No. 25-613

In the Supreme Court of the United States

MARQUISE MILLER,
Petitioner,

v.

LEGACY BANK,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Is this case appropriate for certiorari review, given that there is no conflict in the decisions of the courts of appeals about who may maintain a private right of action under the Equal Credit Opportunity Act?

2. Is this case appropriate for certiorari review, given that this is a straightforward, private party case where Marquise Miller simply and indisputably failed to do what he needed to do to apply for a loan with Legacy Bank, and this case thus does not involve any unsettled matter of public importance?

RULE 29.6 STATEMENT

Legacy Bank is a privately held Oklahoma banking corporation that is a wholly owned subsidiary of Midstate Bancorp, Inc. No publicly traded entity owns 10% or more of the stock of either Legacy Bank or its parent.

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STATEMENT OF THE CASE

I. Decisions of the Lower Courts Below

Marquise Miller claims in this litigation that Legacy Bank discriminated against him because of his race in violation of the Equal Credit Opportunity Act, 15 U.S.C. §1691, *et seq*. After protracted litigation all out of proportion to the nature of the case, the district court granted summary judgment to Legacy Bank on May 7, 2024 (W.D. Okla. ECF No. 348). A panel of the Tenth Circuit affirmed the district court's decision, and the Tenth Circuit denied Miller's Petition for Rehearing *En Banc*. See Pet. App. 1a-11a; *Order and Judgment of the United States Court of Appeals for the Tenth Circuit*; Pet. App. 28a, *Order Denying Petition for Rehearing En Banc*.

Both the district court and the Tenth Circuit panel below correctly concluded that Marquise Miller was not an aggrieved applicant entitled to maintain a private right of action under the ECOA. Distilled to its essence, this case boils down to two things:

1. Miller's persistent unwillingness to provide Legacy Bank with a basic credit application and the financial information Legacy Bank legitimately requests and needs to evaluate customer loan inquiries.
2. Miller's persistent unwillingness to provide good collateral to Legacy Bank for a loan he was inquiring about.

Miller has proceeded *pro se* for much of this case, including on appeal. However, for the duration of the summary judgment litigation and depositions in the district court below, Miller was represented by counsel. [CA10 No. 24-6105, Appellee's Supp. Appx., Vol. I, 206, EOA; ROA, Vol. III, 294-295, Motion to Withdraw; ROA, Vol. III, 300, Order.]

II. Facts of the Case

1. Legacy Bank Provides a Line of Credit to Rhama Counseling in 2013

In February of 2013, Legacy Bank extended a line of credit to Rhama Counseling, a company wholly owned by Marquise Miller. See Legacy Motion for Summary Judgment ("MSJ") (W.D. Okla. ECF No. 316), Exhibit 1, Credit Application (W.D. Okla. ECF No. 317); Exhibit 2, Promissory Note (W.D. Okla. ECF No. 318). Miller formally applied for the line of credit. *Id*. The collateral for the line of credit was two real properties located at 933 NE 32nd and 908 NE 30th in Oklahoma City, OK. *Id*., Exhibit 3, Mortgage (W.D. Okla. ECF No. 316-3). These two properties became known in the district court below as the "Rhama Properties."

Chris Farris, a Legacy Bank loan officer, began servicing Rhama Counseling's line of credit in August of 2013. *Id*.; Exhibit 4, Declaration of Chris Farris at ¶ 3 (W.D. Okla. ECF No. 316-4); Exhibit 5, E-mail from Chris Farris to Michael Chaloner (LB_01626) (W.D. Okla. ECF No. 316-5). Farris assisted Miller with renewing the line of credit in 2014. *Id*.

2. Miller Inquires About a Potential New Loan in 2015

Miller contacted Chris Farris in September of 2015 about seeking a loan to rehabilitate a property Miller had recently purchased at 2110 N. Lottie Avenue in Oklahoma City. See Legacy's MSJ, Exh. 4, Farris Decl., ¶ 5 (W.D. Okla. ECF No. 316-4). This property became known in the District Court below as the "Lottie Property."

During their discussions about a potential new loan, Farris suggested that Miller could either secure the potential loan with the two Rhama Properties he had previously pledged as collateral for the line of credit, or that Miller could partially secure a loan with cash Miller had on deposit at Legacy Bank. Miller was not the one who suggested either of these collateral alternatives. See Legacy's MSJ, Exh. 4, Farris Decl., ¶ 8 (W.D. Okla. ECF No. 316-4); Exhibit 9, Miller letter to OSBD (OSBD #000405-406) (W.D. Okla. ECF No. 316-9).

