (1962), for example, the Supreme Court explained that when a party fails to raise an issue on appeal, courts "[i]n ***exceptional*** circumstances, ***especially in criminal cases***, . . .in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are ***obvious***, or if they otherwise ***seriously affect the fairness, integrity, or public reputation of judicial proceedings***." (emphasis added) (citation and quotation marks omitted). The Majority Opinion has offered no reason why this case presents "exceptional circumstances," and I am aware of no such reason. This is also not a criminal case. Nor, in light of the fact that the Supreme Court recently split 4-4 on the issue the Majority insists on addressing today, *Hawkins*, 136 S. Ct. at 1072, and other circuits are similarly split two to one, can we say the answer to the unraised issue is "obvious." And finally, since the Majority Opinion's answer to the unraised issue results in precisely the same outcome as declaring the issue abandoned—either way, the district court is affirmed—I can see no way that the unraised issue "seriously affect[s]"—or, for that matter, affects at all—"the fairness, integrity, or public reputation of judicial proceedings."

Other Circuits have also identified extremely limited circumstances in which it might be appropriate for an appellate court to address an issue that no party raised. These other Circuits have reasoned that a court may determine an unraised issue where doing so would "enhanc[e] the efficiency of the decisionmaking process and the conservation of scarce judicial resources," and "remand 'would further postpone the ultimate resolution of' the petitioner's underlying claim for relief." *United States v. Holness*, 706 F.3d 579, 592 (4th Cir. 2013) (quoting *LaBruna v. U.S. Marshal*, 665 F.2d 439, 442 (2d Cir. 1981)). Similarly, the Seventh Circuit has concluded it is appropriate to review an unraised issue only when these controlling factors decidedly favor review: the size and complexity of the record, the certainty of the resolution of the issue, and the need for "protracted, costly, and ultimately futile proceedings in the district court," in the absence of addressing the forfeited issue. *United States v. Giovannetti*, 928 F.2d 225, 227 (7th Cir. 1991).

Of course, not one of these circumstances describes this case. The record here is not particularly lengthy or complex; resolution of the issue here, as I have noted, is not cut and dry; and declining to reach the issue would not "result in protracted, costly, and ultimately futile proceedings in the district court." *Id.* Whether we address the unraised issue or not, the result is the same: affirmance of the district court's order granting summary judgment to Regions. In fact, ironically, deciding the unraised issue here makes today's opinion unnecessarily lengthy and complex.

So it should go without saying that this case does not present an appropriate vehicle to justify a wholly unnecessary journey into the deeply debated question of whether "guarantors" can be "applicants," when the claim as resolved by the Majority Opinion should be dismissed, regardless, since it was clearly abandoned.

Apparently recognizing the inadvisability of determining an issue no Appellant invoked and failing to convince even itself that Appellants have raised the Periwinkle Loan Claim on appeal, the Majority Opinion tries a different tack and insists that Appellants' Legal Outsource Loan Claim arguments "logically . . . can relate only" to Counterclaims 11 or 12 (Lisa's individual claim as a guarantor of the Periwinkle loan). Maj. Op. at 28. At the risk of repetition but for the avoidance of doubt, I offer a simpler explanation: on appeal, Lisa, for the first time in this case, has raised a new claim about Regions's attempt to make her (through Periwinkle) guaranty the Legal Outsource Loan. She did not plead the claim in her Counterclaims—including Counterclaims 11 or 12—and she did not otherwise sufficiently develop it in the district court.

Perhaps it was "nonsensical" for Lisa to raise the Legal Outsource Loan Claim at this point, Maj. Op. at 33, but that was her prerogative, not ours. Our task here is to "decide . . . [the] questions presented by the parties." *Greenlaw v. United States*, 554 U.S. 237, 244 (2008) (citation and quotation marks omitted). Our responsibility to construe briefs "liberally" does not grant us permission to recast what was

appealed simply because we want to reach an issue that the parties left behind. *See Nat'l Aeronautics and Space Admin. v. Nelson*, 562 U.S. 134, 147 n.10 (2011) ("The premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them.") (quoting *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983) (opinion for the court by Scalia, J.)); *Greenlaw*, 554 U.S. at 243 ("In our adversary system . . . we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present.").

As for the Legal Outsource Loan Claim, this is hardly the first time a litigant has tried to raise a "wholly novel claim" for the first time on appeal. Maj. Op. at 33. When that happens, it has long been this Court's practice to refuse to consider the issue. *See In re Holywell Corp.*, 874 F.2d 780, 782 (11th Cir. 1989) (refusing to consider claim that was not presented to the district court); *Troxler v. Owens-Illinois, Inc.*, 717 F.2d 530, 532 (11th Cir. 1983) (refusing to consider affirmative defense raised for the first time on appeal); *see also Access Now*, 385 F.3d at 1331 ("[W]e review claims of judicial error in the trial courts. If we were to regularly address questions—particularly fact-bound issues—that districts court never had a chance to examine, we would not only waste our resources, but also deviate from the essential nature, purpose, and competence of an appellate court.").

Because Lisa raises the Legal Outsource Loan Claim for the first time on appeal, the better course would be to forgo considering it at this late hour. *Access Now*, 385 F.3d at 1330–35. We can, however, make exceptions to our general prohibition against considering new claims for the first time on appeal if one of our limited exceptions to the rule applies.[8] *See id.* at 1332. The only exception that could even possibly pertain here allows us to evaluate a new issue for the first time on appeal "if that issue presents significant questions of general impact or of great public concern." *Id.* at 1332.

Perhaps we could rely on that exception to consider whether guarantors are considered "applicants" under the ECOA in the context of Lisa's contentions arising out of the Legal Outsource Loan Claim. But if we are going to do that, we should say so and explain why the exception applies.

Unfortunately, though, that's not what the Majority Opinion does. Instead, inexplicably, it simply considers whether guarantors have standing under the ECOA, in the context of "resolving" the Periwinkle Loan Claim, ignoring Lisa's abandonment of that claim on appeal and Regions's argument that Lisa has forsaken that claim for good by not appealing it. Because Lisa opted not to present the

[8] We have explained that we may consider an issue raised for the first time on appeal (1) "if it involves a pure question of law, and if refusal to consider it would result in a miscarriage of justice"; (2) if "the appellant raises an objection to an order which he had no opportunity to raise at the district court level"; (3) if "the interest of substantial justice is at stake"; (4) if "the proper resolution is beyond any doubt"; or (5) "if that issue presents significant questions of general impact or of great public concern." *Access Now*, 385 F.3d at 1332.

Periwinkle Loan Claim to us on appeal, it should be clear that that claim leaves nothing to be "resolved."

II.

Nevertheless, because the Majority Opinion purports to improperly narrow the ECOA, I must explain why its reasoning is wrong. I begin by setting forth the framework we apply to the question the Majority Opinion has chosen to address: whether guarantors are included within the meaning of "applicants" under the ECOA.

Since we are construing the meaning of a statute, we must start with the text. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). We consider whether the text plainly and unambiguously answers the particular question at issue. *Id.* In assessing the text, we keep in mind that "[a] word in a statute may or may not extend to the outer limits of its definitional possibilities." *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006). To determine the proper meaning, we evaluate "the whole statutory text, considering the purpose and context of the statute, and consult[] any precedents or authorities that inform the analysis." *Id.*; *see also Crandon v. United States*, 494 U.S. 152, 158 (1990) ("In determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy."). And when a statute is remedial in nature, we apply the well-established rule that requires us to construe the text "broadly to effectuate its

purposes." *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967); *Stewart v. Kahn*, 78 U.S. 493, 504 (1870); *SEC v. Levin*, 849 F.3d 995, 1001 (11th Cir. 2017) (observing that remedial legislation "is entitled to a broad construction") (citations omitted). If, after we apply these rules, the text is unambiguous, yielding but a single possible answer to the question at issue, our analysis ends. For we "must give effect to the unambiguously expressed intent of Congress." *Cadet v. Bulger*, 377 F.3d 1173, 1185 (11th Cir. 2004) (citation and quotation marks omitted).

But if the text does not unambiguously answer the precise question we are examining, we must conduct an analysis under *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). Under *Chevron*, we determine whether the agency charged with filling in the ECOA's gaps—originally the Federal Reserve Board but beginning in 2010, the Consumer Financial Protection Bureau[9]—has established a permissible answer to our question. The agency's interpretation is permissible if it is "reasonable." *Id.* at 844. And we must defer to an agency's reasonable construction of a statute for which that agency enjoys rulemaking authority. *Id.* If, on the other hand, the agency's interpretation of the statute as it

[9] In 2010, Congress transferred the Federal Reserve's rulemaking authority to the Consumer Financial Protection Bureau. 15 U.S.C. 1691b(a). The Bureau has since repromulgated Regulation B without making material changes. 12 C.F.R. Pt. 1002 & Supp. I; *see* Equal Credit Opportunity (Regulation B), 76 Fed. Reg. 79,442 (Dec. 21, 2011). Because Regulation B has remained materially the same since its original promulgation by the Federal Reserve, to avoid confusion, for the remainder of this opinion, I refer solely to the Federal Reserve as the administering body.

concerns the precise issue in controversy is "arbitrary, capricious, or manifestly contrary to the statute," the agency's answer is entitled to no weight. *Id.*

With this framework in mind, I consider whether a guarantor qualifies as an "applicant" under the ECOA. I divide my discussion into three parts. In accordance with the Supreme Court's guidance for construing statutory text, *see Dolan*, 546 U.S. at 486, and because the ECOA has "broad remedial goals," *Barney v. Holzer Clinic, Ltd.*, 110 F.3d 1207, 1211 n.6 (6th Cir. 1997), Section A reviews the background, purpose, and broader context of the ECOA as a whole. *Cf. Zuni Pub. Sch. Dist. No.89 v. Dep't of Educ.*, 550 U.S. 81, 89–90 (2007) (departing from usual order of analysis for purposes of exposition). Section B examines the statutory text. And Section C considers the Federal Reserve's approach to answering the question of whether a guarantor qualifies as an "applicant" under the ECOA.

A.

Women were integral to the United States's World War II triumph through, among other ways, their efforts in the workforce.[10] Buoyed by their experiences during the War, women helped detonate America's historic Post-War economic boom by flocking to workplaces in unprecedented droves.[11]

---

[10] Jone Johnson Lewis, *Women and World War II: Women at Work*, ThoughtCo, Mar. 5, 2019, *available at* https://www.thoughtco.com/world-war-ii-women-at-work-3530690 (last visited Aug. 27, 2019).

[11] Howard N. Fullerton, Jr., *Labor Force Participation: 75 Years of Change, 1950-98 and 1998-2025*, Monthly Lab. Rev. 3 (Dec. 1999), *available at* http://www.bls.gov/mlr/1999/12/art1full.pdf (last visited Aug. 27, 2019).

But significant impediments to women's economic parity nonetheless persisted. A particularly important obstacle involved credit availability: creditors would not lend to women so they could start their own businesses or buy their own homes because creditors refused to consider women's applications on par with men's. And the increasing necessity of credit to achieve economic security made this impediment particularly restrictive.[12]

That women faced rampant discrimination in accessing credit was no secret. In fact, in the early 1970s, the then-President of the American Bankers Association openly admitted that banks "do in fact discriminate against women when it comes to granting credit."[13] And in 1972, the National Commission on Consumer Finance found five systemic patterns of gender-based credit discrimination: (1) single women had more trouble obtaining credit than single men; (2) creditors required women to reapply for credit upon marriage, usually in the husband's name; (3) creditors declined to extend credit to a married woman in her own name; (4) creditors often refused to count the wife's income when the couple applied for credit; and (5) women who divorced or widowed had trouble reestablishing credit since the

[12] Dubravka Ritter, *Do We Still Need the Equal Credit Opportunity Act*?, Fed. Res. Bank of Phila. (Sept. 2012), *available at* https://www.philadelphiafed.org/-/media/consumer-finance-institute/payment-cards-center/publications/discussion-papers/2012/d-2012-equal-credit-opportunity-act.pdf?la=en (last visited Aug. 27, 2019).

[13] Susan Smith Blakely, *Credit Opportunity for Women: The ECOA and Its Effects*, 1981 Wis. L. Rev. 655, 657 (1981) (citation omitted).

accounts were in the husband's name. Nat'l Comm. On Consumer Fin., *Consumer Credit in the United States*, 152–53 (1972).

So before marriage, regardless of a woman's wealth accumulation, creditors viewed women as poor credits risks because they considered them "inherently unstable and incapable of handling [their] own affairs . . . and likely to change [their] marital status." Gail R. Reizenstein, *A Fresh Look at the Equal Credit Opportunity Act*, 14 Akron L. Rev. 215, 226 (1980) (citation omitted) ("Fresh Look"). Many creditors even demanded that women disclose the type of birth control they relied upon. *Credit Equality Comes to Women: An Analysis of the Equal Credit Opportunity Act*, 13 San Diego L. Rev. 960, 965 (1976). Some creditors took it yet a step further by making women choose between babies and credit by conditioning a woman's credit approval on her "swear . . . that [she] would not endanger [her] ability to repay [her] debt[] by having children." *Id.* (citations omitted).

Getting married usually didn't improve women's lots in credit markets because lenders often folded whatever credit women had before marriage into their husbands' credit. For instance, after winning multiple Wimbledon championships and supporting her household with those earnings, Billie Jean King could not get a credit card in her own name; rather, she had to apply in the name of her husband, who at that time, was an unemployed law student. Gail Collins, *When Everything Changed: The Amazing Journey of American Women from 1960 to the Present*, 182

(Little, Brown & Co. ed., 2014). And bankers told the mayor of Davenport, Iowa, that they would give her a credit card only if her husband would sign for it. *Id.*

This state of affairs created a paradox for women: they couldn't have their own credit during marriage, and if they divorced or became widowed, lenders would deny their applications because they lacked established credit of their own. *Economic Problems of Women: Hearings Before the Joint Economic Committee*, 93d Cong. 152, 1st Sess. (1973) ("The irony of these credit practices is that when a woman is divorced, separated, or widowed she often is denied credit by these same credit companies on the grounds that she has no established credit record.") (Statement of U.S. Rep. Griffiths, Member, Joint Econ. Comm.) ("*Economic Problems*"). And many women started post-marriage life even worse off than having no credit because lenders insisted on tying women's financial fortunes to those of their ex-husbands, and their ex-husbands' delinquent accounts often detracted from the women's credit scores even after the marriage ended. *See Fresh Look* at 225.

This atmosphere evolved out of the wrong[14] but "widely-held" presumptions that "probability of pregnancy, the subsequent termination of employment upon

[14] Despite higher levels of unemployment than men at the time, women were, in fact, better credit risks than men, studies showed. A study commissioned in 1964 examined the possible correlation between consumer credit risk and sex. It found that out of 8,795 credit accounts established for single men, 176 defaulted (2%); while among 4,337 accounts established for single women, only 33 defaulted (0.75%). *See* Sharon Thornton, *The Not-So-Equal Credit Opportunity Act*, 5 Orange Cty. B.J. 363, 366 (1978).

childbirth, and the general instability and inability of women to control their personal affairs (especially single and divorced women)" made women bad bets. *Fresh Look* at 216 (citation omitted).

Eventually, Congress began to recognize the inequities of tethering women's economic prospects to their husbands and the risks this discrimination posed to the new economy. So in the early 1970s, Congress addressed the problem.

Testimony before Congress established that at that time, to obtain credit, women needed a higher salary and more stable employment than men. *See* Senate Comm. On Banking, Housing & Urban Affairs, S. Rep. No. 93–278, 93rd Cong., 1st Sess. 16–17 (1973) ("Senate Rpt."); *see also Economic Problems* at 197; *Credit Discrimination: Hearings Before the Subcomm. on Consumer Affairs of the House Comm. on Banking and Currency on H.R. 14856 and H.R. 14908*, 93rd Cong., 2d Sess. 315, 636 (1974).[15] Creditors operated under the assumption that women were economically dependent upon their husbands, even if in reality, the wife's earnings outpaced her husband's. *See* Senate Rpt. at 17–18. Creditors also usually altered a wife's credit rating to match her husband's and frequently refused to give married women separate accounts. *See id.* at 17.

[15] During the hearings, one person relayed that an employee of a credit institution had stated that it was "un-American to count a woman's income and that the only way a woman's income could be counted would be if she were to have a hysterectomy." *Economic Problems* at 192 (quotation marks omitted).

The congressional hearings culminated in the Senate Subcommittee's report that found thirteen different "widespread" ways creditors discriminated on the basis of sex and marital status:

(1) Women were held to different standards than men in obtaining credit;

(2) Creditors generally required a woman upon marriage to reapply for credit;

(3) Creditors often refused to extend credit to a married woman in her own name;

(4) Creditors were usually unwilling to consider the wife's income when a married couple applied for credit;

(5) Women who had separated had a particularly difficult time, since the accounts may still have been in the husband's name;

(6) Creditors arbitrarily refused to consider alimony and child support as a valid source of income;

(7) Creditors applied stricter standards to married applicants where the wife was the high earner;

(8) Creditors used information about women's birth-control practices in evaluating credit applications;

(9) Creditors used information concerning the creditworthiness of a spouse where an otherwise-creditworthy married person applied for credit;

(10) Creditors refused to issue separate accounts to married persons;

(11) Creditors considered women dependent upon their husbands even if the women were employed;

(12) Creditors used credit-scoring systems that applied different values depending on sex or marital status; and

(13) Creditors altered women's credit ratings to match their husbands' credit ratings.

Senate Rpt. at 16–17.

Against this background and in light of these findings, Congress enacted the ECOA in 1974. In doing so, Congress concluded sex and marital status "are, and must be, irrelevant to a credit judgment." Senate Rep. (Banking Hous. and Urban Affairs Comm.), S. Rep. No. 94 – 589, 94th Cong., 2d Sess. 3 (1976), reprinted in 1976 U.S.C.C.A.N. 403, 405; *see also* 15 U.S.C. § 1691 (articulating the ECOA's prohibition of credit discrimination based on gender or marital status).

So it is not surprising that the ECOA makes it "unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction [] on the basis of . . . sex or marital status. . . ." 15 U.S.C. § 1691(a)(1).[16] Indeed, the ECOA represents Congress's resolve to "eradicate credit discrimination waged against women, especially married women whom creditors traditionally refused to consider for individual credit," *Anderson v. United Fin. Co.*, 666 F.2d 1274, 1277 (9th Cir. 1982), and "to prevent loans from being conditioned automatically on the

[16] In 1976, Congress extended the ECOA to bar creditors from discriminating on the basis of race, color, religion and national origin. *See* 15 U.S.C. § 1691(a); Ritter, *supra*, at 2–3.

securing of the signature of the non-borrowing spouse," *Mayes v. Chrysler Credit Corp.*, 167 F.3d 675, 676 (1st Cir. 1999).

Against the crazy quilt of discriminatory practices creditors were using at that time, Congress declined to spell out each methodology or action that amounts to impermissible discrimination. Instead, Congress rested on the ECOA's broad language and "entrust[ed] its construction to an agency with the necessary experience and resources to monitor its operation." *Mourning v. Family Publ'ns Serv., Inc.*, 411 U.S. 356, 365 (1973). Specifically, Congress delegated to the Federal Reserve the task of adopting "classifications, differentiation, or other provision[s]," that were, in the Federal Reserve's judgment, "necessary or proper to effectuate the [ECOA's] purposes. . . ." 15 U.S.C. § 1691b(a).

Shortly after Congress enacted the ECOA, the Federal Reserve took the baton from Congress and promulgated Regulation B to implement Congress's directive to combat sex- and marital-status-based credit discrimination. 12 C.F.R. § 202.1(b) (stating that the purpose of Regulation B is "to promote the availability of credit to all creditworthy applicants without regard to . . . sex [or] marital status. . . ."). Included within Regulation B is the Spousal Guaranty Rule, which generally prohibits creditors from treating married people differently by requiring spouses to assume liability for each other's debt obligations. 12 C.F.R. 202.7(d); Equal Credit Opportunity Final Rulemaking, 40 Fed. Reg. 49,308–09 (Oct. 22, 1975). Therefore,

ever since 1977, Regulation B has prohibited creditors from obligating an individual to guaranty her spouse's debts.