To the contrary, Miller vigorously objected to the suggestion that he could secure a potential loan with cash, and he never offered to pledge the two Rhama Properties as collateral. When Farris presented Miller with these two alternatives, Miller asked instead, "why we cant [sic] just use the property on 2110 N. Lottie has collateral." *Id.,* Exhibit 10, Consumer Report (OSBD #000055) (W.D. Okla. ECF No. 316-10); Exh. 4, Farris Decl., ¶¶ 9-10 (W.D. Okla. ECF No. 316-4, E-mail from Miller to Farris (LB_00741) (W.D. Okla. ECF No. 316-11). Thus, far from agreeing to the two alternatives Farris was offering, Miller was balking about them.

3. Legacy Bank's Loan Policies on Loan Applications

Legacy Bank's policy on loan inquiries is to obtain and consider the following information in connection with a real estate loan:

1. A credit application;
2. Sufficient financial information to assist in the credit analysis;
3. Credit Report(s);
4. Evidence of Security Perfection;
5. Other documentation required by policy, procedure, or requested by the Loan Committee.

Legacy's MSJ, Exhibit 6, Loan Policy (LB_03576) (W.D. Okla. ECF No. 319); Exh. 4, Farris Decl., ¶ 4 (W.D. Okla. ECF No. 316-4).

Miller never submitted a credit application to Legacy for any potential loan for the Lottie Property rehabilitation. *Id.*, Exh. 4, Farris Decl., ¶ 6 (W.D. Okla. ECF No. 316-4); Exhibit 7, Plaintiff's Housing Discrimination Complaint #3 (OSBD 00129) (W.D. Okla. ECF No. 316-7); Exhibit 8, Oklahoma State Banking Dep't Letter to Miller at Undisputed Fact #3 (OSBD #000147) (W.D. Okla. ECF No. 320). Likewise, Miller never provided any current financial information to Legacy to assist in any credit analysis for any potential loan for the Lottie Property rehabilitation. *Id.*, Exh. 4, Farris Decl., ¶ 7 (W.D. Okla. ECF No. 316-4).

In the end, Miller never submitted a credit application, current financial information, or any of the

other information required under Legacy Bank's loan policies. Miller outright admitted in his summary judgment response that he never provided Legacy Bank with any of the current financial information it requested and needed to assist in any credit analysis for any potential new loan. *Cf.* Legacy's MSJ at 8, ¶ 10 (W.D. Okla. ECF No. 316), with Miller MSJ Response at 4, ¶ 10 (W.D. Okla. ECF No. 334); see also Pet. App. 6a, *Tenth Circuit Order and Judgment* (pointing out Miller's admitted failure to do so).

The record below shows that Legacy Bank asked Miller for this information, but he never provided it. See Legacy MSJ, Exh. 8, Oklahoma State Banking Dep't Letter to Miller, pp. 2-3 (OSBD #000147-148) (W.D. Okla. ECF No. 320). Thus, the record shows that Legacy Bank encouraged, not discouraged, Miller to apply for a loan. All Miller had to do with Legacy Bank was complete an application for a loan and pledge good collateral. He never did.

4. Miller's Arvest Bank Loan

On November 2, 2015, Miller requested a loan from Arvest Bank for $125,000. Legacy's MSJ, Exhibit 12, Arvest Business Loan Request (ARVEST_000002) (W.D. Okla. ECF No. 321). The purpose of the loan Miller requested from Arvest, like the potential loan he had inquired about from Legacy, was to rehabilitate the Lottie Property. *Id.*

The proposed collateral for the Arvest Bank loan was the two *Rhama Properties*, or in other words, the same properties Legacy Bank had proposed, but Miller had balked at offering, as collateral. *Id.* There is no evidence that the Lottie Property was ever

proposed, discussed, or considered as collateral for the Arvest Bank Loan.

Arvest Bank ultimately approved a loan to Miller for $77,250, secured by the two Rhama Properties. *Id*., Exhibit 16, Promissory Note (ARVEST_000051) (W.D. Okla. ECF No. 325); Exhibit 14, Proposal (ARVEST_000062-63) (W.D. Okla. ECF No. 323). In its decision on a complaint Miller had filed against Legacy Bank with the Oklahoma State Banking Department, the Banking Department noted that Miller appeared to have "later recognized the need to offer additional collateral and granted a mortgage to Arvest Bank on the 30th Street Property and the 32nd Street Property [the Rhama Properties] . . . .". See Legacy MSJ, Exh. 8, Oklahoma State Banking Dep't Letter to Miller, p. 3 (OSBD #000148) (W.D. Okla. ECF No. 320).

Thus, the consensus of the lenders involved in this case is that they were willing to make loans to Miller, including loans for the rehabilitation of the Lottie property, if Miller simply completed an application and agreed to pledge good collateral for the loan. In the case of Legacy Bank, Miller never did so.

5. Miller's Petition Includes Materially False Claims About the Conclusions of the Banking Regulators

i. The Oklahoma State Banking Department Concluded That Legacy Bank Did Not Engage In Redlining

S. Ct. R. 15.2 provides that:

> In addition to presenting other arguments for denying the petition, the brief in opposition should address any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted. Counsel are admonished that they have an obligation to the Court to point out in the brief in opposition, and not later, any perceived misstatement made in the petition. Any objection to consideration of a question presented based on what occurred in the proceedings below, if the objection does not go to jurisdiction, may be deemed waived unless called to the Court's attention in the brief in opposition.

S. Ct. R. 15.2.

Miller prominently but incorrectly claims in his Petition for Certiorari that the Oklahoma State Banking Department concluded that Legacy Bank had engaged in impermissible redlining in violation of federal lending laws. See Pet. at 11. This is a serious accusation, but it is utterly false. Miller has persistently repeated it throughout this litigation, even in the wake of repeated warnings and sanctions from the district court about his abusive litigation conduct.

The Oklahoma State Banking Department actually concluded in no uncertain terms that Legacy Bank had *not* engaged in redlining. The Banking Department reasoned as follows on the redlining point:

Mr. Farris' email denying the loan request stated that the Loan was refused, in part, based on the location of the Lottie Property. Taken alone, Mr. Farris' denial would appear to fall within the impermissible practice of "redlining."

[general legal explanation of redlining is omitted]

However, Mr. Farris' statement of credit denial cannot be reviewed in isolation of the other circumstances surrounding this Loan request. For example, an appraisal of the Lottie Property was ordered by Mr. Farris on September 17, 2025, indicating that the Lottie property's location was not viewed initially as a determining factor in the credit decision. Although the appraisal of the Lottie property was not completed, the value of the property as determined by the Oklahoma County assessor ($44,952) suggests it would not support the Loan request without additional collateral. Finally, after more than a month of negotiations, your email dated October 16, 2015, indicated you only wanted to use the Lottie Property as collateral – though you were aware of the option of using the 30th Street Property and the 32nd Street Property as additional

> collateral for the loan. Ultimately, it appears you later recognized the need to offer additional collateral and granted a mortgage to Arvest Bank on the 30th Street Property and the 32nd Street Property as collateral for the $81,000 Arvest Loan.

See Legacy MSJ, Exh. 8, Oklahoma State Banking Dep't Letter to Miller, p. 3 (OSBD #000148) (W.D. Okla. ECF No. 320).

The Banking Department ultimately concluded as follows on the redlining issue:

> After considering the facts in this matter as well as the reasonable inferences that can be drawn from the facts, the Oklahoma State Banking Department has come to the following conclusions:
>
> 1. The Bank has not engaged in "redlining" low- to moderate-income or African American communities. The Bank provided evidence of loans in the same census tract where the Lottie Property is located and also has a history of loaning funds to you and others based on security of property located in adjacent high minority census tracts.

See Legacy MSJ, Exh. 8, Oklahoma State Banking Dep't Letter to Miller, p. 4 (OSBD #000149) (W.D. Okla. ECF No. 320).

ii. Miller's False Claim About Redlining is Symptomatic of Miller's Abusive Litigation Conduct Throughout This Case

Miller's false, misleading, and out of context claim is nothing but a continuation of Miller's conduct in the courts below. Throughout the course of this litigation, the case devolved into excessive, protracted, vexatious, and abusive litigation tactics on the part of Miller. The best explanation of this comes from the district court's August 4, 2023 Order imposing a relatively modest and measured set of sanctions on Miller, given the egregious nature of Miller's conduct. In that Order, the District Court detailed, among other things, at least thirty-nine meritless Miller filings in what should have been a rather straightforward case. (W.D. Okla. ECF No. 226, pp. 1-2). It will suffice to say here that the barrage of Miller's filings speaks for itself. The record shows that Miller persistently asserted frivolous positions and engaged in abusive, disruptive conduct.