Some courts, though, interpreted Regulation B to mean that when a creditor violated the Spousal Guaranty Rule, the only "applicant" who suffered discrimination was the primary borrower, not the spouse who guaranteed the loan. *See, e.g.*, *Morse v. Mut. Fed. Sav. & Loan Ass'n of Whitman*, 536 F. Supp. 1271, 1278 (D. Mass. 1982). The Federal Reserve recognized that this restrictive reading thwarted one of the purposes of the ECOA—ensuring access to an independent credit profile by detangling spouses' credit—since the guarantor spouse could be saddled with her husband's bad debt with no recourse under the ECOA.

So in 1985, the Federal Reserve expressly construed the ECOA's definition of "applicant"—"any person who applies to a creditor directly for an extension, renewal, or continuation of credit, or applies to a creditor indirectly by use of an existing credit plan for an amount exceeding a previously established credit limit," 15 U.S.C. § 1691a(b)—to include "guarantors, sureties, endorsers, and similar parties" "[f]or purposes of" the Spousal Guaranty Rule. 12 C.F.R. 202.2(e). In doing so, the Federal Reserve emphasized that it was not imposing any new obligations, since in accordance with the ECOA, Regulation B had long prohibited creditors from requiring a guaranty from a borrower's spouse. Rather, the Federal Reserve explained, it was just recognizing that the guarantor spouse also has

standing when the creditor straps the spouses' credit fortunes together. Equal Credit Opportunity; Revision of Regulation B; Official Staff Commentary, 50 Fed. Reg. 48,018 (Nov. 20, 1985).[17]

B.

We begin our analysis of whether the ECOA includes guarantors within the definition of "applicants" by evaluating the statutory text. The ECOA makes it "unlawful for ***any*** creditor to discriminate against ***any*** applicant, with respect to ***any*** aspect of a credit transaction [] on the basis of . . . marital status. . . ." 15 U.S.C. § 1691(a)(1) (emphasis added). In turn, the ECOA defines "applicant" as "***any*** person who applies to a creditor directly for an extension, renewal, or continuation of credit, or applies to a creditor indirectly by use of an existing credit plan for an amount exceeding a previously established credit limit." 15 U.S.C. § 1691a(b) (emphasis added).

Two aspects of this text immediately stand out.

First, Congress employed the word "any" four times in these two sentences. The Supreme Court has explained that "the word 'any' has an expansive meaning." *United States v. Gonzales*, 520 U.S. 1, 5 (1997) (citation omitted). The Majority

[17] The Federal Reserve made Regulation B firm but flexible. If a party is needed to support the loan request because the potential debtor husband's credit is insufficient, the wife can guaranty the loan. Regulation B just bars lenders from "requir[ing] that the spouse be the additional party." 12 C.F.R. 202.7(d)(5).

Opinion is correct that the word "any" does not change the definition of the word it modifies. Maj. Op. at 18–19. But when that word appears repeatedly over just a couple of sentences—here, four times in two sentences—"it begins to seem that Congress meant the statute to have expansive reach." *See United States v. Clintwood Elkhorn Mining Co.*, 553 U.S. 1, 7 (2008).[18]

This would be true for any statutory provision that abundantly uses the word "any," but it is especially so when dealing with remedial legislation. Where Congress uses the term "any" with a "lack of [accompanying] restrictive language," the Supreme Court has instructed us to "refuse[] to engraft artificial limitations" that curb the "expansive remedial purpose[s]" connoted by such language. *Blue Shield of Va. v. McCready*, 457 U.S. 465, 472 (1982); *see id.* (broadly construing "[*a*]*ny* person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws"). So, for example, the text's prohibition against marital-status discrimination "with respect to ***any*** aspect of a credit transaction," 15 U.S.C. § 1691(a)(1) (emphasis added), purports to preclude marital-status discrimination in all aspects of credit transactions, including against guarantors.

[18] *See also Dennis v. Higgins*, 498 U.S. 439, 443 (1991) ("A broad construction of § 1983 is compelled by the statutory language, which speaks of deprivations of '*any* rights, privileges, or immunities secured by the Constitution and laws.' Accordingly, we have repeatedly held that the coverage of [§ 1983] must be broadly construed.") (citations and quotation marks omitted).

Nevertheless, and second, the statutory provisions do not expressly answer the key question at issue here: must the applicant request credit for herself or may she request it for somebody else? As the Sixth Circuit has noted, "the applicant and the debtor are not always the same person." *RL BB Acquisition, LLC v. Bridgemill Commons Dev. Grp., LLC*, 754 F.3d 380, 385 (6th Cir. 2014). And the Majority Opinion's listed common dictionary definitions of "apply" do not limit applicants to only the proposed debtor, because they do not foreclose the scenario where an applicant makes a request for credit on someone else's behalf.

Similarly, both the Sixth and Eighth Circuits, in construing the text at issue, have relied on common dictionary definitions of "apply" as meaning "to make an appeal or request especially formally and often in writing and ***usually for something of benefit to oneself***." *Hawkins*, 761 F.3d at 941 (quoting *Webster's Third New Int'l Dictionary* at 105 (2002) (quotation marks and alterations omitted) (emphasis added); *RL BB Acquisition*, 754 F.3d at 385 (quoting *Webster's Third New Int'l Dictionary* at 105 (1993) (cleaned up)); *see also Webster's Third New Int'l Dictionary* at 105 (1961) (same definition, cleaned up). Obviously, if something is "***usually*** for something of benefit to oneself," it must ***sometimes*** be for something of benefit to another.

So we must consider whether a guarantor may ever reasonably and naturally be viewed as requesting "something of benefit" to another—that is, credit for the

benefit of the proposed debtor. As it turns out, under the plain meaning of "guarantor," she may.

As Corbin on Contracts explains, "In most cases of guaranty contracts, the offer comes from the guarantor requesting the giving of credit to a principal debtor. . . ." *See* Timothy Murray, Corbin on Contracts § 3.14, at 467 (rev. ed. 2018).[19] In fact, a guaranty is typically enforceable only because, in exchange for the creditor's promise to extend credit to the debtor, the guarantor promises to repay the loan if the primary debtor defaults. *See* Restatement (Second) of Contracts § 71(2) (1981). Thus, guaranty contracts would be unenforceable absent the exchange of consideration by the guarantor—a promise to repay—and the creditor—the fulfillment of the guarantor's "application" that it lends to the debtor. *See* Restatement (Third) of Suretyship and Guaranty § 9, cmt. a (1996); Joseph M. Perillo, Corbin on Corbin § 9.4, at 252–253 (rev. ed. 1996); *see also United States v. Burgreen*, 591 F.2d 291, 294 (5th Cir. 1979) (finding that guaranty was supported by consideration through the loan to the primary borrower).

The Majority Opinion charges that this definition of "apply" falls outside the word's natural meaning. Maj. Op. at 20. But there are three problems with the Majority Opinion's position.

[19] Additionally, other banking regulations provide that guarantors request and receive extensions of credit. *See, e.g.*, 12 C.F.R. 215.3(a)(4).

First, in support of its argument, the Majority Opinion inexplicably invites readers to consider an incongruous hypothetical, arguing that parents who seek to bribe their daughter's way into college by offering to "make a large gift if their daughter is admitted" are not "applicants." Maj. Op. at 13. I agree. But nor are they analogous to guarantors. Unlike the parents in the Majority Opinion's hypothetical, who can obtain admission for their daughter only by paying a bribe to the college, a guarantor does not bribe or otherwise pay the creditor for credit to be extended to another. And if the eventual debtor pays back the credit, the guarantor will never pay anything. So the Majority Opinion's efforts to explain in tangible terms why a guarantor cannot fall within the meaning of "applicant" fail.

Second, none of the many definitions of the word "apply" that the Majority Opinion cites *excludes* the interpretation that the application was for someone else. Maj. Op. at 10–11. And that is significant to our analysis. In *Smith v. United States*, 508 U.S. 223, 225 (1993), for example, the Supreme Court had to determine whether the exchange of a gun for narcotics amounted to the "use" of a firearm "during and in relation to . . . [a] drug trafficking crime," within the meaning of 18 U.S.C. § 924(c)(1). The Court rejected the petitioner's request to apply only the limited and most common meaning of the phrase. *Id.* at 229. Rather, the Court determined that trading a firearm for drugs also qualified as "use" of the firearm under the statute, explaining, "It is one thing to say that the ordinary meaning of 'uses a firearm'

includes using a firearm as a weapon, since that is the intended purpose of a firearm and the example of 'use' that most immediately comes to mind. But it is quite another to conclude that, as a result, the phrase also *excludes* any other use." *Id.*

Applying *Smith*, we must conclude that the availability of a frequently used definition of "applicant"—one who seeks credit for herself—does not necessarily negate a less-common definition—one who seeks credit for others. That is so because the definitions of "applicant" do not exclude use of the word to refer to guarantors.

And third, the ECOA is a remedial statute that we must construe "broad[ly]" to effectuate its remedial goals. *Barney*, 110 F.3d at 1211 n.6; *see also Levin*, 849 F.3d at 1001 (observing that remedial legislation "is entitled to a broad construction"); *Morante-Navarro v. T&Y Pine Straw, Inc.*, 350 F.3d 1163, 1166 (11th Cir. 2003) (construing the remedial Migrant and Seasonal Agricultural Workers Protection Act "broadly to effect its . . . purpose"). Our task cannot begin and end with a definitional popularity contest. If it did, there would be no way to construe remedial legislation "broadly" to effectuate its purpose, because all words in all statutes would be read as conveying only a single potential meaning.

Notably, the Majority Opinion makes no attempt whatsoever to reconcile the "familiar canon of statutory construction that remedial legislation should be construed broadly to effectuate its purposes," *Tcherepnin*, 389 U.S. at 336, or the

caveat that "[a] word in a statute may or may not extend to the outer limits of its definitional possibilities," *Dolan*, 546 U.S. at 486, with the Majority Opinion's the-words-can-have-only-a-single-meaning mantra.[20] Of course, if either or both of these doctrines apply, the Majority Opinion cannot be right.

So instead of responding substantively, the Majority Opinion asserts the Supreme Court has "rejected applying" the remedial-purpose doctrine. Maj. Op. at 21. And it has no answer at all to the Supreme Court's instruction in *Dolan*.

But while the Majority Opinion pulls colorful language from context to suggest that the Supreme Court has determined that the remedial-purpose doctrine is no longer good law, there's a problem with this response: the Supreme Court has not rejected the doctrine. Rather, the Court concluded the doctrine was simply inapplicable in the cases the Majority Opinion cites.

For example, there were multiple reasons why the doctrine would not apply to the Comprehensive Environmental Response, Compensation, and Liability Act, the statute at issue in *CTS Corp. v. Waldburger*, 573 U.S. 1 (2014): (1) the Court

[20] As Judge William Pryor explained last year, "the text must be construed as a whole. . . . Strict construction sequesters the words of a text from their context. That is one of the reasons why strict construction is foolish." *Pictet Overseas Inc. v. Helvetia Trust*, 905 F.3d 1183, 1190 (11th Cir. 2018) (William Pryor, J., concurring) (cleaned up); *see also Deal v. United States*, 508 U.S. 129, 132 (1993) *superseded by statute as stated in United States v. Davis*, 139 S. Ct. 2319, 2324 n.1 (2019) (it is a "fundamental principle of statutory construction (and indeed, of language itself), that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used."). So we ought not to pluck words out of their context and define them narrowly just because a dictionary indicates that the narrower meaning is the more common one.

held that the statute "d[id] not provide a complete remedial framework," and so it was not necessarily a remedial statute, *see id.* at 18; (2) even if it was a remedial statute, the statute's legislative history supported a construction of the statutory text at odds with the remedial purpose, *see id.* at 14–17; and (3) the statute, which would trump state law if the Court adopted the respondents' argument, was subject to a competing presumption against preemption, *see id.* at 12.

Likewise, the respondents in *Inyo County v. Paiute-Shoshone Indians of the Bishop Community of the Bishop Colony*, 538 U.S. 701 (2003), argued that the Bishop Paiute Tribe should be considered a "person" under 42 U.S.C. § 1983, a construction—according to respondents—that would be consistent with the law's remedial purpose. *See Paiute-Shoshone Indians*, 538 U.S. at 710. The Court rejected this bid, holding that "Section 1983 was designed to secure private rights against government encroachment, not to advance a sovereign's prerogative to withhold evidence relevant to a criminal investigation." *See id.* at 711–12 (citation omitted). So rather than rejecting the doctrine, the Court disagreed that the statute was meant to remedy the harms that the respondents addressed.

Norfolk Southern Railway Co. v. Sorrell, 549 U.S. 158 (2007), is similarly uninstructive here. *Norfolk* involved the Federal Employers' Liability Act ("FELA"), which makes railroads liable to their employees for injuries "resulting in whole or in part from the negligence" of the railroad, 45 U.S.C. § 51. 549 U.S. at

160. In that case, the Court considered whether the statute permitted different standards of causation for railroad and employee contributory negligence. *Id.* Although the Court recognized that FELA was "enacted to benefit railroad employees" and that a more lenient standard of causation for employee contributory negligence would favor employees, it held that FELA required application of a single negligence standard, stating that FELA's "remedial purpose [does not] require[] us to interpret every uncertainty in the Act in favor of employees." *Id* at 171. But what's important for this case is that the Court decided that the "system of comparative fault" would not "work" if "the basis of comparison [meaning the standard for contributory negligence] [were not] the same." *Id.* at 170, 171 (citations omitted). In other words, the Court left open the possibility that the remedial-purpose doctrine would apply in cases where the object of interpretation makes the difference between accomplishing the statute's central purposes at all and not.

This is just such a case. First, unlike the situation with FELA in *Norfolk*, construing "applicant" to include guarantors under § 1691(a)(1) does not prevent the ECOA's mechanisms from working. And unlike whether the contributory negligence standard is the same for employees and employers under the FELA—a question that impacts only the amount of the recovery but not entitlement to recovery—whether "applicant" encompasses guarantors under § 1691(a)(1) does not involve just some random "uncertainty in the Act," *Norfolk*, 549 U.S. at 171. Rather,

the answer to that question determines whether the ECOA will effect one of its central purposes at all—that is, whether the ECOA will allow spouses to disentangle their credit, or whether it will permit lenders to require such entanglement.

The Majority Opinion's reliance on *Household Credit Servs., Inc. v. Pfennig*, 541 U.S. 232 (2004), fares no better. In that case, the Supreme Court concluded that the statutory language of the Truth in Lending Act was ambiguous on the question at issue there, so it noted that the agency's regulation answering the question was "binding" unless, among other things, "manifestly contrary to the statute." *Id.* at 242 (citation omitted). The Court then concluded that the regulation was "in no way manifestly contrary" to the statute. *Id.*

As was the case with the statute in *Household Credit*, here, the ECOA is ambiguous on the precise question at issue. And when we turn to the agency's interpretation—Regulation B—as in *Household Credit*, that regulation is not "manifestly contrary to the statute." *Id.* Rather, as in *Household Credit*, it furthers one of the "primary goals" of the statute, *see id.* at 243, as I have explained.

Finally, turning to *Director, Office of Workers' Compensation Programs, Department of Labor v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122 (1995), which the Majority Opinion suggests "ridiculed" the remedial-purpose doctrine and rendered it no longer good law, Maj. Op. at 21 (citing *Newport News*, 514 U.S. at 135), that's not an accurate description of that case. Rather, the Court

ridiculed the petitioner's attempt to rely on the doctrine in that case, when the Court was not even analyzing a remedial statute. In fact, the Court discussed—at some length—that the statute's "goal" was not clear. *See id.* at 131. Not only did the Court not invalidate the remedial-purpose doctrine, the Court recognized that the principle of construing any statute broadly to achieve its purposes could be invoked "in case of ambiguity," *id.* at 135, which I submit is the case here. And finally, the Court in *Newport News* went on to construe the statute at issue "as liberally as can be." *Id.* at 136.

But you don't have to take it from me; you can take it from the Court itself. Seven years after issuing *Newport News*, the Supreme Court unanimously applied the remedial-purpose doctrine in *S.E.C. v. Zandford*, 535 U.S. 813, 819 (2002) ("[W]e have explained that [Section 10(b) of the Securities Exchange Act] should be construed not technically and restrictively, but flexibly to effectuate its remedial purposes.") (citation and internal quotation marks omitted).

Instead of addressing the substance of this argument on the remedial-purpose doctrine and *Dolan*'s instruction that "[a] word in a statute may or may not extend to the outer limits of its definitional possibilities," 546 U.S. at 486, the Majority Opinion accuses this dissent of engaging in "hornbook abuse of the whole-text canon" and mischaracterizes my argument as "since the overall purpose of the statute

is to achieve *x*, any interpretation of the text that limits the achieving of *x* must be disfavored." Maj. Op. at 20.

But it's not that the Majority Opinion's interpretation of "applicant" "limits the achieving" of the ECOA's purpose of disentangling spouses' financial fortunes, *see* Senate Rpt. at 16–17;[21] it's that it is antithetical to that reason for the ECOA.

The guarantor spouse often suffers a unique economic injury that the primary debtor spouse does not. Say the creditor refuses to extend the loan unless the wife guarantees it, so the wife agrees to do so. But the husband—the direct debtor—may have no complaints, since he received the loan he was after. And even if he did, he may well not have economic damages to assert in a lawsuit. *See, e.g.*, *Mayes*, 167 F.3d at 678 ("[The husband] has no claim for damages or injunctive relief under ECOA for harm done to his wife. If anyone was injured by requiring [the wife] to sign the guarantee, it was she and not [the husband], who after all received the loan he had sought."). Without the potential for redress, he would lack standing.

By contrast, the wife who guaranteed the loan may have a separate injury stemming from the fact that her credit score is likely lower because she agreed to be secondarily liable for the loan. *See* Mechel Glass, Equifax, *Should I Co-Sign On a Loan for a Family Member?*, *available* https://blog.equifax.com/tag/credit-

[21] *See also Mayes*, 167 F.3d at 676 (Congress also set out "to prevent loans from being conditioned automatically on the securing of the signature of the non-borrowing spouse.").

score/page/4/ (last visited Aug. 27, 2019). So she may have suffered an injury if she sought credit and was unable to obtain it, or if any credit she did receive either was more limited or bore a higher interest rate than it would have had she not been required to guaranty her husband's loan. Yet construing "applicants" to exclude guarantors would mean nobody in this scenario would have standing to pursue the creditor's flagrant violation of the ECOA.

And worse yet, allowing lenders to, with impunity, require wives to guaranty their husbands' debts actually creates the same financial intertwinement problems that arose when lenders demanded that women like Billie Jean King obtain their husbands' guaranties before lenders would extend credit to them. In both cases, the wives' credit is forever tied to the husbands' credit fortunes.

As a result, guaranteeing the husband's loan can "negatively impact [the wife's] credit report and creditworthiness," since guaranteeing a loan shows up on credit reports immediately. Glass, *supra*, at 26. And if the husband "miss[es] payments or default[s] on the loan, [the wife's] credit reports will show the delinquencies," ruining her credit history and ability to secure future credit. TransUnion, *The Benefits & Issues of Co-Signing a Loan*, *available at* http://www.transunion.com/personal-credit/credit-issues-bad-credit/cosigning-a-loan.page (last visited Aug. 27, 2019).

So far from "'open[ing] vistas of liability' that Congress did not envision," Maj. Op. at 24 (quoting *Moran Foods, Inc. v. Mid-Atl. Market Dev. Co., LLC*, 476 F.3d 436, 441 (7th Cir. 2007)), construing "applicants" to include guarantors actually effectuates Congress's goal of disentangling spouses' credit. In contrast, the interpretation the Majority Opinion and the Eighth Circuit in *Hawkins* offer creates the very entanglement of spouses' credit Congress sought to eradicate. That Congress would have prohibited one form of enforced credit entanglement and unworthiness only to allow another to fully replace it makes about as much sense as ice-hockey cleats. *See W. Air Lines, Inc. v. Bd. of Equalization*, 480 U.S. 123, 133 (1987) ("[I]llogical results . . . argue strongly against the conclusion that Congress intended" a particular statutory construction).

The Majority Opinion's reliance on Judge Colloton's *Hawkins* concurrence—where Judge Colloton argued that the word "application" should have only one meaning throughout the ECOA—is similarly misplaced. Maj. Op. at 14–16. I understand Judge Colloton's concern. After all, we "ordinarily assume[] that identical words used in different parts of the same act are intended to have the same meaning." *Utility Air Reg. Grp. v. E.P.A.*, 573 U.S. 302, 319-20 (2014) (citations omitted). But that assumption is not absolute. It "readily yields whenever there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different

intent." *Atl. Cleaners & Dyers v. United States*, 286 U.S. 427, 433 (1932); *see also Yates v. United States*, 135 S. Ct. 1074, 1082 (2015) ("In law as in life . . . the same words, placed in different contexts, sometimes mean different things."). This is one of those times, or else the ECOA ensures the existence of the very problem it seeks to eliminate.