The district court also pointed to Miller's unwarranted aspersions of "the trial court's incompetence and judicial dishonesty." (W.D. Okla. ECF No. 226, p. 3). The district court pointed out Miller's obstinance, his sharp-tongued rhetoric, and his abusive tactics, as evidenced by Miller's remarks such as the following: "If the trial judge doesn't want to make decisions between disputing parties, then there are other career paths that would help him reach this goal." (W.D. Okla. ECF No. 226, pp. 3, 5) The Court noted that Miller's disruptive conduct had "unduly taxed the Court's limited resources" and

"undermined the Court's ability to effectively manage its docket." (W.D. Okla. ECF No. 226, p. 5).

Even the Tenth Circuit was not spared. Prior to his appeal of the district court's Order Granting Summary Judgment, Miller filed a combination of six interlocutory appeals and mandamus relief petitions, all of which the Tenth Circuit dismissed or denied. The Tenth Circuit described one of Miller's requests for mandamus relief as a "prolix pro se petition." See 6/2/23 Order Denying Petition, p. 1, CA10 No. 23-6066 (Doc: 010110868504). The Tenth Circuit noted in another one of the proceedings that Miller "accuses the district court judge of lying in several orders." See 12/12/2023 Order Denying Petition, p. 2, CA10 No. 23-6163 (Doc. 010110967438).

Amidst all this, the district court awarded attorneys' fees to Legacy Bank on two separate occasions arising out of discovery abuse on the part of Miller. Miller eventually sued, in their personal capacity, the District Judge and a Magistrate Judge assigned to oversee discovery disputes and monitor depositions in the case. See *infra*. The Tenth Circuit affirmed the district court's attorneys' fee awards, but Miller has not sought certiorari review of that decision.

RELATED PROCEEDINGS OMITTED BY MILLER

Miller has not provided a complete statement of related cases and appeals.

United States District Court (W.D. Okla.):

Marquise Miller v. *Timothy DeGiusti,* No. 5:25-CV-00301-SWS (June 13, 2025) (dismissed)

Marquise Miller v. *Suzanne Mitchell*, No. 5:25-CV-00535 (November 24, 2025) (dismissed)

United States Court of Appeals (CA10):

In re Marquise Miller, No. 23-6066, Petition for Writ of Mandamus and/or in the Alternative a Petition for Writ of Certiorari to correct Western District of Oklahoma's discovery violations in No. 5:20-CV-946-D; denied June 2, 2023.

Marquise Miller v. *Legacy Bank*, No. 23-6105, Miller's appeal of the Western District of Oklahoma's denials of Plaintiff's Motions to Compel [Docs. 114 and 147] in No. 5:20-CV-946-D; denied September 8, 2023.

In re Marquise Miller, No. 23-6124, Petition for Writ of Mandamus to Disqualify Judge Timothy DeGiusti in the Western District of Oklahoma, No. 5:20-CV-946-D; denied September 29, 2023.

In re Marquise Miller, No. 23-6146, Petition for Mandamus for Writ to Correct Oft-Repeated Error(s) by the Western District of Oklahoma in No. 5:20-CV-946-D; denied December 12, 2023.

In re Marquise Miller, No. 23-6163, Petition for Writ of Mandamus to Vacate District Court's Order [W.D. Okla. ECF No. 276] Compelling Mr. Miller to Provide Privileged [sic] Documents in Western District of Oklahoma, No. 5:20-CV-946-D; denied December 12, 2023.

Marquise Miller v. *Legacy Bank*, No. 23-6182, Miller's appeal of the district court's granting of Legacy Bank's Motion for Attorney's Fees [W.D. Okla. ECF No. 194] in 5:20-CV-946-D; denied November 21, 2023.

Marquise Miller v. *Timothy DeGiusti*, No. 25-6120 (pending appeal of district court's dismissal of W.D. Okla. No. 5:25-CV-000301-SWS)

Miller's statement in his Petition that his cases against Judges DeGiusti and Mitchell are merely "pending" is an understatement to say the least. Both cases have been dismissed at the trial level, and Miller has appealed the dismissal of the case against the District Judge. On appeal, Miller has filed motions to disqualify the Department of Justice as legal counsel, as well as the *entire* roster of the Tenth Circuit judges from hearing the case. (CA10, No. 25–6120, ECF Nos. 12 and 17)

REASONS FOR DENYING THE PETITION

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling rea-

sons. S. Ct. R. 10. A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law. *Id*.

Moreover, certiorari should not be granted except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of parties, and in cases where there is a real and embarrassing conflict of opinion and authority between courts of appeals. *Rice* v. *Sioux City Mem'l Park Cemetery*, 349 U.S. 70, 79 (1955); *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U.S. 387, 393 (1923).