Even assuming some parts of the ECOA suggest—or even require—a narrow interpretation of the word "applicant," that does not mean that the term as used in 15 U.S.C. § 1691(a)(1) must be similarly construed, since "a characterization fitting in certain contexts may be unsuitable in others." *See NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 262 (1995). For instance, to make his point, Judge Colloton primarily invokes 15 U.S.C. § 1691(d), titled, "Reason for adverse action; procedure applicable; 'adverse action' defined." That subsection articulates what happens when a lender denies or revokes credit to a debtor. It therefore makes sense that it applies to the person who would have received or actually received the loan.

Section 1691(a), on the other hand, is the statute's vehicle for proscribing discrimination on the basis of marital status. By both its terms and its function, it has broader application than the provisions to which Judge Colloton points. *Cf. Atl. Cleaners*, 286 U.S. at 435 ("A consideration of the history [of the ECOA] . . . sanctions the conclusion that Congress meant to deal comprehensively and

effectively with the evils resulting" from discrimination). Indeed, it directly effects Congress's purposes in enacting the ECOA in the first place—preventing credit discrimination on the basis of marital status and allowing spouses to disentangle their credit from one another. And its text, as I have noted, makes it applicable to "***any*** aspect" of a credit transaction.

That Judge Colton's citations are exclusively to other provisions of 15 U.S.C. § 1691 does not change this fact. *See Hawkins*, 761 F.3d at 943–44 (Colloton, J., concurring). "Most words have different shades of meaning and consequently may be variously construed, not only when they occur in different statutes, but when used more than once in the same statute *or even in the same section*." *Envtl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 574 (2007) (emphasis added) (citation and alteration omitted); *accord Gen. Dynamics*, 540 U.S. at 595-97 ("age" has different meanings in 29 U.S.C. § 623(a) and § 623(f) of the Age Discrimination in Employment Act of 1967); *Robinson*, 519 U.S. at 342–43 ("employee" has different meanings in different parts of 42 U.S.C. § 2000e–16(b) of Title VII of the Civil Rights Act of 1964); *see also Wachovia Bank, N.A. v. Schmidt*, 546 U.S. 303, 313–14 (2006) ("located" has different meanings in different sections of the National Bank Act).

But even if we were to hold that the term "applicant" as used throughout the statute includes guarantors, that is a better answer than the Majority Opinion's conclusion. Judge Colloton's examples suggest that such an interpretation could

create unexpected benefits for guarantors. That is preferable to gutting the statute's reason for being. The Majority Opinion's interpretation does not simply "limit[] the achieving" of what Congress sought with the ECOA, Maj. Op. at 20 (citation omitted); as I have explained, it "would be destructive of [the law's] purpose. . . ." *Robinson*, 519 U.S. at 346.

So the Majority Opinion's analysis cannot carry the day. "[T]he overriding national policy against discrimination that underlies the [ECOA]" means that "we cannot give" words in that statute a "narrow interpretation." *Bros. v. First Leasing*, 724 F.2d 789, 793 (9th Cir. 1984). Instead, we must "construe the literal language of the ECOA in light of the clear, strong purpose evidenced by the Act and adopt an interpretation that will serve to effectuate that purpose." *Id.*; *see also United States v. Am. Trucking Ass'ns*, 310 U.S. 534, 543 (1940) ("[W]hen the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole[,]' this Court has followed that purpose, rather than the literal words.") (citation omitted). Considering Congress's remedial purposes in enacting the ECOA, as well as that the many definitions of "applicant" do not exclude the possibility that an "applicant" includes a guarantor, we must conclude that Congress's employment of the term "applicant" is ambiguous with respect to whether it covers guarantors. For this reason, we must conduct a *Chevron*

analysis of the Federal Reserve's answer to our question of whether the ECOA includes guarantors within the definition of "applicants."

C.

Under *Chevron*, "we may not disturb an agency rule unless it is 'arbitrary or capricious in substance, or manifestly contrary to the statute.'" *Mayo Found. for Med. Educ. & Res. v. United States*, 562 U.S. 44, 53 (2011) (quoting *Pfennig*, 541 U.S. at 242). At bottom, then, we must ask whether the Federal Reserve's inclusion of guarantors in the ECOA's definition of "applicant" is a "reasonable interpretation" of the ECOA's text. *Chevron*, 467 U.S. at 844. The Federal Reserve's interpretation is reasonable for at least three reasons: it accords with the ECOA's text; it furthers a primary purpose of the ECOA; and, Congress has tacitly approved of the Federal Reserve's interpretation.

1. <u>The Federal Reserve's inclusion of guarantors within the meaning of "applicants" is consistent with the ECOA's text.</u>

First, guarantors fit within the plain meaning of "applicants." As I have noted, leading authorities recognize that guarantors apply to the creditor by asking it to extend credit to the primary debtor. *See supra* at 63.

The Majority Opinion's conclusion to the contrary rests on its premise that "[a]lthough a guarantor makes a promise related to an applicant's request for credit, the guaranty is not itself a request for credit." Maj. Op. at 12. But the Majority Opinion offers no support (beyond the Eighth Circuit's erroneous conclusion in

Hawkins) for the notion that the guarantor is not requesting that the creditor extend credit to the primary borrower. Not a treatise. Not an industry source. Not another statute. Not a dictionary. Not even something from the remote reaches of the internet. Instead, the Majority Opinion relies on its own understanding of credit markets.

But the Majority Opinion's own view—regardless of how learned and reasonable—of how terms are used in credit markets, does not control if the agency's interpretation is also reasonable. Indeed, "[t]he reviewing court may not substitute its judgment for that of the agency but must, instead, defer to the agency's technical expertise" if its interpretation is within the range of reasonableness. *Miami-Dade Cty. v. E.P.A.*, 529 F.3d 1049, 1065 (11th Cir. 2008) (citation and quotation marks omitted). And here, as I have noted, leading treatises and industry sources recognize that guarantors request credit. *See supra* at 63. Since the Federal Reserve's interpretation of the text is reasonable—not to mention well-supported—we must defer to it.

2. <u>The Federal Reserve's inclusion of guarantors within the meaning of "applicants" is consistent with primary purposes of the ECOA.</u>

Second, the Federal Reserve's interpretation is reasonable because covering "guarantors" fits squarely within the wheelhouse of the ECOA's aims. As I have noted, in enacting the ECOA, Congress sought to disentangle sex and marital status from credit. *See* Senate Rpt. at 16–17. Congress also set out "to prevent loans from

being conditioned automatically on the securing of the signature of the non-borrowing spouse." *Mayes*, 167 F.3d at 676.

The Federal Reserve's interpretation accounts for and respects these primary goals of the ECOA. But not including guarantors within the definition of "applicants" yanks the teeth out of the ECOA. *See supra* at 71–73.

3. The Federal Reserve's inclusion of guarantors within the meaning of "applicants" is consistent with congressional abstention from amending the ECOA to preclude that interpretation, despite Congress's other amendments to the ECOA.

Third, the Federal Reserve's interpretation of "applicants" to include guarantors is reasonable, in view of congressional action on the ECOA since its enactment in 1974. The Supreme Court has instructed us to tread lightly where Congress has amended a statute but declined to disturb the agency's interpretation.

For instance, in *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507 (2015), the Court considered whether the statutory language authorized disparate-impact claims under the Fair Housing Act. In conducting its analysis, the Court found it significant that Congress declined to alter the language at issue to preclude such claims, even though Congress had amended the statute after several Circuits had determined that the statute authorized such claims. *Id.* at 2519. Congress's inaction, the Court explained, was "convincing support for the conclusion that Congress accepted and ratified the unanimous holdings of the Courts of Appeals finding disparate-impact liability." *Id.*

at 2520; *see also Gen. Dynamics*, 540 U.S. at 593–94 & n.6 (noting that the two federal appellate courts and nearly all the district courts to consider the issue held that the Age Discrimination in Employment Act of 1967 did not prohibit favoring older employees over younger ones: "The very strength of this consensus is enough to rule out any serious claim of ambiguity, and congressional silence after years of judicial interpretation supports adherence to the traditional view.").

Here, Congress has tinkered with the ECOA no fewer than three times since 1985, when the Federal Reserve began construing the ECOA to include guarantors within the term "applicants." *See, e.g.*, Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, §§ 1071, 1474, 124 Stat. 1376, 2056–57, 2199–2200 (2010); Omnibus Consolidated Appropriation Act, 1997, Pub. L. 104-208, § 2302, 110 Stat. 3009 (1996); Federal Deposit Insurance Corporation Improvement Act of 1991, Pub. L. 102-242, §§ 212(d), 223, 105 Stat. 2236 (1991).

And up until 2014, when the Eighth Circuit issued *Hawkins*, the "vast majority of courts" that examined the issue found that guarantors had standing under the ECOA. *See RL BB*, 754 F.3d at 386. True, as the Majority Opinion notes, many of the cases deciding this issue offered little reasoning for their decisions. Maj. Op. at 25–26. But the Supreme Court does not require otherwise. While the Court acknowledged the judicial consensus of the interpretation of the Fair Housing Act in *Texas Department of Housing*, contrary to the Majority Opinion's characterization,

it did not require the lower courts' decisions to be "reasoned." Maj. Op. at 26. It noted simply that the courts that had "addressed" the issue had consistently come out the same way. *Tex. Dep't of Hous.*, 135 S. Ct. at 2519. And most of the cases the Court referenced were *not* particularly well-reasoned; they just adopted what other circuits had done. *See, e.g.*, *Hanson v. Veterans Admin.*, 800 F.2d 1381, 1386 (5th Cir. 1986) (noting and adopting analysis from other circuits that Fair Housing Act violations can be proven with a showing of discriminatory effect); *Arthur v. City of Toledo, Ohio*, 782 F.2d 565, 574–75 (6th Cir. 1986) (same); *United States v. Marengo Cty. Comm'n*, 731 F.2d 1546, 1559, n.20 (11th Cir. 1984) (same); *Smith v. Town of Clarkton, N.C.*, 682 F.2d 1055, 1065 (4th Cir. 1982) (same); *Halet v. Wend Inv. Co.*, 672 F.2d 1305, 1311 (9th Cir. 1982) (same).

The more important point, though, is that Congress has long been on notice as to how federal courts have interpreted the ECOA and Regulation B. And with that knowledge in hand, Congress amended the law multiple times and never considered tweaking the ECOA to abrogate these courts' approval of the Federal Reserve's interpretation. Even after the Seventh Circuit issued *Moran*, in which a Court of Appeals—for the first time—voiced doubts in dicta about the Federal Reserve's interpretation, Congress left the ECOA's definition of "applicant" the same, even though it substantively amended the ECOA three years later, in 2010. So Congress declined to take the Seventh Circuit up on its invitation to cap the

supposed "vistas of liability" that the Seventh Circuit concluded Congress was "unlikely to accept." *Moran*, 476 F.3d at 441. Congressional inaction on this point in the face of thirty years of uniformity "supports adherence to the traditional view," *Gen. Dynamics*, 540 U.S. at 594, that the Federal Reserve's inclusion of guarantors within the term "applicants" is valid.

III.

We should dismiss this case because it is not properly before us. The Majority Opinion's insistence on "resolving" a claim that no Appellant has presented to us renders its discussion of the ECOA unnecessary. But because that discussion incorrectly purports to truncate the ECOA's broad reach, it leaves me no choice but to respond. Unfortunately, the Majority Opinion's analysis artificially limits the definitions of "applicant" and "guaranty"; it conflicts with congressional aims in enacting the ECOA; and it is rebutted by Congress's failure to amend the ECOA to make guarantors fall outside the meaning of "applicants," in the 34 years since the Federal Reserve has construed the term "applicants" to include guarantors. Ultimately, the Majority Opinion's interpretation of the ECOA ironically allows lenders to get away with discriminating on the basis of sex or marital status, the very thing the ECOA meant to eliminate. I therefore respectfully dissent.

Appendix A

DOCKET NO. 17-11736

United States Court of Appeals

for the

Eleventh Circuit

REGIONS BANK, an Alabama state chartered bank,

Plaintiff/Appellee,

v.

LEGAL OUTSOURCE PA, a Florida professional association; PERIWINKLE PARTNERS, LLC, a Florida limited liability company; CHARLES PT PHOENIX, individually, a.k.a. Charles PT Phoenix; LISA M. PHOENIX, individually,

Defendants/Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
CASE NO: 2:14-cv-00476-PAM-MRM
(Hon. Paul A. Magnuson)

INITIAL BRIEF OF APPELLANTS

JOHN M. DUGGAN
DERON A. ANLIKER
JAY T. SHADWICK
DUGGAN SHADWICK DOERR & KURLBAUM LLC
11040 Oakmont Street
Overland Park, KS 66210
(913) 498-3536

CHARLES PT PHOENIX
RHODES TUCKER PHOENIX
2407 Periwinkle Way, Suite 6
Sanibel, FL 33957
(239) 472-1144

JASON W. GRAHAM
GRAHAM & JENSEN, LLP
17 Executive Park Drive, Suite 115
Atlanta, GA 30329
(404) 842-9380

Counsel for Plaintiff/Appellant

Counsel Press (804) 648-3664 * (800) 275-0668

STATEMENT OF THE ISSUES

1. As a fundamental issue of procedural due process, can a district court enter blanket judgment against all parties on all counts in a complaint when the plaintiff sued a particular defendant, for example, on only one (1) of the six (6) alleged claims?
2. Were there genuine disputes on issues of material fact precluding summary judgment where the district court finds that the defendants "do not dispute that they were in default under the relevant notes and guaranties" despite the presentation of conflicting evidence on each material issue?
3. If a lender's initial acceleration of a mortgage is wrongful, and hence a breach of the mortgage note, is the borrower excused from further performance until after the wrongfully accelerated note is decelerated and the borrower is permitted to resume normal payments?
4. Does a wife who refuses to collateralize loans or guaranty her husband's unsecured business debt have Equal Credit Opportunity Act (ECOA) standing as an "applicant" to sue if the lender then forces over a dozen technical defaults as pretense to falsely accelerate and foreclose on her separate secured loan?
5. If Congress did not precisely answer whether "applicant with respect to any aspect of a credit transaction" includes persons liable for the applied-for loan

as guarantors, did the Federal Reserve Board have authority under ECOA to include by regulation spousal guarantors as "applicants" to further the purposes of eliminating discrimination against married persons?

inspecting the public records available on the Lee County (Florida) Tax Collector's website.

V. Equal Credit Opportunity Act

In a dizzying effort to substantiate dismissing Lisa Phoenix's and Periwinkle's claims, the District Court relied exclusively on the Eighth Circuit's ruling in *Hawkins v. Community Bank of Raymore*, 761 F.3d 937 (8th Cir. 2014) which stated that "[i]f [the spouses] do not qualify as applicants, then [the lender] did not violate the ECOA" Stated differently, even though ECOA and Regulation B prohibit requiring spouses to collateralize, co-sign, or guaranty debts, Regions asserts that lenders are not liable because the persons required to collateralize or co-sign the debts cannot sue.

In short, according to the District Court, the ECOA and Regulation B spousal discrimination prohibition, which has remained unchallenged for over forty years, is now a nullity. According to the District Court, *Hawkins* grants lenders an untethered license to require spouses to collateralize and sign for their husbands' loans with impunity.

This flawed reading of the ECOA eviscerates the black letter principle that illegal contracts are unenforceable. *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 78 (1982); *Silverman v. Eastrich Multiple Investor Fund, L.P.*, 51 F.3d 28, 33 (3rd Cir. 1995); *United States v. Meadors*, 753 F.2d 590, 593 (7th Cir. 1985); *Kline*,

782 N.W.2d at 461; *Eure*, 448 S.E.2d at 419; *Boone*, 47 S.W.3d at 375; *King v. Moorehead*, 495 S.W.2d 65, 77 (Mo. Ct. App. 1973). If the District Court is upheld, persons being sued in federal court to enforce illegal guaranties violating ECOA cannot defend against the illegal guaranties' enforcement anda guarantor is not protected from marital-status discrimination by the ECOA even though the contract violates the its signature prohibitions.

Congress expressly delegated authority to the FRB to "prescribe regulations" that "in the judgment of the [FRB] are necessary or proper to effectuate the purposes" of ECOA, "to prevent circumvention or evasion thereof, or to facilitate or substantiate compliance therewith." 15 U.S.C. § 1691b(a). It is well-settled that the agency's interpretation of the statute it is charged to administer is entitled to great deference. In Regulation B's forty years, Congress has not amended this spousal guaranty prohibition. In fact, Congress amended ECOA in 2010, reaffirming that FRB regulations carry the force of law. 15 U.S.C. § 1691a(g) ("Any reference to any requirement imposed under this subchapter or any provision thereof includes reference to the regulations of the Bureau under this subchapter or the provision thereof in question.").The Supreme Court has concluded that "congressional failure to revise or repeal the agency's [statutory] interpretation is persuasive evidence that the interpretation is the one intended by Congress." *Young v. Cmty. Nutrition Inst.*, 476 U.S. 974, 983 (1986) (quoting

N.L.R.B. v. Bell Aerospace, Co., 416 U.S. 267, 275 (1974)). Here, Regions has not challenged the FRB's § 202.7(d) prohibition against requiring spouses to collateralize, co-sign, or guaranty debts. Indeed, the Eighth Circuit did not consider the FRB's authority under § 202.7(d) either. *See, generally, Hawkins*, 761 F.3d 937. Other courts have universally acknowledged this valid spousal signature prohibition. *RL BB Acquisition*, 754 F.3d at 383; *Silverman*, 51 F.3d at 33; *Kline*, 782 N.W.2d at 458-62; *Boone*, 47 S.W.3d at 373-75.

Lisa Phoenix and Periwinkle claim Regions required them to sign for and collateralize her husband's business debts hence violating ECOA prohibitions. These claims fall squarely within ECOA's protections.

CONCLUSION

As this Court should be able to discern from the foregoing, the district court denied Appellants their right to a trial on disputed facts – even a bench trial – by effectively bench trying the case on motions. The district court resolved disputed issues of material fact in favor of the movant Appellee without giving the standard deference to the non-movant. The clearest error was the awarding of unrequested relief against parties to which said relief did not even apply. The district court ignored conflicting evidence submitted by Appellants in opposition to summary judgment. Despite acknowledging the technical nature of the purported

Supreme Court of Florida

No. SC19-185

IN RE: STANDARD JURY INSTRUCTIONS IN CIVIL CASES AND STANDARD JURY INSTRUCTIONS IN CONTRACT AND BUSINESS CASES—JOINT REPORT NO. 19-01.

August 29, 2019

PER CURIAM.

The Supreme Court Committee on Standard Jury Instructions in Civil Cases and the Supreme Court Committee on Standard Jury Instructions in Contract and Business Cases (Committees) have submitted a proposed new model verdict form to be included in section 451 of their respective sets of standard jury instructions pertaining to Fiduciary Duty and ask that the Court authorize the proposed verdict form for publication and use. This Court has jurisdiction. *See* art. V, § 2(a), Fla. Const.

The Committees propose new verdict form 451.14 (Model Form of Verdict for Breach of Fiduciary Duty) to accompany instructions 451.4 (Existence of Fiduciary Duty Disputed) and 451.5 (Breach of Fiduciary Duty). The Committees

published the proposed verdict form in the September 1, 2018, issue of *The Florida Bar News*. No comments were received.

Having considered the Committees' joint report and joint supplemental report, we modify the proposed verdict form and authorize the modified form for publication and use. The Court modifies question one of the Committees' proposed verdict form to more closely track instruction 451.4 (Existence of Fiduciary Duty Disputed), which instructs the jury regarding the factual question of whether a fiduciary relationship has been established. *See Gracey v. Eaker*, 837 So. 2d 348, 354 nn.7, 9 (Fla. 2002) ("The existence, *vel non*, of a duty is a question of law and is appropriate for an appellate court to review. . . . [Whether] a fiduciary relationship was formed [is a] determination[] . . . for the finder of fact to make at trial.").

Having considered the Committees' reports, the Court authorizes the verdict form, as modified and as set forth in the appendix to this opinion, for publication and use. New language is indicated by underlining. In authorizing the publication and use of this verdict form, the Court expresses no opinion on its correctness and reminds all interested parties that this authorization forecloses neither requesting an additional or alternative verdict form nor contesting the legal correctness of the verdict form. The Court further cautions all interested parties that any Notes on Use associated with the proposed verdict form reflect only the opinion of the

Committees and are not necessarily indicative of the views of this Court as to their correctness or applicability. The verdict form as set forth in the appendix shall be effective when this opinion becomes final.

It is so ordered.

CANADY, C.J., and POLSTON, LABARGA, LAWSON, LAGOA, LUCK, and MUÑIZ, JJ., concur.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

Original Proceeding – Supreme Court Committee on Standard Jury Instructions — Civil Cases and Contract and Business Cases

Honorable Paul Lee Huey, Chair, Supreme Court Committee on Standard Jury Instructions in Contract and Business Cases, Tampa, Florida; Laura K. Whitmore, Chair, Tampa, Florida, and Jeffrey Alan Cohen, Vice Chair and Subcommittee Chair, Supreme Court Committee on Standard Jury Instructions in Civil Cases, Miami, Florida; and Joshua E. Doyle, Executive Director, Mikalla Andies Davis and Heather Savage Telfer, Bar Liaisons, The Florida Bar, Tallahassee, Florida,

for Petitioner

APPENDIX

FORM 451.14 MODEL FORM OF VERDICT FOR BREACH OF FIDUCIARY DUTY

We, the jury, return the following verdict:

1. Did a relationship exist between (claimant) **and** (defendant) **in which** (claimant) **put [his] [her] [its] trust in** (defendant) **to protect** (claimant's) **[financial or property interests] [secrets] [confidences] [private information] and** (defendant) **accepted that trust?**

YES _____ NO _____

If your answer to question 1 is YES, proceed to question 2. If your answer to question 1 is NO, your verdict is for (defendant) **on this claim, and you should not proceed further except to date and sign this verdict form and return it to the courtroom.**

2. Did (defendant) **breach a fiduciary duty owed to** (claimant) **that was a legal cause of damage to** (claimant)**?**

YES _____ NO _____

If your answer to question 2 is YES, your verdict is for (claimant) **on this claim, and you should proceed to question 3. If your answer to question 2 is NO, your verdict is for** (defendant) **on this claim, and you should not proceed further except to date and sign this verdict form and return it to the courtroom.**

3. What is the total amount of damage sustained by (claimant)**?** **$ _____.**

SO SAY WE ALL, this _____ day of _____, 2_____.

_____

FOREPERSON

NOTE ON USE FOR FORM 451.14

1. Question 1 should be given only if necessary. If there is no dispute as to existence of the fiduciary duty, question 1 should not be given.

FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D17-2996

ATKINS NORTH AMERICA, INC.,

Appellant,

v.

TALLAHASSEE MH PARKS, LLC
and TALLAHASSEE REAL ESTATE
HOLDINGS, LLC,

Appellees.

On appeal from the Circuit Court for Leon County.
Karen A. Gievers, Judge.

August 29, 2019

KELSEY, J.

Atkins North America appeals a final judgment foreclosing three mortgages held by Tallahassee MH Parks (TMHP) as assignee of the original mortgagee. Atkins is a lienholder with a recorded money judgment against the mortgagor, Tallahassee Real Estate Holdings (TREH). Atkins raises four issues on appeal, one of which we affirm with no further comment. We reverse because we find merit in the other three issues: the mortgage reformation improperly prejudiced Atkins's rights; the amount of the debt was not supported by competent, substantial evidence; and the amount of the debt and corresponding bid credit incorrectly included funds on which the evidence failed to prove the payment of required intangible and documentary stamp taxes.

Facts

In 2005, TREH obtained three loans from Farmers & Merchants Bank to buy three "crime-ridden mobile home parks with a plan to turn them into affordable housing communities," in the words of TREH's manager and now sole member, Daniel Manausa. The loans were memorialized in three separate notes and secured with three mortgages.

In 2009, Atkins obtained and recorded a final money judgment against TREH for services Atkins provided in the first apartment project, which turned out to be the only one that was completed. Every year from 2006 through 2012, one or more of the notes was renewed; and although there were sporadic capital payments or other decreases in principal, the principal amount of each note was increased at least once and up to three times. In 2013, the bank consolidated the three original notes into two new notes. In 2015, the bank assigned its interests in the new notes and the original mortgages to TMHP.

In 2016, TMHP filed a foreclosure action and asked the court to reform one of the mortgages to include a parcel, Lot 45, that allegedly was omitted from the original mortgage description by mutual mistake of the original parties, TREH and the bank. The foreclosure complaint identified nine persons or entities with recorded liens against the mortgaged properties, but TMHP claimed its interests were superior to the claims of all other lienholders. Atkins was the only defendant that answered the complaint. It denied that its lien was inferior.

At the bench trial, no representative of the bank testified. Mr. Manausa was the sole witness. He testified in support of the mortgage reformation claim that the original parties, TREH and the bank, had intended to add another parcel of land, Lot 45, under one of the mortgages as additional security, but by mutual mistake had failed to document the intention. Over Atkins's objection due to its being prejudiced by such a retroactive modification of the mortgage, the trial court granted reformation.

Regarding the total amount due at foreclosure, Mr. Manausa deferred to the loan documents themselves and a loan summary document created by TMHP. Those documents reflected the

principal balance as of the loan consolidation, but not the balance due at foreclosure. The trial court nevertheless set the amount of damages at the unpaid balance of the three original notes on the date they were consolidated in the two successor notes.

With respect to whether intangible and documentary stamp taxes were paid on all new money, Mr. Manausa admitted that his personal knowledge was limited, and deferred to the loan documents, which he authenticated. He testified that he believed the bank lent TREH new money only twice, and all required taxes were paid; and that any other principal advances were used to pay property taxes or insurance, on which no taxes were due.

The loan documents, however, flatly contradict this testimony. The documents show that the notes were renewed multiple times, and additional principal was advanced in connection with at least six of those renewals. However, none of the advances was designated for tax-exempt payment of taxes or insurance on the properties. On the contrary, two advances were for renovations, one was to rezone twenty-five acres for apartments, and another was for "seven new units." Although any tax payments would be evidenced on the documents themselves, the record shows taxes were paid only on the original loan amounts and two—but not all—subsequent principal advances.

Analysis

Atkins first claims the court erred when it reformed one of the mortgages, because the reformation prejudiced legal rights Atkins obtained through its pre-reformation money judgment. Second, Atkins claims the record lacked sufficient evidence to support the amount the court determined to be owed on the notes. Third, Atkins claims the judgment is void because TMHP failed to pay required documentary stamp taxes on the notes. We will discuss the issues in turn, beginning with the mortgage reformation.

The Mortgage Reformation

We reverse as to the effect of the mortgage reformation on Atkins's interests. A mortgage reformation is an equitable remedy within the court's sound discretion. *See Pendelton v. Witcoski*, 836 So. 2d 1025, 1025 (Fla. 1st DCA 2002) (holding the equitable

remedy of rescission was "within the sound discretion of the trial court"); *Bevis Constr. Co. v. Grace*, 134 So. 2d 516, 519 (Fla. 1st DCA 1961) (describing a mortgage reformation as an equitable remedy).

A mortgage can be reformed to conform to the parties' original intent, and that reformation generally relates back, but with an important limitation: reformation cannot prejudice a person or entity that had acquired legal rights before the reformation occurs. *See Straight's Tr. v. Comm'r of Internal Revenue*, 245 F.2d 327, 329 (8th Cir. 1957) ("The broad rule as to the effect of a reformation decree is that it relates back to the date of the instrument reformed and is binding upon all except bona fide purchasers without notice 'and those standing in similar relations'[] - in short, covering those who have acquired some legal rights which would be destroyed or injured by subsequent reformation nunc pro tunc.") (citation omitted); *accord Barlow v. Stevens*, 150 So. 245, 246 (Fla. 1933); *Whitice Bonding Agency, Inc. v. Levitz*, 559 So. 2d 755, 756 (Fla. 4th DCA 1990); *Burleson v. Brogdon*, 364 So. 2d 491, 494 (Fla. 1st DCA 1978). "The lien of a judgment creditor stands upon the precise footing of that of a purchaser in good faith, as against a mortgage with an incorrect description." *Whitice*, 559 So. 2d at 756.

Here, Atkins recorded its money judgment in 2009, and therefore it stands in the place of a purchaser in good faith regarding the later-reformed mortgage. The trial court abused its discretion when it reformed the mortgage and injured legal rights Atkins had obtained prior to the reformation, and therefore we reverse this aspect of the final judgment. Atkins has priority as to Lot 45.

The Sufficiency of the Evidence

We reverse as to balance due, because the trial court's findings are not supported by competent, substantial evidence. "It is axiomatic that the party seeking foreclosure must present sufficient evidence to prove the amount owed on the note." *Wolkoff v. Am. Home Mortg. Servicing, Inc.*, 153 So. 3d 280, 281 (Fla. 2d DCA 2014). Where a foreclosure is tried without a jury, a party may challenge the sufficiency of the evidence on direct appeal without having lodged a contemporaneous objection. *Id.* at 282 (quoting Fla. R. Civ. P. 1.530(e)). We review the court's findings to

determine whether they are supported by competent, substantial evidence. *Id.* at 283. Substantial evidence is "such relevant evidence as a reasonable mind would accept as adequate to support a conclusion." *De Groot v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957); *see also Gonci v. Panelfab Products, Inc.*, 179 So. 2d 856, 858 (Fla. 1965) (noting that competent, substantial evidence must comport with logic and reason). "[A]n essential finding or conclusion [based] solely on unreliable evidence should be held insufficient." *Fla. Rate Conference v. Fla. R. R. & Pub. Utils. Comm'n*, 108 So. 2d 601, 607 (Fla. 1959). Testimony that conflicts with valid documentary evidence is not legally sufficient to support findings or conclusions contrary to the documentary evidence. *Cf. Wiggins v. Fla. Dep't of High. Saf. & Motor Veh.*, 209 So. 3d 1165, 1166 (Fla. 2017) (holding findings based on testimony were not supported by sufficient evidence because the testimony was "totally contradicted and . . . refuted by video evidence"). We cannot accept trial court findings based on clearly unreliable evidence. *See id.* at 1172.

Mr. Manausa authenticated the loan documents and attested to their accuracy, and the documents were admitted into evidence. His testimony, although presented as being based on the loan documents, contradicts the documents in several respects. For instance, the final order states that according to Mr. Manausa's testimony "there had been no principal reduction in the balance due under [the original notes] after the last of the renewals or after those notes were consolidated into [the two successor notes]," but the loan documents clearly show that the outstanding principal balance on one of the successor notes was reduced twice in 2014. This reduction is also reflected in the plaintiff's loan summary sheet, which Mr. Manausa confirmed to be correct. The court's findings on the amount outstanding on the loans, which were based on Mr. Manausa's testimony, are contrary to the very documents on which Mr. Manausa relied. Therefore, his testimony cannot serve as sufficient evidence to support the trial court's finding on the balance due at consolidation, nor to support a finding of balance due at foreclosure. The loan documents must control to determine that issue, which must be quantified on remand.

Documentary Stamp Taxes

We reverse the trial court's finding that all required documentary stamp taxes were paid. Mr. Manausa testified that the bank only made two future principal advances to TREH, but the loan documents that he authenticated reference six advances. Because Mr. Manausa's testimony contradicts the very documents he authenticated and confirmed as accurate, his testimony does not constitute legally sufficient evidence on this issue. If the documentary evidence is correct, this may make at least portions of the outstanding balance unenforceable, which in turn would place Atkins in a priority position to the extent of the unenforceable portions of the debt. *See* § 201.08(1)(b); *Glenn Wright Homes (Delray) LLC v. Lowy*, 18 So. 3d 693, 696–97 (Fla. 4th DCA 2009); *Somma v. Metra Elecs. Corp.*, 727 So. 2d 302, 304 (Fla. 5th DCA 1999). However, because the trial court failed to make sufficient factual findings based on the documentary evidence, we are unable to resolve this issue.

In evidentiary proceedings on remand, the parties shall present competent documentary evidence establishing the dollar amount of new-money advances on which taxes were not paid prior to the foreclosure—which amounts are unenforceable as to Atkins and must be deducted from the debt and bid credit. The parties shall present competent documentary evidence proving the accurate enforceable amount due at foreclosure. Atkins shall have first priority as to Lot 45. The trial court shall determine the respective rights of the parties accordingly.

REVERSED and REMANDED.

LEWIS and M.K. THOMAS, JJ., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

Karl E. Pearson of Pearson Doyle Mohre & Pastis, LLP, Maitland, for Appellant.

James M. Durant, Jr. of Boyd & Durant, P.L., Tallahassee, for Appellee Tallahassee MH Parks, LLC; Kyle L. Shaw and Daniel E. Manausa of Manausa Law Firm, P.A., Tallahassee, for Appellee Tallahassee Real Estate Holdings, LLC.

FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D18-4815

SUZUKI MOTOR CORPORATION, a
foreign corporation,

Petitioner,

v.

SCOTT WINCKLER,

Respondent.

Petition for Writ of Certiorari—Original Jurisdiction.

August 29, 2019

OSTERHAUS, J.

Suzuki Motor Corporation seeks certiorari review of an order granting an application for a letter rogatory to take the examination of Mr. Osamu Suzuki, its current Chairman and former Chief Executive Officer. In the order, the trial court found that the "apex doctrine" does not apply outside the governmental context and that Mr. Suzuki was uniquely able to provide information relevant to this case. We deny the petition because the trial court's decision does not depart from the essential requirements of law.

I.

Scott Winckler's case alleges that on June 16, 2013, the brakes failed on his GSX-R series Suzuki motorcycle while he was riding

it. The bike crashed and paralyzed Mr. Winckler from the waist down. Four months after the accident, Suzuki Motor Corporation issued a recall on the brakes of its GSX-R series motorcycles.

Mr. Winckler filed a products liability suit against Suzuki Motor Corporation related to his accident and the brake issue. In the course of discovery, he sought a letter rogatory from the trial court seeking to take the examination of the Chairman of the Board of Suzuki Motor Corporation in Japan. *See* Fla. R. Civ. P. 1.300(b). Mr. Winckler's application stated that the Chairman "possesses unique knowledge about specific facts relevant to [the] allegations," citing the Chairman's involvement with a document addressing the brake issue and a related email.

Suzuki Motor Corporation filed objections to the application and a motion seeking protection under the apex doctrine. Its position was that its top-level corporate manager should not be subject to examination when others within the corporation could testify to the relevant issues.* It also filed a declaration from Chairman Suzuki in opposition to the application, stating that he has "no independent memory" of reviewing or signing the document regarding the brake issue and "no personal knowledge" of the details.

After a hearing in October 2018, the trial court granted the motion for a letter rogatory. It found that the apex doctrine hadn't been applied outside of the governmental context and couldn't be applied to the corporate officer here. Besides rejecting the apex doctrine, the court found that that the Chairman had personal involvement and could uniquely provide case-relevant information due to having personal involvement with the brake issue. After the trial court granted the application, this petition for writ of certiorari followed.

---

* Mr. Winckler's counsel deposed Suzuki Motor Corporation's corporate representative earlier this year but weren't satisfied with some of his answers.

II.

We review petitions for writ of certiorari for "(1) a departure from the essential requirements of the law, (2) resulting in material injury for the remainder of the case (3) that cannot be corrected on postjudgment appeal." *Citizens Prop. Ins. Corp. v. San Perdido Ass'n*, 104 So. 3d 344, 351 (Fla. 2012) (citations omitted). Our analysis focuses on the first prong—a departure from the essential requirements of the law. A departure from the essential requirements of the law is "a violation of a clearly established principle of law." *State v. Belvin*, 986 So. 2d 516, 525-26 (Fla. 2008) (quoting *Belvin v. State*, 922 So. 2d 1046, 1048 (Fla. 4th DCA 2006)).

Suzuki Motor Corporation argues that the trial court's order granting a letter rogatory violates the apex doctrine. The problem with its argument is that the doctrine is only clearly established in Florida in the government context, with respect to high-ranking government officials. The essence of Florida's apex doctrine is that "[an] *agency head* should not be subject to deposition, over objection, unless and until the opposing parties have exhausted other discovery and can demonstrate that the *agency head* is uniquely able to provide relevant information which cannot be obtained from other sources." *Dep't of Agric. & Consumer Servs. v. Broward Cty.*, 810 So. 2d 1056, 1058 (Fla. 1st DCA 2002) (emphasis added). "[A] party seeking to depose a . . . high-ranking *governmental official* must demonstrate the personal involvement of the official in a material way or the existence of extraordinary circumstances." *Horne v. Sch. Bd. of Miami-Dade County*, 901 So. 2d 238, 241 (Fla. 1st DCA 2005) (emphasis added). We highlight "agency head" and "governmental official" because we have noted before that "no Florida court has adopted the apex doctrine in the corporate context." *Fla. Office of Ins. Regulation v. Fla. Dep't of Fin. Servs.*, 159 So. 3d 945, 951 (Fla. 1st DCA 2015); *see also Remington Lodging & Hospitality, LLC v. Southernmost House, Ltd.*, 206 So. 3d 764, 765 n.1 (Fla. 3d DCA 2016). We emphasized in that case (though in dicta) "that the government context is distinguishable [from the corporate context] because of separation of powers concerns." *Id.* And so, it follows that because the apex doctrine hasn't been adopted in the corporate context, the trial court did not depart from the essential requirements of the

law by refusing to apply this doctrine to Suzuki Motor Corporation's corporate officer.

Moreover, trial court's decision that the Chairman's deposition was reasonably calculated to lead to the discovery of admissible evidence provides no basis for us to quash the order below. *See* Fla. R. Civ. P. 1.280(b)(1) (allowing a party to discover any matter that is not privileged and is relevant to the subject matter of the pending action or appears reasonably calculated to lead to the discovery of admissible evidence); *Univ. of W. Fla. Bd. of Trs. v. Habegger*, 125 So. 3d 323, 325 (Fla. 1st DCA 2013). In deciding whether to grant a writ of common-law certiorari, we are not so much concerned with "the mere existence of legal error as much as with the seriousness of the error." *Combs v. State*, 436 So. 2d 93, 95-96 (Fla. 1983). The district court should grant a petition "only when there has been a violation of a clearly established principle of law resulting in a miscarriage of justice." *Id.; see also Jones v. State*, 477 So. 2d 566, 569 (Fla. 1985) (Boyd, C.J., concurring specially) (noting that a "departure from the essential requirements of law . . . means an inherent illegality or irregularity, an abuse of judicial power, an act of judicial tyranny perpetrated with disregard of procedural requirements, resulting in a gross miscarriage of justice)." Here, we are mindful that trial courts have broad discretion in overseeing discovery and in protecting persons from whom discovery is sought. Fla. R. Civ. P. 1.280(c); *Rojas v. Ryder Truck Rental, Inc.*, 641 So. 2d 855, 857 (Fla. 1994). In this instance, the trial court's order cited specific evidence supporting its conclusion that the Chairman was personally involved with recall-related corporate documents and uniquely able to provide relevant information. *Cf. Remington Lodging & Hospitality*, 206 So. 3d 764; *Racetrac Petroleum v. Sewell*, 150 So. 3d 1247 (Fla. 3d DCA 2014). With documentary support underlying its ruling, we cannot conclude that this situation is like the *Habegger* and *General Star Indemnity Co. v. Atlantic Hospitality of Florida, LLC*, 57 So. 3d 238 (Fla. 3d DCA 2011), cases where trial courts departed from the essential requirements of law by allowing depositions of high officials that were not reasonably calculated to lead to the discovery of relevant evidence.

III.

The petition for writ of certiorari is DENIED.

ROWE, J., concurs; B.L. THOMAS, J., dissents with opinion.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

B.L. THOMAS, J., dissenting.

This case involves a tragic accident that resulted in catastrophic injuries. Nevertheless, I must respectfully dissent because the apex doctrine is and must be equally applicable in the private sector as it is in the governmental context. And even assuming the doctrine's basis in the governmental context is grounded in the separation of powers under article II, section 3 of the Florida Constitution, *see Fla. Office of Ins. Regulation v. Fla. Dept. of Financial Services*, 159 So. 3d 945, 952 (Fla. 1st DCA 2015), the abusive discovery allowed here has no basis in law or fact and under traditional rules of relevancy, extraordinary relief must be granted. Allowing discovery not meant to ferret out the truth, but designed to create settlement pressures, threatens the proper operation of the commercial enterprise for no legitimate factfinding purpose.

To answer the question by stating that the trial court's ruling cannot be a departure from law because no law recognizes the apex doctrine in the corporate context is no answer at all, *because otherwise the doctrine could never be applied.* That is precisely why Florida courts permit extraordinary review of improper discovery orders by writs of certiorari under Art. V, section 4(b)(3), Fla. Const.; Fla. R. App. P. 9.030 (b)(2)(A); *Allstate Ins. Co. v. Langston*, 655 So. 2d 91, 94-95 (Fla. 1995). Here, we should grant the writ and quash the order.

Respondents persuaded the lower court to allow for the issuance of letters rogatory to take the deposition of Osamu Suzuki, former Chief Executive Officer and current chairman of Suzuki Motor Corporation and resident of Japan. This petition involves a challenge to a one-page document, one of more than 250,000 pages of documents provided to Respondents, which provides a list of issues relevant to the suit involving a "GSX R series Front brake pressure loss."

Mr. Suzuki filed a "Declaration in Opposition to Plaintiff's Application for Letter Rogatory" under penalty of perjury pursuant to section 95.525, Florida Statutes, that he has "no independent memory" of signing the document. And he "cannot recollect [his signature] even after reviewing the document" which he signed more than five years before he filed the statement in opposition. Most significantly, actions by the "Quality Countermeasure Committee" involving the allegedly defective front-brake pressure could not be ordered, rejected, or modified by Mr. Suzuki. Finally, Mr. Suzuki stated, again under penalty of perjury, that he "did not prepare the document, and even what I might have known about it in 2013 would have been told to me by someone else in the Corporation. I would have had at that time *no personal knowledge of the details in that document*." (emphasis added.).

To keep this case in context, it must also be noted that plaintiffs deposed the Suzuki Motor Company's corporate representative for *three days*. It was not until Respondents amended their response to the petition before us that the court learned that this extensive discovery was purportedly unsatisfactory. Even more revealing, the Respondents have *failed to set a single* deposition of any member of the Quality Countermeasure Committee*, the sole body with the authority to decide what measures if any to take regarding the allegedly defective product part.*

To allow this unjustified deposition is to allow Respondents to disrupt the functions of the Petitioner for no legitimate reason. Mr. Suzuki is "involved in governmental affairs in various countries [in which Suzuki] does business including domestically, ongoing financial matters, exchange rate issues, expanding and enhancing the multiproduct line of [Suzuki] products domestically and internationally. Accordingly, he is "chronically busy with

important and business management issues as [Suzuki]'s Chairman, meeting with other [Suzuki] high level executives. . . on [a] regular basis, meeting with government officials and representatives from all countries around the world in which Suzuki does business, regular speaking engagements to industry and business groups, making public appearances representing Suzuki, and regular meeting with major corporate stockholders on the status of Suzuki business." Thus, if Mr. Suzuki is required to give testimony in this case, which would obviously result in being required to give testimony in hundreds of other cases, the deposition here would "substantially interfere with [his] job responsibilities as Chairman".

The trial court's order allowing this discovery abuse cited no justification other than "it is appropriate for Plaintiff to be granted an opportunity to discover from the Chairman, Mr. Suzuki, his perspective on the contents of the Document and Email." But in the face of sworn testimony that Mr. Suzuki has no recollection and had no authority to affect the decision regarding the recall or otherwise addressing the allegedly defective product, there can be only one logical conclusion: the discovery request of the top corporate chairman of a worldwide company with tens of thousands of employees who has provided an unrefuted statement of no involvement in the issue and a recitation of his extensive corporate leadership responsibilities can only be designed to harass and attempt to force a settlement to avoid significant corporate disruption. The trial court's order is thus a departure from the essential requirements of law for which Suzuki has no adequate remedy on appeal. *Horne v. School Bd. or Miami-Dade County*, 901 So. 2d 238 (Fla. 1st DCA 2005); *Dep't of Agric. & Consumer Servs. v. Broward Cty.*, 810 So. 2d 1056, 1058 (Fla. 1st DCA 2002).

In *Broward County,* this court applied the apex doctrine to prohibit the deposition of Agriculture Commission Charles Bronson in a rule-challenge proceeding. We said this:

> We agree with the department that the ALJ abused his discretion in denying the motion for protective order. In circumstances such as these, the agency head should not be subject to deposition, over objection, *unless and until the opposing parties have exhausted other discovery*

> *and can demonstrate that the agency head is uniquely able to provide relevant information which cannot be obtained from other sources*. To hold otherwise would, as argued by the department, *subject agency heads to being deposed in virtually every rule challenge proceeding, to the detriment of the efficient operation of the agency in particular and state government as a whole*.

810 So. 2d at 1058 (emphasis added).

We reiterated and reaffirmed the rule in *Horne v. School Bd. or Miami-Dade County*, 901 So. 2d 238 (Fla. 1st DCA 2005), when we applied the apex doctrine to *former* governmental officials. We noted that application would help ensure that qualified people do not seek elevated public positions for fear of post-public employment discovery entanglements.

In *Fla. Office of Ins. Regulation v. Fla. Dept. of Financial Services*, 159 So. 3d 945 (Fla. 1st DCA 2015), this court discussed the apex doctrine in more detail than in earlier cases and stated:

> The concern of setting such a precedent has been the foundation of this court's reasoning in cases in which it has precluded the deposition of agency heads. *See Univ. of W. Fla. Bd. of Trustees v. Habegger*, 125 So.3d 323, 325 (Fla. 1st DCA 2013), *review denied*, 143 So.3d 918 (Fla. 2014) ("[C]ompelling the deposition of President Bense in this context could have future widespread ramifications and subject her to depositions in numerous other employment disputes."); *Dep't of Agric.*, 810 So.2d at 1058 ("To hold otherwise would, as argued by the department, subject agency heads to being deposed in virtually every rule challenge proceeding, to the detriment of the efficient operation of the agency in particular and state government as a whole."). The time spent preparing and testifying in this case will take away from the Insurance Commissioner's duties and responsibilities as an agency head for the state of Florida, and the precedent served by compelling him to testify will create "a significant deterrent to qualified candidates seeking public service positions." *Horne*, 901 So.2d at 241. To allow an agency head to give speculative testimony concerning what

> might have been done with accurate information would constitute a serious intrusion into the executive branch of government.
>
> For the foregoing reasons, we find the circuit court's order compelling the Insurance Commissioner to appear for a deposition is a departure from the essential requirements of the law that will cause irreparable harm that cannot be remedied on appeal. *See Horne*, 901 So.2d at 240 ("Orders granting discovery requests have traditionally been reviewed by certiorari because once discovery is wrongfully granted, the complaining party is beyond relief.").

159 So. 3d at 952–53. This logic is clearly equally applicable in the corporate context albeit not based on Art. II, section three, Fla. Const.

To allow meritless discovery depositions of corporate leaders, who have provided sworn statements that they have no discoverable knowledge of the issue at hand, or that such information can be obtained from persons with less corporate responsibilities, is to allow illegitimate disruption in the private sector that is forbidden in the public sector. While the separation of powers certainly compels the application of the apex doctrine in the public sphere, *the rationale* of the doctrine is equally applicable in the private sphere: the courts cannot countenance unjustified discovery of lead corporate executives *for no legitimate reason*.

In *Florida Office of Insurance Regulation v. Florida Department of Financial Services*, we specifically stated we were *not* addressing the issue of whether it applied in the corporate context: "It is unnecessary for us to address whether the apex doctrine applies in the corporate context, and we specifically decline to do so in this opinion." 159 So. 3d at 951 n.3. (Our note that we need not address the question implies that the doctrine *could apply* in the corporate context). But we recognized that:

> Some state and federal courts refer to this doctrine as the "apex" doctrine, in the context of both high-ranking government and corporate officials. *See, e.g.*, *State ex rel. Massachusetts Mut. Life Ins. Co. v. Sanders*, 228 W.Va. 749, 724 S.E.2d 353, 363 (2012) (adopting the "apex"

> doctrine in the corporate context and noting that doctrine is "analogous to the approach this Court adopted for use when a party seeks to depose [a] high-ranking governmental official"); *Crown Cent. Petroleum Corp. v. Garcia*, 904 S.W.2d 125 (Tex.1995) (applying the "apex" doctrine to the deposition of a corporate officer).

159 So. 3d at 950–51.

Other state and federal courts have applied the apex doctrine in the corporate context. *Sun Capital Partners, Inc. v. Twin City Fire Ins. Co.*, 310 F.R.D. 523, 527-29 (S.D. Fla. 2015) (prohibiting deposition of corporate co-founders); *Alberto v. Toyota Motor Corp.*, 796 N.W. 2d 490, 497 (Mich. Ct. App. 2010) (prohibiting depositions of Toyota executives in products-liability case where executives possessed no more than "generalized knowledge of Toyota's unintended acceleration problems"); *State ex rel. Mass. Mut. Life Ins. Co. v. Sanders*, 724 S.E.2d 353, 364 (W. Va. 2012) (cited above); *Liberty Mut. Ins. Co. v. Superior Court*, 13 Cal. Rptr. 2d 363, 367-68 (Cal. Ct. App. 1992) (adopting apex doctrine and prohibiting deposition of president of company with no knowledge of claims). We should apply it now to this case.

Furthermore, whether the rationale for granting certiorari relief here is labeled the "apex doctrine" or we simply apply fundamental law applicable to prevent discovery abuse which "is not reasonably calculated to lead to the discovery of admissible evidence," we should grant the writ:

> Certiorari is available to review a discovery order which departs from essential requirements of law and causes injury that has no adequate remedy in a subsequent appeal. *Banc of Am. Inv. Servs. v. Barnett*, 997 So.2d 1154, 1155 (Fla. 3d DCA 2008). The order departs from essential requirements of law because Atlantic Hospitality has not shown that the president's deposition is "reasonably calculated to lead to the discovery of admissible evidence" under Florida Rule of Civil Procedure 1.280. *See Granada Ins. Co. v. Ricks*, 12 So.3d 276, 277 n.1 (Fla. 3d DCA 2009). General Star has shown that its president is a manager, not an adjuster or

> other employee with personal knowledge of the factual disputes involved in the lawsuit.

Gen. Star Indem. Co. v. Atl. Hosp. of Fla., LLC, 57 So. 3d 238, 239 (Fla. 3rd DCA 2011). The facts here readily support granting extraordinary relief, where Respondents have failed to depose any member of the relevant corporate committee, spent three days deposing the corporate representative, and have no legitimate reason to depose Mr. Suzuki, and this will subject him to countless other illegitimate discovery requests.

As the Third District noted in a very similar case of discovery abuse:

> The injury that cannot be remedied in a subsequent, plenary appeal is described by General Star's president in her affidavit:
>
> > 12. As President and Chief Executive Officer of General Star Management Company, my signature appears on every policy issued by General Star Indemnity Company in the State of Florida as a standard, pre-printed signature on all policies.
> >
> > 13. Because of the size and nature of the insurance business the number of people insured by General Star, Genesis, and General Re, the insureds and reinsureds of these entities are involved in hundreds of lawsuits throughout the United States. If I were summoned as a deponent to testify in each of those cases, I would not have time to fulfill my duties as an executive officer of Genesis, General Star or General Re, as I could literally be in depositions every single day. It would be extremely disruptive to my responsibilities to any one of these companies and its policyholders if I were to give depositions in cases involving individual insureds, when I was not involved with their claims or policies, as is the case here.

> I have not participated in the above-captioned litigation, or in the underlying insurance claim, or in the underwriting of the subject policy, and I am filing this affidavit in support of a motion for protective order.

> This is an obvious but compelling point. The job of the president of the company is to manage the company, not to fly around the United States participating in depositions about policy-related claim disputes of which the president has no personal knowledge. While the out-of-pocket costs of such an exercise can be calculated and shifted if appropriate at the conclusion of the case (or in a separate sanctions motion), the effect on the company is much more difficult to measure. *If all claimants demand and obtain the same right, the chief executive officer manages his or her deposition schedule, not the company*.

57 So. 3d at 239-40 (emphasis added).

Our facts here are almost identical. A chairman of a worldwide company, involved in hundreds of lawsuits, cannot be subjected to discovery which is not reasonably calculated to lead to the admission of relevant evidence where less intrusive means of obtaining relevant evidence in discovery have not been attempted, and the consequent disruption of corporate function cannot be remedied on appeal.

We should grant the writ and order the trial court to grant the protective order. Therefore, I respectfully dissent.

Raoul G. Cantero of White & Case LLP, Miami, and Larry M. Roth of Larry M. Roth, P.A., Winter Park, for Petitioner.

Maegen Peek Luka and Celene H. Humphries of Brannock & Humphries, Tampa, for Respondent.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

MICHAEL BATTERBEE, Appellant, v. MERRI L. RODERICK, as trustee for the Wilma L. Hinkley Trust, Appellee.	)	Case No. 2D18-2037

Opinion filed August 30, 2019.

Appeal from the Circuit Court for
Highlands County; Larry Helms, Judge.

Clifford R. Rhoades of Clifford R.
Rhoades, P.A., Sebring, for Appellant.

James V. Lobozzo, Jr., of James V.
Lobozzo, Jr., Sebring, for Appellee.

NORTHCUTT, Judge.

Michael Batterbee filed suit against Merri Roderick, trustee of the Wylma L. Hinkley Trust, seeking to quiet title to real property based on a claim of adverse possession. Following a bench trial, the trial court rejected the claim, holding that Batterbee failed to prove that he and his predecessors in interest had held the property in a hostile manner for the requisite statutory period. We disagree and reverse.

The material facts are largely undisputed. At issue is a mobile home and its associated plot in a mobile home park in Sebring, Florida. In 1993 the owner of the property, Wylma Hinkley, transferred it to the Wylma L. Hinkley Trust, for which she served as trustee. In 2008 she asked her son, Scott Hinkley, to move into the home. Scott and his then-girlfriend, Suzann Batterbee, then took exclusive possession. In 2009, shortly after Scott and Suzann were married, Wylma executed a quitclaim deed conveying the property to Scott. Scott also signed the deed. As written, however, the deed did not state that Wylma executed it in her capacity as trustee of the trust that owned the property. Wylma died in 2011, whereupon Scott's sister, Merri Roderick, succeeded Wylma as trustee of the trust.

The parties agree that the 2009 deed conveying the property to Scott without reference to Wylma's capacity as trustee was legally ineffective. The evidence suggests that no one was aware of that problem. The trial court found that Scott took delivery of the deed in good faith. Scott recorded the deed, and he and Suzann lived on the property openly and exclusively, improved the property, and paid all applicable taxes; they possessed the property as if they were its true owners.

When Scott and Suzann began divorce proceedings in 2014, they both listed the home as an asset on their financial affidavits. At some point during the divorce, Merri first learned that Scott and Suzann claimed to own the property. In response to this discovery, in 2015 Merri recorded a corrective quitclaim deed purporting to convey the property back to the trust. Apparently, the court hearing Scott and Suzann's divorce was unaware of Merri's deed; its 2016 final judgment dissolving the marriage awarded the property to Suzann. She continued to occupy the property

until later that year, when she died. Upon Suzann's death, her interest in the property passed to her brothers, Michael and Dennis Batterbee. Dennis then conveyed his interest to Michael, the appellant here.

Section 95.16(1), Florida Statutes (2016), provides that

> [w]hen the occupant, or those under whom the occupant claims, entered into possession of real property under a claim of title exclusive of any other right, founding the claim on a written instrument as being a conveyance of the property, or on a decree or judgment, and has for 7 years been in continued possession of the property included in the instrument, decree, or judgment, the property is held adversely.

To support an adverse possession claim, "the possession must have been for the full statutory period [of seven years], under claim of right or color of title, and must have been actual, open, visible, notorious, continuous, and hostile to the true owner and to the world at large." Douglass v. Aldridge, 105 So. 145, 146 (Fla. 1925). The only element at issue in this appeal is hostility.

The trial court concluded that Michael failed to prove that his predecessors in interest held the property in a hostile manner for the full statutory period of seven years.[1] The court reasoned that because Scott took possession in 2008 with Wylma's permission, his possession was not hostile until Merri, as successor trustee, learned of Scott and Suzann's claim of ownership during the divorce proceedings in 2014. Indeed, "[p]ermission to occupy the land, as given by the true title owner to the claimant, will

---

[1]Florida law has recognized that a person claiming ownership of property through adverse possession may satisfy the durational requirement by including the previous possession of the property by his or her predecessors in interest. See, e.g., Coogler v. Rogers, 7 So. 391, 397 (Fla. 1889); Porter v. Lorene Inv. Co., 297 So. 2d 622, 624 (Fla. 1st DCA 1974).

negate the hostility element." Herrin v. O'Hern, 275 P.3d 1231, 1234 (Wash. Ct. App. 2012); see also Turner v. Wheeler, 498 So. 2d 1039, 1042 (Fla. 1st DCA 1986) ("It is essential to a finding of adverse possession that the possessor's use not be permissive. Actual use is presumed permissive and the user has the burden to demonstrate that his use was without permission." (citations omitted)). Michael does not appear to contest the court's finding that Scott and Suzann's initial use of the property, beginning in 2008, was with Wylma's permission, and the evidence supports the trial court's finding on that point. The key issue, then, is when that permissive use ended.

"Permissive use can become adverse, but only upon clear, positive and distinct notification of the owner by the permissive user that he is claiming the property other than by permission." Turner, 498 So. 2d at 1042. Stated another way,

> [f]or a permissive use to become adverse possession there must be proof that the permissive user utilized the property in a manner inconsistent with the dedicated/permissive use, or, alternatively, that the permissive user notified the dedicator in a clear, positive and distinct way that it claimed title or ownership other than by dedication [or permission].

Hollywood, Inc. v. Zinkil, 403 So. 2d 528, 537 (Fla. 4th DCA 1981); see also Miller v. Anderson, 964 P.2d 365, 369 (Wash. Ct. App. 1998) ("Generally, the party claiming adverse possession bears the burden of proving that permission terminated either because (1) the claimant has asserted a hostile right, or (2) the servient estate has changed hands through death or alienation."); Herrin, 275 P.3d at 1236 ("Whether the December 1993 conveyance terminated permissive use of the farmhouse property is undisputed. It did, by operation of law. That is because permissive use cannot extend beyond ownership.").

In its commendably thorough "Findings of Fact and Conclusions of Law in

Support of Final Judgment for Defendant," the trial court cited each of the above cases concerning permissive use, but it ruled that the permissive use in this case did not end upon the attempted conveyance of the property to Scott in 2009:

> [Michael] Batterbee now seeks to convince the court that the mere execution of an invalid deed provides sufficient hostility to render the possession of the property adverse. Such an argument flies in the face of the fact that the true record owner, Wylma Hinkley as trustee of her trust[,] granted permission and authority for the possession of the property.

The court therefore seemed to conclude that the permissive use could be terminated only by the trustee's revocation of that permission. We disagree. The issue here is not whether Wylma, as trustee, revoked Scott's permission to use the property. Rather, it is whether Scott "asserted a hostile right," Miller, 964 P.2d at 369, or expressed a "clear, positive and distinct notification [to] the owner . . . that he is claiming the property other than by permission," Turner, 498 So. 2d at 1042. Clearly, he did so: He accepted delivery of and recorded a deed in the good faith belief that it conveyed ownership to him; he occupied the property, improved it, paid the taxes assessed on it, and otherwise openly treated the property as his. With hostile occupation commencing with the August 27, 2009, deed, Scott and his successors in interest had held the property adversely for more than seven years by the time Michael filed the complaint in this case on March 1, 2017.

The trial court pointed out that Merri was unaware that the property had been taken out of the trust until 2014 and therefore had no reason to object before then. But it was unnecessary for Merri to know of or suspect Scott's claim of ownership in order for his possession to be adverse and hostile. As explained above, when Scott took delivery of Wylma's deed, the requirement that he notify his grantor of the adverse

claim had been satisfied, and his heretofore permissive occupation ended. From then on, Scott and his successors had no duty to notify Wylma or Merri that they were possessing the property as exclusive owners. Their exclusive, open, and notorious use of the property satisfied the traditional definition of hostility and was constructive notice to Merri:

> [I]n order to perfect title by adverse possession it is not necessary that the true owner should have had actual knowledge or notice of the claim. If the claimant's possession is open and notorious under claim of title it is sufficient in its character, whether the true owner knew the facts or not. The claimant need not otherwise repudiate the title of others claiming the land, or notify them of his claim of title. . . . Such possession is the equivalent of actual notice of the claim under which it is held, and if the owner fails to look after his interests until the title of the adverse claimant grows into maturity he has no one but himself to blame for the loss of his estate.

Harrison v. Speer, 114 So. 515, 517 (Fla. 1927) (emphasis added) (quoting 2 C. J. p. 77, § 59); see also Birtley v. Fernandez Co., 392 So. 2d 291, 293 (Fla. 5th DCA 1980) ("This use was also hostile because it was inconsistent with and contrary to the use and rights of the owners of the property.").

The evidence demonstrated that Michael Batterbee and his predecessors in interest possessed the subject property in an adverse and hostile manner for the full seven-year statutory period. We therefore reverse the judgment for Roderick and remand for entry of a judgment in Batterbee's favor, quieting and vesting fee simple title to the property in him.

Reversed and remanded with instructions.

SLEET and BADALAMENTI, JJ., Concur.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

JOHN W. HOPSON, Appellant, v. DEUTSCHE BANK NATIONAL TRUST COMPANY, as Indenture Trustee for New Century Home Equity Loan Trust 2005-2, Appellee.	)	Case No. 2D18-673

Opinion filed August 28, 2019.

Appeal from the Circuit Court for Pinellas County; John A. Schaefer, Judge.

Robert E. Biasotti of Biasotti Law, St. Petersburg, for Appellant.

Morgan L. Weinstein of Van Ness Law Firm, Deerfield Beach, for Appellee.

ATKINSON, Judge.

John W. Hopson appeals the trial court's order denying him attorney's fees pursuant to section 57.105(7), Florida Statutes (2018), in the foreclosure action brought against him by Deutsche Bank National Trust Company, as Indenture Trustee for New

Century Home Equity Loan Trust 2005-2 (Deutsche Bank). Because Hopson could not establish that Deutsche Bank was a party to the contract that contained the attorney's fees provision, we affirm.

On March 14, 2005, Hopson executed and delivered to Mortgage Approval Services, Inc. (MAS), the original lender, a note and mortgage, in the principal amount of $175,000. Hopson defaulted on the note and mortgage by failing to make the payment due on September 1, 2006, and all payments thereafter. Deutsche Bank filed a foreclosure action against Hopson to foreclose the mortgage and for reestablishment of the lost note and mortgage, which Deutsche Bank alleged had been lost or destroyed after its acquisition of the note and mortgage. Attached to the complaint were copies of the mortgage and note, which contained no endorsements or allonges. Deutsche Bank alleged that MAS assigned the note and mortgage to Deutsche Bank in an Assignment of Mortgage (Assignment) dated January 1, 2007. A copy of the Assignment was attached to the complaint. The Assignment was executed by New Century Mortgage Corporation (New Century) as attorney-in-fact for MAS.

In its third amended complaint, Deutsche Bank alleged that it "took assignment by a Mortgage Loan Purchase Agreement series 2005-2 dated as of April 22, 2005" and included the following attachments: a copy of a Mortgage Loan Purchase Agreement and a limited power of attorney between Deutsche Bank and Carrington Mortgage Services, LLC (Carrington), as successor servicer to New Century. Hopson filed a motion to dismiss, alleging that Deutsche Bank lacked standing because the record was clear from Deutsche Bank's "allegations and from the exhibits attached to the complaint that a person other than [Deutsche Bank] may be the true owner of the

claim sued upon and that [Deutsche Bank] is not the real party in interest and is not shown to be authorized to maintain this foreclosure action." Hopson specifically contested the validity of the Assignment. The trial court denied Hopson's motion.

At the ensuing bench trial, Deutsche Bank's sole witness was a default litigation and mediation supervisor for Carrington, who testified that Carrington purchased New Century after New Century went into bankruptcy. Various documents were admitted through that testimony, including the following: a limited power of attorney, in which Deutsche Bank appointed Carrington as successor servicer to New Century; the note made payable to MAS without any indorsements or allonges; a copy of the mortgage issued from Hopson to MAS; and a copy of the Assignment dated January 1, 2007, assigning the note and mortgage from New Century as attorney-in-fact for MAS to Deutsche Bank.

Hopson moved for an involuntary dismissal, arguing that Deutsche Bank failed to prove standing at inception and at trial. Relying on Bonafide Properties, LLC v. E-Trade Bank, 208 So. 3d 1279 (Fla. 5th DCA 2017), counsel for Hopson contended that Deutsche Bank's "assignment [was] insufficient" because there was no evidence that New Century was the attorney-in-fact for MAS: "If there was an endorsement on the lost Note, we'd have a different story. But all you have in order for them to establish their standing is they're relying on a fraudulent assignment of Mortgage."

On June 30, 2017, the trial court entered a final judgment in favor of Hopson:

> 3. [Deutsche Bank] failed to introduce any testimony or evidence about New Century['s] . . . ability to assign the note and mortgage to [Deutsche Bank] and [MAS'] granting of a power of attorney.

> 4. The Court finds that [Deutsche Bank] failed to prove the elements of standing in this case as [Deutsche Bank] failed to explain the lack of endorsements or allonges on the lost note, and the power of attorney relationship of [New Century] as attorney in fact for [MAS] on the assignment of mortgage, pursuant to Bonafide Properties, LLC v. E-Trade Bank, 208 So. 3d 1279, 1281 (Fla. 5th DCA 2017).

The trial court awarded Hopson his reasonable attorney's fees and costs and reserved jurisdiction to determine the amount.

Deutsche Bank then filed a motion for rehearing regarding Hopson's entitlement to attorney's fees, arguing that Hopson was not entitled to fees on the basis of a contract that he claimed never existed between him and Deutsche Bank. The trial court granted Deutsche Bank's motion and held that Hopson, "who prevailed at trial on the argument that [Deutsche Bank] lacked standing upon the contract at issue, cannot recover fees based on a provision in that same contract."

A trial court's order on attorney's fees is reviewed for an abuse of discretion, while a trial court's interpretation of law is reviewed de novo. Santini v. Cleveland Clinic Fla., 65 So. 3d 22, 29 (Fla. 4th DCA 2011). On appeal, Hopson argues that the trial court erred in failing to award him prevailing party attorney's fees under section 57.105(7), which provides the following:

> If a contract contains a provision allowing attorney's fees to a party when he or she is required to take any action to enforce the contract, the court may also allow reasonable attorney's fees to the other party when that party prevails in any action, whether as plaintiff or defendant, with respect to the contract.

To be entitled to attorney's fees under section 57.105(7), the movant has the burden of proving the following: "(1) the contract provides for prevailing party fees; (2) both the

movant and opponent are parties to that contract; and (3) the movant prevailed." Madl v. Wells Fargo Bank, N.A., 244 So. 3d 1134, 1138 (Fla. 5th DCA 2017) (citing Nationstar Mortg. LLC v. Glass, 219 So. 3d 896, 898 (Fla. 4th DCA 2017)). Here, it is undisputed that the mortgage contract contains a provision for prevailing party fees and that Hopson prevailed at trial. The parties dispute whether they were both parties to the contract.

Hopson maintained throughout trial that the assignment of the mortgage was invalid, successfully arguing that Deutsche Bank failed to establish that New Century was the attorney-in-fact for MAS in order to prove that the Assignment occurred—an argument that proved fatal to Deutsche Bank's right to foreclose. This same argument was fatal to Hopson's attempt to establish that he was entitled to attorney's fees pursuant to a provision in that mortgage. Hopson prevailed on the basis that Deutsche Bank never became a party to the mortgage by virtue of the assignment, foreclosing his argument that Deutsche Bank was a party to "a contract contain[ing] a provision allowing attorneys' fees to a party when he or she is required to take any action to enforce the contract." See § 57.105(7).

Other courts have concluded that a foreclosure defendant cannot establish entitlement to fees based on section 57.105(7) if it successfully defended against foreclosure based on a theory that the plaintiff lacked standing. See, e.g., Deutsche Bank Tr. Co. Ams. v. Page, 44 Fla. L. Weekly D1479 (Fla. 4th DCA June 12, 2019) (en banc) ("NO STANDING = NO ATTORNEY'S FEES"); Glass, 219 So. 3d at 899 ("A party that prevails on its argument that dismissal is required because the plaintiff lacked standing to sue upon the contract cannot recover fees based upon a

provision in that same contract."); Bank of N.Y. Mellon Tr. Co., N.A. v. Fitzgerald, 215 So. 3d 116, 121 (Fla. 3d DCA 2017) ("Because [the plaintiff] successfully obtained a judgment below that the Bank lacked standing to enforce the mortgage and note against her, we find that no contract existed between the Bank and [the plaintiff] that would allow [the plaintiff] to invoke the mutuality provisions of section 57.105(7)."); cf. HFC Collection Ctr., Inc. v. Alexander, 190 So. 3d 1114, 1117 (Fla. 5th DCA 2016) ("[The plaintiff] cannot employ section 57.105(7) as a basis for an attorney's fees award after she proved that HFC never became a party to the contract.").

In Harris v. Bank of New York Mellon, 44 Fla. L. Weekly D141 (Fla. 2d DCA Dec. 28, 2018)—asserted as supplemental authority by Hopson—this court certified conflict with two of those decisions "to the extent that" they "hold that a party's failure to establish standing in a mortgage foreclosure case necessarily means that no contract existed between the parties." Id. at D143. We would be bound to follow Harris if that decision controlled the outcome of this case, but it does not. The rationale underlying the conclusion in Harris that the plaintiff was entitled to fees under 57.105(7) is inapplicable to the circumstances of this case because Harris's theory of defense differed significantly from Hopson's.

As in this case, the plaintiff in Harris alleged that it became a party to a mortgage by virtue of an assignment. Id. at D142. However, unlike this case, the defendant in Harris did not impugn the validity of that assignment. Id. at D143. Instead, admitting the existence of the contractual relationship formed by the assignment, the defendant prevailed on a theory that the plaintiff had subsequently lost its holder status when, prior to filing the foreclosure suit, it relinquished physical possession of the

promissory note to a third party with whom it failed to prove an agency relationship.[1] Id. at D142–43. The defendant in Harris filed a motion for attorney's fees pursuant to the fee provision in the mortgage and section 57.105(7), the trial court's denial of which was reversed by this court. Id. at D143.

Unlike the defendant in Harris, who "admitted the contractual relationship," id., Hopson successfully argued that Deutsche Bank had failed to establish a contractual relationship with Hopson because the Assignment was invalid. In Harris, the borrower's theory of defense allowed him to admit that the plaintiff was a party to the note and mortgage. The borrower could concede that the plaintiff was at one time the holder of the note and was a party to the mortgage that contained the attorney's fees provision but could still argue that prior to the filing of the foreclosure complaint a different entity took possession of the note, leading the trial court to conclude that the plaintiff lacked standing at the time of inception.

The circumstances that led this court in Harris to conclude that the defendant could enforce the fees provision in a mortgage that the plaintiff lacked standing to foreclose are not present in this case. Here, Hopson impugned the validity of the assignment that would have made Deutsche Bank a party to the mortgage in the

---

[1]In Harris, the plaintiff alleged that it was the holder of the note it sought to foreclose and attached to its complaint a copy of the mortgage and the note bearing a blank indorsement, which were later admitted into evidence. Id. at D142. However, the plaintiff's servicer testified that it, not the plaintiff, was in physical possession of the original note at the time the foreclosure complaint was filed. Id. The borrower moved for an involuntary dismissal, contending "that the [plaintiff] did not prove that it was the holder of the note at inception because [the servicer] possessed the note and there was no evidence of an agency relationship between the [plaintiff] and [the servicer]." Id. Concluding that the plaintiff failed to prove its standing at inception, the trial court entered a final judgment in favor of the borrower. Id.

first place, foreclosing the argument that he was in privity of contract with Deutsche Bank for the purpose of attorney's fees entitlement.

Because Hopson could not establish that Deutsche Bank was a party to the mortgage containing the fees provision on which Hopson relied, we affirm the trial court's order denying Hopson attorney's fees pursuant to section 57.105(7).

Affirmed.

SILBERMAN and LUCAS, JJ., Concur.

Third District Court of Appeal

State of Florida

Opinion filed August 28, 2019.
Not final until disposition of timely filed motion for rehearing.

No. 3D18-1078
Lower Tribunal No. 15-26465

Ancla International, S.A.,
Appellant,

vs.

Tribeca Asset Management, Inc.,
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Thomas J. Rebull and Miguel M. De La O, Judges.

Sardi Law, PLLC, and Carlos E. Sardi, for appellant.

Holland & Knight LLP, and Rebecca M. Plasencia, Adolfo E. Jimenez, and L. Vanessa Lopez, for appellee.

Before SCALES, LINDSEY, and LOBREE, JJ.

LINDSEY, J.

This appeal arises from a dispute as to whether language in an arbitration clause subjects two non-resident entities, Appellant Ancla International, S.A. and Appellee Tribeca Asset Management, to personal jurisdiction in Florida. The trial court granted Tribeca's motion to dismiss Ancla's petition to compel arbitration for lack of personal jurisdiction. Because we interpret the plain meaning of the disputed language to confer jurisdiction on Florida courts to enforce the parties' Confidentiality Agreement, we reverse.[1]

I. BACKGROUND

In January 2012, Ancla, a Colombian beer company owned by a Florida resident, allegedly entered into a Confidentiality Agreement (the "Agreement"), with Tribeca, a Panamanian investment company.[2] Tribeca allegedly agreed to invest in Ancla's re-entry into the Colombian beer market and not to divulge certain trade secrets. During the next few months, Ancla forwarded confidential information to Tribeca and the parties engaged in business negotiations. Ultimately,

---

[1] Both parties agree that the legal basis for personal jurisdiction in this case stems from a provision in the Florida Arbitration Code and not the Florida Long-Arm Statute. See § 682.18(1), Fla. Stat. (2012) ("The making of an agreement or provision for arbitration subject to this law and providing for arbitration in this state shall, whether made within or outside this state, confer jurisdiction on the court to enforce the agreement or provision under this law, to enter judgment on an award duly rendered in an arbitration thereunder and to vacate, modify or correct an award rendered thereunder for such cause and in the manner provided in this law.").

[2] In its Motion to Dismiss below, Tribeca argued it was not a party to the Agreement. The trial court denied Tribeca's Motion, and this issue is not before us.

Tribeca did not invest in Ancla and instead invested in one of Ancla's competitors. Ancla subsequently filed a Petition to Compel Arbitration pursuant to an arbitration clause ("Article Seven") in the Agreement, which states:

> **SEVENTH**. APPLICABLE LAW. ***This agreement will be governed by the laws of the State of Florida of the United States of America (USA), a jurisdiction accepted by the parties irrespective of the fact that the principal activity of the beer project will be conducted in Colombia***. The parties agree that, in the event that differences arise between them as a result of or in relation to the present Agreement, they will attempt to resolve their differences via direct negotiation. For this purpose, the parties will have a period of thirty (30) business days, counting from the date on which either of the parties presents a request in this regard. This term may be extended by mutual agreement for additional thirty-day periods. ***If a solution is not reached within these stipulated periods, the differences will be submitted to an Arbitration Board, whose ruling with carry the force of law***.

(Emphasis added).

At the beginning of an evidentiary hearing on Ancla's Petition to Compel Arbitration, the trial court considered whether the language in Article Seven conferred personal jurisdiction over Tribeca. The court concluded that Article Seven was merely a choice of law provision and granted Tribeca's Motion to Dismiss for lack of personal jurisdiction. Specifically, the court held that "[i]t is plain, obvious, and unambiguous that 'jurisdiction' in that provision refers to 'location'—the Parties to the contract agreed that the choice of law will be that of the jurisdiction of the State of Florida." Ancla appeals.

II. STANDARD OF REVIEW

Contractual interpretation is subject to de novo review. Real Estate Value Co. v. Carnival Corp., 92 So. 3d 255, 260 (Fla. 3d DCA 2012) ("The interpretation of a contract, including whether the contract or one of its terms is ambiguous, is a matter of law subject to de novo review." (citations omitted). Further, issues arising from a lower court's order granting a motion to dismiss for lack of personal jurisdiction are subject to de novo review. Am. Exp. Ins. Servs. Europe Ltd. v. Duvall, 972 So. 2d 1035, 1038 (Fla. 3d DCA 2008).

III. ANALYSIS

The narrow issue before us is whether the language "Florida . . . a jurisdiction accepted by the parties" confers jurisdiction on Florida courts to enforce the Agreement. As always, we begin with the plain language of the contract. See Dirico v. Redland Estates, Inc., 154 So. 3d 355, 357 (Fla. 3d DCA 2014) ("We begin with the longstanding principle that contracts 'must be construed according to their plain language.'" (quoting St. Johns Inv. Mgmt. Co. v. Albaneze, 22 So. 3d 728, 731 (Fla. 1st DCA 2009))).

Here, the fundamental dispute is over the meaning of the word "jurisdiction." Black's Law Dictionary defines jurisdiction as "[a] court's power to decide a case or issue a decree . . . ." *Jurisdiction*, Black's Law Dictionary (11th ed. 2019). Consequently, the plain and ordinary meaning of the disputed language is that the parties accept the power of Florida courts to decide their case. We therefore disagree

with the trial court's interpretation that "jurisdiction" simply refers to the parties' choice of law. Based on a plain reading of the Agreement, the parties agreed to be bound by Florida law *and* be subject to the jurisdiction of Florida courts:

> This agreement will be governed by the laws of the State of Florida of the United States of America (USA), a jurisdiction accepted by the parties irrespective of the fact that the principal activity of the beer project will be conducted in Colombia.

We see no reason to read this language any other way. Moreover, our interpretation of the term "jurisdiction" is supported by the context of the provision. See Perez-Gurri Corp. v. McLeod, 238 So. 3d 347, 350 (Fla. 3d DCA 2017) ("A single term or group of words must not be read in isolation." (citing American K–9 Detection Servs., Inc. v. Cicero, 100 So. 3d 236, 238–39 (Fla. 5th DCA 2012))). After specifying that the parties accepted jurisdiction in Florida, the parties further explained that this was "irrespective of the fact that the principle activity of the beer project will be conducted in Colombia."

IV. CONCLUSION

Because the parties accepted the power of Florida courts to enforce the Agreement, the trial court did not lack personal jurisdiction over Tribeca. Accordingly, we reverse the dismissal below and remand for further proceedings.

Reversed and remanded.

Third District Court of Appeal

State of Florida

Opinion filed August 28, 2019.
Not final until disposition of timely filed motion for rehearing.

Nos. 3D18-1837 & 3D18-2168
Lower Tribunal No. 16-4547

Beach Towing Services, Inc., et al.,
Appellants,

vs.

Sunset Land Associates, LLC, et al.,
Appellees.

Appeals from the Circuit Court for Miami-Dade County, Rodolfo A. Ruiz, Judge.

Levine & Partners, P.A., and Allan S. Reiss, for appellants.

Buckner + Miles, and David M. Buckner and Brett E. von Borke; Podhurst Orseck, P.A., and Stephen F. Rosenthal, for appellee Sunset Land Associates, LLC.

Before SALTER, LINDSEY and MILLER, JJ.

PER CURIAM.

Beach Towing Services, Inc. and other defendants appeal a final declaratory judgment regarding the language of a restrictive covenant within a 2003 warranty

deed. The plaintiff seeking declaratory relief is Sunset Land Associates, LLC, and the affected property is located on Purdy Avenue and Bay Road in Miami Beach, Florida.

Declaratory relief was granted via an order granting partial summary judgment and a partial final declaratory judgment, and this appeal followed. We agree with the carefully-reasoned, ten-page order granting in part and denying in part the motion for partial summary judgment filed by the appellee, Sunset Land Associates, LLC. Finding no error in that order, we affirm and incorporate it here:

> **ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT**
>
> This Cause came before the Court upon Plaintiff, Sunset Land Associates, LLC's, Motion for Partial Summary Judgment, filed May 29, 2018, seeking partial summary judgment on Counts X (meaning), XI (duration), and XII (ambiguity) of the Second Amended Complaint ("SAC") as to all Defendants.[1] Plaintiff filed this action to obtain declaratory relief as to its rights with regard to a covenant on certain specific parcels of real property.
>
> **BACKGROUND**
>
> Plaintiff owns three parcels of land located at 1759 Purdy Avenue 1747 Purdy Avenue, and 1738 Bay Road, Miami Beach, more specifically described as Lot 6 and the West ½ of Lot 5, Block 16, ISLAND VIEW SUBDIVISION, according to the map or plat thereof, recorded in Plat Book 6, Page(s) 115, of the Public Records of Miami-

[1] Plaintiff's Motion for Partial Summary Judgment also sought summary judgment against certain Defendants as to Count XVI (standing) of the Second Amended Complaint. Plaintiff's motion as to that count will be resolved by separate order.

Dade County, Florida ("Property"). On July 3, 2003, Defendants Mark Festa, individually and as trustee, and Maureen Festa, conveyed the Property to Gert Elfering by warranty deed, recorded in Official Records Book 21412, Page 1665 of Official Records of Miami-Dade County. That warranty deed included a restrictive covenant ("Covenant"), which states:

> This property is being conveyed by the Grantor to the Grantee subject to the Grantee agreeing that the property will not be used as a parking lot, storage yard facility or for a garage or tow truck company. This covenant shall run with the land.

After the Property changed hands several times, Plaintiff acquired it on April 23, 2014. Plaintiff intends to improve the Property and would like to be able to include a parking garage as part of any such improvement. Defendants take the position that the Covenant prohibits the construction of a parking garage on the Property. Defendants accordingly created doubt about Plaintiff's rights, and in particular its rights under the deed to the Property, and Plaintiff brought this action to remove that doubt.

With regard to the specific terms used in the Covenant, the Code of the City of Miami Beach defines "parking lot" as "an at-grade, level area used for the parking of motor vehicles." Code of the City of Miami Beach, Florida ("City Code"), § 114-1.[2] Moreover, there is no dispute among the parties that the term "parking lot" as used in the Covenant means a surface parking lot. Deposition of Ralph Andrade ("Andrade Dep.") at 134:20-25. There is also no dispute among the parties that the term "storage yard facility" as used in the Covenant means a property used to store delinquent vehicles, towed vehicles, box trucks, and the like. Deposition of Mark Festa ("Mark Festa Dep.") at 149:12-15,

[2] Defendants requested that the Court take judicial notice of the City Code, including specifically § 114-1. See Defendants' Request for Judicial Notice (June 9, 2016), item 9. And the parties stipulated that certain City of Miami Beach documents are admissible for purposes of the trial of the Covenant counts, including the City Code. See Stipulation Regarding City of Miami Beach Documents (July 18, 2018).

150:14-21. There is similarly no dispute among the parties that the term "tow truck company" as used in the Covenant means a company that provides towing services. Andrade Dep. at 139:13-18.

Therefore, the dispute in this case turns on the meaning of the term "garage" as used in the Covenant. Plaintiff contends that the term "garage" as used in the Covenant, when properly read in context, is actually "garage company," and means a business where vehicles are mechanically repaired, rebuilt, or constructed for compensation. Defendants contend that the Covenant's prohibition of a "garage" on the Property means a parking garage.

The American Heritage Dictionary defines "garage" as:

> 1. A building or indoor space in which to park or keep a motor vehicle.
>
> 2. A commercial establishment where cars are repaired, serviced, or parked.

American Heritage Dictionary, https: //www.ahdictionary.com, last accessed August 4, 2018. The City Code contains three different definitions for uses that contain the word "garage," to wit:

> Garage, accessory means an accessory building designed or used for parking for the main permitted structure.
>
> Garage, commercial means a building or a portion thereof, used primarily for indoor parking of vehicles for compensation.
>
> Garage, mechanical means any premise where vehicles are mechanically repaired, rebuilt or constructed for compensation.

City Code, § 114-1.

ANALYSIS

Florida's Declaratory Judgment Act provides in pertinent part that "[a]ny person claiming to be interested or who may be in doubt about his rights under a deed . . . may have determined any question of construction or validity arising [thereunder] . . .''). Fla. Stat. § 86.021; see also Fla. Stat. § 86.011; Lambert v. Justus, 335 So. 2d 818, 820 (Fla. 1976) (declaratory judgment is the appropriate method for determining the "construction of certain restrictions on . . . property and a declaration that these restrictions are invalid and unenforceable"), receded from on other grounds in Higgins v. State Farm Fire and Casualty Co., 894 So. 2d 5 (Fla. 2004). Defendants' insistence that the Covenant's inclusion of the word "garage" prevents Plaintiff from constructing a parking garage on its Property created "doubt as to the existence or nonexistence of some right or status, and [Plaintiff] is entitled to have such doubt removed." Flagship Real Estate Corp. v. Flagship Banks, Inc., 374 So. 2d 1020, 1021 (Fla. 2d DCA 1979). That is all that is required to invoke this Court's jurisdiction under the Declaratory Judgment Act. Id. A declaratory judgment action is the proper vehicle for a party to seek a determination of its developmental rights. See 19650 NE 18th Avenue, LLC v. Presidential Estates Homeowners Assoc., Inc., 103 So. 3d 191 (Fla. 3d DCA 2012). Therefore, this Court has subject matter jurisdiction over this controversy.

"When interpreting a contract, the court must first examine the plain language of the contract for evidence of the parties' intent." Perez-Gurri Corp. v. McLeod, 238 So. 3d 347, 350 (Fla. 3d DCA 2017) (citation omitted).[3] "The expressed intent of the parties is the controlling factor. Intent unexpressed will be unavailing, and substantial ambiguity or doubt must be resolved against the person claiming the right to enforce the covenant." Moore v. Stevens, 106 So. 901, 903 (Fla. 1925), quoted in McInerney v. Klovstad, 935 So. 2d 529, 532 (Fla. 5th DCA 2006). Expressed intent is that found on the face of the covenant "as shown by the language of the entire instrument in which the covenant appears." Moore, 106 So. at 903, see also Wilson v. Rex Quality Corp., 839 So. 2d 928, 930 (Fla. 2d DCA 2003) ("In

[3] Deeds are analyzed in the same manner as contracts. Branscombe v. Jupiter Harbour, LLC, 76 So.3d 942, 947 (Fla. 4th DCA 2011).

construing restrictive covenants the question is primarily one of intention, and the fundamental rule is that the intention of the parties as shown by the agreement governs, being determined by a fair interpretation of the entire text of the covenant"). Moreover, it is well settled that a single contractual term must not be read in isolation. Id. Rather, the goal is to arrive at a reasonable interpretation of the entire agreement, and to construe contractual terms "in such a manner as to give them a meaning consistent with the apparent object of the parties in entering into the contract." Blackhawk Heating & Plumbing Co., Inc. v. Data Lease Fin. Corp., 302 So. 2d 404, 407 (Fla. 1974).

The Court's first task in construing the Covenant is to determine whether it is unambiguous or ambiguous on its face. See Team Development Land, Inc. v. Anzac Contractors, 811 So. 2d 698, 699-700 (Fla. 3d DCA 2002) (the initial determination of whether a contractual term is ambiguous is a question of law for the court) (citations omitted). In so doing, the Court applies the pertinent rules of construction.

First, '"[a]s a general proposition, the use of different language in different contractual provisions strongly implies that a different meaning was intended.'" Fowler v. Gartner, 89 So. 3d 1047, 1048 (Fla. 3d DCA 2012) (quoting Kel Homes, LLC v. Burris, 933 So. 2d 699, 703 (Fla. 2d DCA 2006)). With regard to the specific connectors contained in the Covenant, "the Florida Supreme Court has explained that . . . . 'the word 'or' is a disjunctive participle that marks an alternative.'" Blue Heron Beach Resort Developer, LLC v. Branch Banking & Tr. Co., 6:13-CV-372-ORL-36, 2014 WL 2625255, at *7 (M.D. Fla. June 12, 2014) (quoting Rudd v. State ex rel. Christian, 310 So. 2d 295, 298 (Fla. 1975)). In addition, the series-qualifier canon provides that, "when there is a straightforward, parallel construction that involves all nouns or verbs in a series, a prepositive or postpositive modifier normally applies to the entire series. A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts § 19, at 147-51 (2012). Therefore, in the absence of some other indication, such as a determiner, the modifier reaches the entire enumeration. Id. at 147-48. So, for example, in the phrase "a wall or fence that is solid," the postpositive modifier "that is solid" should be read as modifying both "wall" and "fence" to mean that both the wall as well as the fence must

be solid. Id. at 148.[4] Also pertinent here, under the canon of *noscitur a sociis*, which means "it is known by its associates," words that are grouped in a list should be given related meanings. Id. at § 31, p. 195. So again, for example, if a phrase reads '''tacks, staples, nails, brads, screws, and fasteners,' it is clear from the words with which they are associated that the word nails does not denote fingernails and that staples does not mean reliable and customary food items." Id. at 196.

Here, the Covenant provides that the Property "will not be used **as** a parking lot, storage yard facility or **for** a garage or tow truck company." (emphasis added). The Court must presume that separate use of the prepositions "as" and "for" indicates a distinction between "parking lot, storage yard facility" and "garage or tow truck company" as used in the Covenant. Fowler, 89 So. 3d 1048. And when giving the words "as" and "for" their plain meaning and reading them in context, the "as" clearly and unambiguously refers to physical structures (i.e., "**as** a parking lot, storage yard facility") (emphasis added), whereas the "for" clearly and unambiguously refers to business activities (i.e., "**for** a garage or tow truck company") (emphasis added). Indeed, if "garage" was meant to be a physical structure, as opposed to a business activity, the Covenant would read that the Property "will not be used **as** a parking lot, storage yard facility, garage, **or** **for** a tow truck company." But it does not. Clearly then, "a parking lot, storage yard facility" is intended to be something different in kind than "a garage or tow truck company." See Blue Heron Beach Resort Developer, 2014 WL 2625255, at *7.

The question thus becomes how to construe the words "for a garage or tow truck company," since the parties agree that the only dispute in this case is whether the word "garage" as used in the Covenant prohibits Plaintiff from construction of a parking garage on the Property. Applying the series-qualifier, the Court must read the term "company" as modifying both the term "garage," as well as the term, "tow truck," and the Covenant must therefore be read to mean that the Property cannot be used for either a "garage company" or a

[4] The ejusdem generis canon does not apply to the Covenant, because here there is no "catchall" phrase at the end of the listed prohibited uses that would indicate that other uses similar in kind to those listed are also prohibited. See Reading Law, at 199.

"tow truck company." Reading Law, at 148; see also Sch. Bd. of Broward County v. Pierce Goodwin Alexander & Linville, 137 So. 3d 1059, 1068 (Fla. 4th DCA 2014) (terms "negligent, reckless or intentional wrongful" modified the term "acts" in the phrase "negligent, reckless or intentional wrongful acts"). Indeed, there is no determiner before the words "tow truck" that would indicate that the term "company" modifies only "tow truck" and not "garage" (i.e., the Covenant does not say "for use as a garage or **a** tow truck company"). See Reading Law, at 149. Moreover, when reading the Covenant's prohibition on a "garage company" in context, as the Court must do, "garage company" is clearly associated with "tow truck company." The canon of *noscitur a sociis* thus mandates that "garage company" and "tow truck company" be given related meanings. Id. § 31 at 195. A "tow truck company" is a business enterprise that is involved with the mechanical operations of vehicles. Therefore, a "garage company" must be construed to mean a business enterprise that is involved with the mechanica1 operations or repair of vehicles. See id. When read this way after applying the aforementioned rules of construction, the plain language of the Covenant clearly and unambiguously evidences that the parties' intent was to prohibit a "garage company" where vehicles are mechanically repaired, rebuilt or constructed for compensation. See Perez-Gurri Corp., 238 So. 3d at 350; Blackhawk Heating & Plumbing Co., Inc., 302 So. 2d at 407; Wilson, 839 So. 2d at 930.[5]

In sum, the Court holds that the language of the Covenant is clear and unambiguous. And based on the plain language of the Covenant, the term "garage" is properly read as "garage company" and refers to a business activity, not a physical structure. In the context in which this phrase appears, that business activity can only reasonably be construed to mean a company where vehicles are mechanically repaired, rebuilt, or constructed for compensation. Specifically, "for" as used in the Covenant indicates an intent to prohibit specific business activities, as opposed to physical structures, which are preceded by "as." "Company" must be read as modifying "garage" so as to prohibit "a garage company," as opposed to simply "a garage." And the

[5] Defendants note that Mark Festa testified that he meant a garage related to parking. Opp. at 7. But as the case law discussed above makes clear, it is the expressed intent found on the face of the Covenant that controls.

prohibition on a "garage company," when read in context and given a related meaning to the associated prohibition on a "tow truck company," can only be read as evidencing an intent to prohibit the use of the Property for a company where vehicles are mechanically repaired, rebuilt or constructed for compensation.[6] As such the clear and unambiguous language of the Covenant does not prohibit Plaintiff from building or operating any kind of a parking garage on the Property, and the Court so holds.

Alternatively, the Court holds that the Covenant is ambiguous with regard to what the terms "garage" or ''garage company" prohibit. These terms are reasonably susceptible to more than one interpretation. Real Estate Value Co., Inc. v. Carnival Corp., 92 So. 3d 255, 260 (Fla. 3d DCA 2012) (quoting Pan Am. W., Ltd. v. Cardinal Commercial Dev., LLC, 50 So. 3d 68, 71 (Fla. 3d DCA 2010)) ("A contract is ambiguous when its language is reasonably susceptible to more than one interpretation, or is subject to conflicting interests.").[7] For example,

---

[6] This reading of the Covenant also aligns with the fact that Defendants at various times had or operated everything set forth in the Covenant on the adjacent property where Defendant Beach Towing Services, Inc., conducts business, and the fact that they never had a parking garage there. (See Deposition of Vincent Festa at 31:13-25, 33:19-23; Mark Festa Dep., Ex. 4, at 12:20-23, 48:7-10, 151:16-152:5, 153:14-154:5, 154:11-22, 159:1-6; Deposition of Michael Festa Dep. at 25:1-l 5, 87:1-6; Andrade Dep. at 139:13-25, 153:21-154:5).

[7] Defendants assert that Heleski v. Harrell, 119 So.3d 1271, 1273 (Fla. 2d DCA 2013), stands for the proposition that, under Florida law, a garage is defined as "a building or indoor space in which to park or keep a motor vehicle." That is a misreading of that decision. The Second District noted in *dicta* that the American Heritage Dictionary of the English Language (5th ed. 2011) provided that definition of "garage" but concluded that, although the property owners referred to the structure as a "garage," it was unclear what use they actually intended to use it for. Id. at 1273. There was no dispute among the parties about the meaning of the term "garage" in the deed restriction, and the court made no finding on it. Thus,

the American Heritage Dictionary defines the term "garage" as both a building in which to park a motor vehicle and a commercial establishment where cars are repaired. American Heritage Dictionary, https://www.ahdictionary.com, last accessed August 4, 2018. And the City Code, as to which Defendants asked this Court to take judicial notice, has three different defined uses containing the word "garage," each of which necessarily contains a modifier to make the actual use clear. City Code § 114-1. Moreover, a "garage company" could be reasonably read to include a business that repairs cars or a business that operates a valet service.

Where a restrictive covenant is ambiguous, it must be construed against the party seeking to enforce it. Boyce v. Simpson, 746 So. 2d 507 (Fla. 4th DCA 1999). Moreover, restrictive covenants must be strictly construed in favor of the free and unrestricted use of real property. See 19650 NE 18th Avenue, LLC v. Presidential Estates Homeowners Assoc., Inc., 103 So. 3d 191, 195 (Fla. 3d DCA 2012). Here, Defendants are the parties seeking to enforce the Covenant. Therefore, it must be construed against them. Boyce, 746 So. 2d at 508. In addition, because the Covenant restricts the use of real property, it must be construed in favor of the free and unrestricted use of the Property. 19650 NE 18th Avenue, LLC, 103 So. 3d at 195. Accordingly, the Covenant must be construed to prohibit only the use of the Property for a company where vehicles are mechanically repaired, rebuilt or constructed for compensation. See McInerney v. Klovstad, 935 So. 2d 529, 532 (Fla. 5th DCA 2006) (concluding that disputed phrase "any conflict" in restrictive covenant was ambiguous because it was undefined and thus fairly susceptible to more than one interpretation, and holding that "based on our conclusion that [the covenant] is ambiguous, the rules of construction require that it be construed against the [neighbors] who seek to enforce the restriction"). The Covenant cannot be read to prohibit a parking garage on the Property. Any other construction would run counter to the well settled rules that a restrictive covenant must be strictly construed against the party seeking to enforce it, and in favor of the free and unrestricted use of the Property. See Presidential Estates, 103 So. 3d at 195. Moreover, the construction advanced by Defendants would impermissibly result

---

the court had no reason to consider the other meanings of the word "garage" found in the American Heritage Dictionary.

> in the forfeiture of Plaintiff's substantial development rights, in violation of these long-standing principles of real property law. Id.

Following our de novo review of the appellants' alternative arguments for the interpretation of the Covenant, we find no error in the final declaratory decree as entered by the trial court.

Affirmed.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

VALENCIA RESERVE HOMEOWNERS ASSOCIATION, INC.,
Appellant,

v.

BOYNTON BEACH ASSOCIATES, XIX, LLLP,
Appellee.

No. 4D18-1320

[August 28, 2019]

Appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Peter D. Blanc, Judge; L.T. Case No. 502016CA007123XXXXMBAB.

Robert Rivas of Sachs Sax Caplan, P.L., Tallahassee, for appellant.

Mark F. Bideau and Robert R. Kane III of Greenberg Traurig, P.A., West Palm Beach, and Julissa Rodriguez and Jay A. Yagoda of Greenberg Traurig, P.A., Miami, for appellee.

BOATWRIGHT, JOE, Associate Judge.

Appellant, Valencia Reserve Homeowners Association, Inc. ("HOA"), appeals the circuit court's final order granting partial summary judgment in favor of Appellee, Boynton Beach Associates XIX, LLLP ("Developer"). The HOA challenges the Developer's use of certain monies collected from homeowners to offset the Developer's financial obligation to the HOA. Specifically, the HOA claims that the Developer's use of the "working fund contribution" to offset its financial obligation to the HOA is prohibited by the Homeowners' Association Act ("HOA Act"), codified in Chapter 720, Florida Statutes. We hold that the Developer's use of the working fund contributions to offset its financial obligation to the HOA does not contravene Chapter 720. Therefore, we affirm the decision below.

BACKGROUND

Valencia Reserve is a single-family home residential community located in Palm Beach County. Valencia Reserve's HOA was established and governed pursuant to a Declaration of Covenants, Restrictions and

Easements ("declaration") and the HOA Act. The Developer controlled the HOA from its inception until the date of turnover, when the Developer gave control of the HOA to the community's homeowners.

According to the declaration, the Developer was required to pay its share of assessments on any lot owned by the Developer while the Developer was in control of the HOA. Pursuant to the declaration and the HOA act, the Developer had the right to excuse itself from payment of its share of assessments related to its lots so long as the Developer obligated itself to pay the deficit—*i.e.*, any operating expenses incurred during the guarantee period which exceeded the assessments receivable from other members. The guarantee period began when the Developer recorded the declaration and ended upon the turnover date.

The declaration defined the term "deficit" as the difference between the operating expenses incurred by the HOA during the guarantee period and the sum of: 1) the amounts assessed as guaranteed assessments against owners during the guarantee period; 2) the "working fund contributions"; and 3) any other income of the HOA.

In order to offset the deficit obligation, the Developer used a provision in the declaration called the "Working Fund Contribution." The declaration's section entitled "Working Fund Contribution" states as follows:

> Each Owner who purchases a Lot with a Home thereon from [the Developer] shall pay to the [HOA] at the time legal title is conveyed to such Owner, a "Working Fund Contribution." The Working Fund Contribution shall be an amount equal to a three (3) months' share of the annual, non-abated Operating Expenses applicable to such Lot pursuant to the initial Budget . . . . The purpose of the Working Fund Contribution is to insure that the [HOA] will have cash available for initial start-up expenses, to meet unforeseen expenditures and to acquire additional equipment and services deemed necessary or desirable by the Board. Working Fund Contributions are not advance payments of Individual Lot Assessments and shall have no effect on future Individual Lot Assessments, nor will they be held in reserve. . . . Working Fund Contributions . . . may also be used to offset Operating Expenses, both during the Guarantee Period . . . and thereafter.

The Developer elected to excuse itself from paying its share of assessments and thereby obligated itself to pay the deficit incurred during

the guarantee period. Before the turnover, the Developer used the working fund contributions to satisfy the deficit, as authorized by the above provision.

The HOA then sued the Developer, claiming that the working fund contributions could not be used to offset the deficit obligation under the HOA Act. Both parties filed cross motions for summary judgment. The circuit court granted summary judgment in favor of the Developer, finding that the working fund contributions could be used to offset the deficit amount. This appeal follows.

STANDARD OF REVIEW

A trial court's interpretation of a declaration of a homeowners' association is subject to de novo review. *Klinow v. Island Court at Boca W. Prop. Owners' Ass'n, Inc.,* 64 So. 3d 177, 180 (Fla. 4th DCA 2011). "The constitution and by-laws of a voluntary association, when subscribed or assented to by the members, becomes a contract between each member and the association." *Waverly 1 & 2, LLC v. Waverly at Las Olas Condo. Ass'n, Inc.*, 242 So. 3d 425, 428 (Fla. 4th DCA 2018) (citation omitted). "Issues of contract and statutory interpretation are reviewed de novo as they raise questions of law." *MacKenzie v. Centex Homes*, 208 So. 3d 790, 793 (Fla. 5th DCA 2016).

APPLICABLE LAW

"When the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning." *A.R. Douglass, Inc., v. McRainey*, 137 So. 157, 159 (Fla. 1931). "This court is without power to construe an unambiguous statute in a way which would extend, modify, or limit its express terms or its reasonable and obvious implications. To do so would be an abrogation of legislative power." *Am. Bankers Life Assur. Co. of Fla. v. Williams*, 212 So. 2d 777, 778 (Fla. 1st DCA 1968). "When a statute is susceptible to only one reasonable interpretation, the plain language of the statute controls. Only where the plain language of a statute is ambiguous—where a reasonable person could find two different meanings leading to two different outcomes—will this Court resort to the tools of statutory construction." *See MacKenzie*, 208 So. 3d at 793 (citation omitted). Finally, "[a] statute should be interpreted to give effect to every clause in it, and to accord meaning and harmony to all of its parts." *Giamberini v. Dep't of Fin. Servs.*, 162 So. 3d 1133, 1136 (Fla. 4th DCA

2015) (citation omitted). "A single word or provision of a statute cannot be read in isolation." *Id.*

"The purposes of [the HOA Act] are to give statutory recognition to corporations not for profit that operate residential communities in this state, to provide procedures for operating homeowners' associations, and to protect the rights of association members without unduly impairing the ability of such associations to perform their functions." § 720.302(1), Fla. Stat. (2018). To this end, Section 720.309(1), Florida Statutes (2018), states:

> Any grant or reservation made by any document, and any contract that has a term greater than 10 years, that is made by an association before control of the association is turned over to the members other than the developer, and that provides for the operation, maintenance, or management of the association or common areas, must be fair and reasonable.

With regard to a developer's financial obligation to an HOA before turnover, Section 720.308(1)(b), Florida Statutes (2018), provides:

> While the developer is in control of the homeowners' association, it may be excused from payment of its share of the operating expenses and assessments related to its parcels for any period of time for which the developer has, in the declaration, obligated itself to pay any operating expenses incurred that exceed the assessments receivable from other members and other income of the association.

Thus, Section 720.308(1)(b) allows a developer to forego paying HOA assessments on lots which it owns provided that the developer agrees "to pay any operating expenses incurred that exceed the assessments receivable from other members and other income of the association." *Id.*

If a developer chooses to rely upon Section 720.308(1)(b), the developer's potential financial obligation to the HOA is calculated using a formula outlined in Section 720.308(5), Florida Statutes (2018). Section 720.308(5) provides:

> The guarantor's total financial obligation to the association at the end of the guarantee period shall be determined on the accrual basis using the following formula: the guarantor shall pay any deficits that exceed the guaranteed amount, less the

> total regular periodic assessments earned by the association from the members other than the guarantor during the guarantee period regardless of whether the actual level charged was less than the maximum guaranteed amount.

In other words, at the end of the guarantee period, when the developer turns over control of the HOA to the homeowners, the developer must pay "any deficits that exceed the guaranteed amount, less the total regular periodic assessments" received from other HOA members. *Id.*

An "assessment," as defined by Section 720.301(1), Florida Statutes (2018), is a "sum or sums of money payable to the association, to the developer or other owner of common areas, or to recreational facilities and other properties serving the parcels by the owners of one or more parcels as authorized in the governing documents, which if not paid by the owner of a parcel, can result in a lien against the parcel." Further, Section 720.308(1) and (1)(a), Florida Statutes (2018), provides that "the governing documents must describe the manner in which expenses are shared and specify the member's proportional share thereof" and "assessments levied pursuant to the annual budget or special assessment must be in the member's proportional share of expenses as described in the governing document." Notably, Sections 720.308(6) and 720.308(4)(b), Florida Statutes (2018), prohibit the developer from using "[a]ny portion of the parcel assessment which is budgeted for designated capital contributions of the association" to pay for operating expenses.

If an HOA declaration's terms contravene a governing statute, the term is deemed invalid. *Palm Bay Towers Corp. v. Brooks*, 466 So. 2d 1071, 1074 (Fla. 3d DCA 1984). However, a declaration's terms are afforded a "very strong presumption of validity which arises from the fact that each individual [lot] owner purchases his [lot] knowing of and accepting" the declaration's terms. *Hidden Harbour Ests., Inc., v. Basso*, 393 So. 2d 637, 639 (Fla. 4th DCA 1981).

ANALYSIS

The issue before this Court is whether the Developer's use of the working fund contributions to offset its deficit obligation is prohibited by Chapter 720 and, in particular, Section 720.308. We begin our analysis by noting that the statutory provisions at issue in the instant case are clear and unambiguous such that this Court has no occasion to resort to the rules of statutory construction. *See MacKenzie*, 208 So. 3d at 793. Thus, we must give the relevant provisions in Chapter 720 their plain and obvious meanings. In doing so, we hold that the declaration's terms, which

permitted the Developer to use the working fund contributions to offset its deficit obligation, did not contravene Chapter 720. Therefore, we affirm the circuit court's final order granting partial summary judgment in the Developer's favor for the following reasons.

First, the declaration's section entitled "Working Fund Contribution" clearly stated that each lot owner would be obligated to pay an amount equal to three months' share of the initial budget's annual, non-abated operating expenses. The declaration specified that these funds were due at the time legal title was conveyed to the lot owner. Significantly, the declaration specifically stated that these funds could be used for, among other things, initial startup expenses, unforeseen expenditures, and "to offset Operating Expenses, both during the Guarantee Period . . . and thereafter." The declaration also explicitly stated that the working fund contribution could be used to reduce the operating expense deficit. As the declaration contained these terms at the time of recording, every Valencia Reserve lot owner agreed to pay the working fund contribution and knew that these funds could be used to cover operating expenses and offset the Developer's deficit obligation. *See Hidden Harbour Ests., Inc.*, 393 So. 2d at 639. Given that each lot owner expressly agreed to these terms upon completing the property purchase, we similarly find that the declaration's provision authorizing the Developer to use the working fund contributions to offset its deficit obligation was "fair and reasonable" as required by Section 720.309(1).

Second, the Developer's use of the working fund contributions to pay for operating expenses did not violate Sections 720.308(4)(b) and 720.308(6). Under these sections, a developer may not pay for operating expenses using lot assessments which have been budgeted for designated capital contributions. Here, the working fund contributions were not budgeted for designated capital contributions, thus, Sections 720.308(4)(b) and 720.308(6) do not apply.

Third, we agree with the circuit court's conclusion that the working fund contributions qualified as regular periodic assessments for the purpose of calculating the Developer's final deficit obligation under Section 720.308(5). Per the declaration, all lot owners were required to pay the working fund contribution at the time of conveyance. The declaration further stated that the working fund contributions could be used to pay the HOA's operating expenses or offset operating expenses during or after the guarantee period. Under Chapter 720, nothing prevents an assessment from being used to pay an HOA's operating expenses. Consequently, the working fund contribution would qualify as an assessment as it could be used to pay the expenses of the HOA.

Although only paid once, the working fund contribution was equal to three months' share of the annual regular assessments calculated pursuant to the initial budget. In essence, the working fund contribution was the first regular periodic assessment, due as an upfront, lumpsum payment. Thereafter, periodic payments were due at regular intervals set by the declaration. Accordingly, the working fund contribution is consistent with a regular periodic assessment that could be used to pay or offset operating expenses.

In conclusion, the use of the working fund contributions to offset the Developer's deficit obligation did not violate the HOA Act. We find nothing in Chapter 720 that prohibits the Developer's action in this case. If the legislature wishes to prevent such action, it can do so by enacting legislation to that effect.

Finally, we find no merit to the HOA's argument that genuine issues of material fact precluded summary judgment. The parties filed cross motions for summary judgment and stipulated that there were no material facts in dispute. Moreover, the HOA has not identified any disputed material facts to support its argument that summary judgment was improper.

Therefore, we affirm the decision below.

Affirmed.

LEVINE, C.J. and KUNTZ, J., concur.

* * *

Not final until disposition of timely filed motion for rehearing.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

GRACE AND NAEEM UDDIN, INC., a Florida corporation,
Appellant,

v.

SINGER ARCHITECTS, INC., BROWARD COUNTY, and **ARCH INSURANCE COMPANY,**
Appellees.

No. 4D18-2972

[August 28, 2019]

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; John B. Bowman, Judge; L.T. Case No. 14-004946 (05) and 13-013834 CACE (02).

David R. Elder and Kerry H. Lewis of Elder & Lewis, P.A., Miami, for appellant.

Neil P. Robertson of Daniels Rodriguez Berkeley Daniels & Cruz, P.A., Coral Gables, for appellees.

MAY, J.

Whether a supervising architect owes a duty of care to a contractor hired by the county for an airport improvement project is the question asked in this appeal. The contractor argues the trial court erred in failing to apply *Moyer*[1] and granting final summary judgment for the architect. We agree and reverse.

The county entered into separate contracts with the architect and the contractor for the development of an improvement project at the Fort Lauderdale Airport. The county's contract with the architect assigned the latter with consultant and administrative duties. The county's contract with the contractor concerned the scope of work and the architect's role as a consultant and administrator.

---

[1] *A.R. Moyer v. Graham*, 285 So. 2d 397 (Fla. 1973).

As the project neared completion, the county terminated its contract with the contractor. The contractor filed suit against the county and the architect claiming breach of contract and professional negligence, respectively. The trial court consolidated the actions for discovery and trial.

The architect moved for partial summary judgment, arguing it did not owe the contractor a duty of care and the contractor could not recover contract damages in tort. The trial court granted the architect's motion, concluding the architect did not owe the contractor a duty of care in its role as the county's consultant. From that partial summary judgment, the contractor now appeals.

- *The Architect/County Contract*

The contract between the architect and the county outlined the architect's role as "CONSULTANT SERVICES FOR MISCELLANEOUS PROFESSIONAL ARCHITECT, ENGINEER, AND INTERIOR DESIGN SERVICES." The contract designated the architect as a "Consultant." Article 10.20 declared the parties' intent not to "create any rights or obligations in any third person or entity under this agreement."

Under Article 3, the "SCOPE OF SERVICES/TASKS/PHASES," the architect was responsible for: (1) visiting the site and attending construction events and meetings regularly; (2) conducting joint observations of the work with the county; (3) informing the county of the progress and quality of the work; (4) managing administrative records outlined in the contract; (5) assisting the county in determining the amounts owed to the contractor; and (6) certifying the contractor's evaluation for payment.

The architect was to:

(1) interpret and give recommendations on disputes arising between the county and contractor;

(2) recommend rejection of work not in conformity with the contract;

(3) review and act on the contractor's "shop drawings, product data and samples";

(4) coordinate with the county to review "Change Orders for Code Compliance";

(5) conduct site observations, make recommendations, and assist the county in determining the project's completion; and

(6) manage the finalization of the project by preparing a punch list of incomplete or work needing correction and confirm the contractor's "successful demonstration" of the project.

The architect's principal described his role as the county's "eyes and ears" for the project. He subcontracted a consulting firm to help him "run the job" because he could not dedicate more than fifteen or twenty percent of his time on the project. The scope of the consulting firm's work related to reviewing construction schedules and other administrative work.

The principal admitted he recommended the contractor's termination to the county and knew termination could happen upon his recommendation. Conversely, the county's project manager testified that although the county and architect had discussions regarding the contractor's termination, the architect never expressly recommended termination. The county's director of capital improvement and projects and contract administrator for the project described the architect as the "architect on the job," and relied on the principal's input in reviewing pay applications, change orders, time extensions, and inspection of the punch list. He added that the county paid the contractor based on the principal's recommendation.

- *The Appeal*

The contractor argues that *Moyer* recognized a professional negligence claim against an architect, who supervises a project resulting in economic damages to the contractor. Therefore, the contractor argues the trial court erred in granting partial summary judgment. The architect responds that the trial court correctly found the architect hired by the county owed no duty of care to the contractor because Florida case law does not extend the architect's duty of care to the contractor. The architect also argues the contractor cannot recover contract damages against the architect because those damages would be duplicative.

We review summary judgments de novo. *Chirillo v. Granicz*, 199 So. 3d 246, 249 (Fla. 2016). "The duty of care in a negligence action is a question of law . . . ." *Cheeks v. Dorsey*, 846 So. 2d 1169, 1171 (Fla. 2003).

"Under Florida's common law a person who is injured by another's

negligence may maintain an action against the other person based on that other person's violation of a duty of due care to the injured person." *Moransais v. Heathman*, 744 So. 2d 973, 975 (Fla. 1999). "A professional duty may arise in favor of a third party as a result of a matter of law . . . ." *Trikon Sunrise Assocs. v. Brice Bldg. Co.*, 41 So. 3d 315, 318 (Fla. 4th DCA 2010).

"[A] third party general contractor, who may foreseeably be injured or sustained an economic loss proximately caused by the negligent performance of a contractual duty of an architect, has a cause of action against the alleged negligent architect, notwithstanding absence of privity." *Moyer*, 285 So. 2d at 402. *Moyer* relied upon California case law that recognized the professional liability of a supervising architect to a third-party contractor.

> Altogether too much control over the contractor necessarily rests in the hands of the supervising architect for him not to be placed under a duty imposed by law to perform without negligence his functions as they affect the contractor. The power of the architect to stop the work alone is tantamount to a power of economic life or death over the contractor.

Id. at 401 (quoting *United States v. Rogers & Rogers*, 161 F. Supp. 132, 136 (S.D. Cal. 1958)).

Florida courts have required the existence of "supervisory duties" or responsibilities and a "close nexus" between the architect and contractor for *Moyer* to apply. *McElvy, Jennewein, Stefany, Howard, Inc. v. Arlington Elec., Inc.*, 582 So. 2d 47, 49-50 (Fla. 2d DCA 1991); *E.C. Goldman, Inc. v. A/R/C Assocs.*, 543 So. 2d 1268, 1270-72 (Fla. 5th DCA 1989); *see also Recreational Design & Constr., Inc. v. Wiss, Janney, Elstner & Assocs.,* 867 F. Supp. 2d 1234, 1239 (S.D. Fla. 2011). When the contract does not require an architect to supervise, the architect does not perform supervisory duties, and the contractor is more removed from the architect, liability will not be imposed. *McElvy*, 582 So. 2d at 49.

The Southern District of Florida found a duty of care existed in a case involving the same plaintiff and virtually identical facts. *Grace & Naeem Uddin, Inc. v. Jacobs Facilities, Inc.*, 2012 WL 12950012, at *1-6 (S.D. Fla. June 7, 2012). There, the court determined the supervising architect/engineer may be found to have the requisite control to establish professional liability even without ultimate decision-making power. *Id.* at *5.

Upon reviewing the record in a light most favorable to the contractor, the court denied the architect/engineer's motion for summary judgment. *Id.* Applying *Moyer*, the court found that despite the architect/engineer having no decision-making authority, the nexus between it and the contractor was sufficiently strong. *Id.* The architect/engineer worked on the project together with the contractor; and, the contractor was not a subcontractor. *Id.*

Here, the contractor argues a duty of care existed because he and the architect had contracts with the county, and testimony revealed that the architect effectively controlled the project and the contractor's fate. The architect was broadly responsible for administration of the county/contractor contract and sometimes acted as the county's representative. The architect was also responsible for on-site observational duties, which were later used to certify payment.

The architect responds that it did not have final decision-making authority. The architect also argues the facts in this case are more akin to *McElvy, E.C. Goldman,* and *Recreational Design & Construction*, where the court found the consultants lacked the requisite authority and nexus to impose liability. We disagree.

Although the architect was not given absolute authority to stop work, it had the authority to recommend work stoppage. Article 5.1 provided the architect, in conjunction with the county's contract administrator, was responsible for reviewing final documentation and the architect would issue "Final Certificate of Payment." Article 5.3 provided final payment was contingent on the architect's certification.

The architect's supervisory control over the contractor was further supported by deposition testimony in which the architect's principal described himself as the "eyes and ears" of the project. Both the county's project manager and contract administrator confirmed the county's reliance on the architect in overseeing the contractor's performance.

Although the county had final authority to terminate the contractor or otherwise stop work, it relied on the architect's duty as consultant to make its ultimate determination to terminate the contractor. The architect was given near absolute authority regarding payments to the contractor, demonstrating the architect's influence over the contractor's economic vitality.

The architect's reliance on *McElvy, E.C. Goldman,* and *Recreational Design & Construction* is misplaced. Unlike the architect in *McElvy*, who

did not have definitive supervisory control over the contractor, here the architect had supervisory control, both de facto and de jure. And, unlike the subcontractor in *McElvy*, the contractor's status as a general contractor on the project established the requisite nexus to fall within *Moyer*.

Both *E.C. Goldman* and *Recreational Design & Construction* concerned persons other than a supervising architect. *E.C. Goldman* involved a design expert. *Recreational* involved an engineer. Neither of them supervised the project, and neither had the requisite nexus with the contractor. *See Recreational Design & Constr., Inc.*, 867 F. Supp. 2d at 1237; *E.C. Goldman*, 543 So. 2d at 1270-71.[2]

Lastly, the architect argues Article 10.20 in the county/architect contract, which declared no duty to third-party beneficiaries, eliminates any duty of care between the architect and contractor. Once again, we disagree.

In *Moyer*, our supreme court established a supervising architect's duty of care to a general contractor based on foreseeability of harm. "[A] contractor is an incidental beneficiary absent clear intent manifested in the owner-architect contract to the contrary." 285 So. 2d at 403. Because *Moyer* specifically established tort liability in the absence of any contractual privity based on foreseeability of harm, the contractor's status as a contractual beneficiary is inconsequential.

Lastly, the architect argues because the contractor seeks to recover contractual economic damages from the county, tort damages from the architect are barred. "[U]nder Florida law, a party is not permitted to recover for the same damages more than once." *Addison Constr. Corp. v. Vecellio*, 240 So. 3d 757, 762 (Fla. 4th DCA 2018). "A judgment against one person liable for a loss does not terminate a claim that the injured party may have against another person who may be liable therefor." *Id.* (citation omitted). A party is not barred from claiming against multiple parties where there are overlapping claims. *Id.*

---

[2] The architect also relies on a per curiam decision of ours in which the dissent suggested the economic loss rule barred a contractor from pursuing economic damages in tort. *D.I.C. Commercial Constr. v. Broward County*, 668 So. 2d 697, 698 (Fla. 4th DCA 1996). Since *D.I.C. Commercial Constr.*, our supreme court has limited the application of the economic loss rule to products liability actions. *Tiara Condo. Ass'n v. Marsh & McLennan Cos.*, 110 So. 3d 399, 407 (Fla. 2013).

Here, liability has not yet been determined against either defendant. While a party may not collect the same damages twice, when the judgment is undetermined, overlapping damages claims are a "post-judgment issue." *Id.* For this reason, the architect's argument is premature.

For the foregoing reasons, we reverse and remand the case to the trial court to vacate the summary judgment in favor of the architect.

Reversed and Remanded.

GROSS, J., and NUTT, JAMES, Associate Judge, concur.

* * *

Not final until disposition of timely filed motion for rehearing.