Here, Miller cannot meet this high burden. There is no circuit conflict here. There is no federal question of great public importance that this Court needs to settle. The decision of the Tenth Circuit panel below is straightforward, correct, and consistent with the ECOA statute, regulations, and the consensus of other federal courts on the right of an individual to maintain a private right of action under the ECOA.

Under the clear language of the ECOA statutes and regulations, to maintain a private right of action under the ECOA, an individual must be an *actual applicant* who has submitted a *completed* application to a creditor. The requirement is not a perfunctory one. To the contrary, an application is not complete until the creditor has received *all* the verifying information it ordinarily and regularly obtains, considers, and requires to evaluate a loan—including but not limited to a formal loan application. Miller

indisputably failed to provide that information and documentation to Legacy Bank.[1]

Moreover, the lower courts have consistently and correctly concluded that if a person merely makes a request or an inquiry for a loan, even a specific one, that person is not an applicant. Thus, a "prospective applicant" may not maintain a private right of action under the ECOA. To the extent Miller contends otherwise in his petition, his contention flies in the face of the plain language of the ECOA statutes, regulations, and the consensus of the federal cases. Miller has no private right of action under the ECOA as a matter of law.

Miller's petition centers upon his incorrect take on the decision of a Seventh Circuit panel in *Consumer Fin. Prot. Bureau* v. *Townstone Financial*, 107 F.4th 768 (CA7 2024). *Townstone* is inapposite, however. *Townstone* dealt exclusively with the scope of the Consumer Financial Protection Bureau's authority to bring civil actions to enforce the ECOA. The case did not involve the scope of a private right of action at all.

The distinction is key. The statutory and regulatory framework and structure are completely different for an administrative enforcement action under the ECOA than they are for a private right of action. *Townstone* did not hold, nor does it stand for the proposition, that a "prospective applicant" has a private right of action under the ECOA. If it did, the court's

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[1] Miller's uniquely specific failure to meet even basic financial information obligations to Legacy Bank shows that this case is merely a *sui generis*, private controversy that is not likely to recur. This case is thus not a matter of significant public importance justifying certiorari review.

decision in *Townstone* would be in direct conflict with the plain language of the ECOA statutes and regulations. Ultimately, the Seventh Circuit panel's decision in *Townstone* is too limited in scope, and too debatable in its reasoning, to amount to a decision in conflict with the Tenth Circuit's decision in this case.

The consensus of every decisionmaker who evaluated this case, whether it be a court or regulatory agency, is that Miller either failed or refused to do what he needed to do to be a loan applicant, or to otherwise get a loan from Legacy Bank. Because of that, he failed to make a prima facie case for a private right of action under the ECOA. Neither *Townstone* nor any other federal case teaches otherwise. As such, Miller is not entitled to certiorari review from this Court.

I. There is No Circuit Conflict for This Court to Resolve

A. *Townstone* Dealt Exclusively with the Scope of a Regulatory Enforcement Action, Not the Scope of a Private Right of Action

The gist of Miller's Petition is, of course, that the Tenth Circuit panel's decision below conflicts with the Seventh Circuit panel's decision in *Townstone*. It does not.

Townstone does not present a circuit conflict for several reasons. First, *Townstone* exclusively involved the extent of the CFPB's authority to bring a civil enforcement action under the ECOA. Converse-

ly, this case involves a private party's right to bring a civil action under the ECOA.

In *Townstone*, the panel reversed a district court ruling that the CFPB could not state a valid claim for relief based on allegations that the defendant's advertising activities discouraged consumers from applying for loans. *Townstone*, 107 F.4th at 777. The panel simply held, in the narrow context of an early Fed. R. Civ. P. 12(b)(6) motion to dismiss, that "Regulation B's prohibition on the discouragement of prospective applications is consistent with the plain text of the ECOA." *Id*. Unlike Miller, the CFPB never alleged that any consumers had in fact applied for loans, nor did the CFPB ever allege that the defendants had in fact denied any loans.[2]

The CFPB is specifically authorized by statute to file a civil action to enforce the ECOA. See 12 U.S.C. §5564. In filing such a civil action, it is significant that "[t]he Bureau may act in its own name and through its own attorneys in enforcing *any* provision of this title, rules thereunder, or any other law or regulation." 12 U.S.C. §5564(b) (emphasis added). The breadth of the CFPB's civil action enforcement power is all that was in controversy in *Townstone*.

That is not the controversy in this case. The question in the district court below, and on appeal, is whether Miller had produced or pointed to admissible evidence in support of *his* private right of

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[2] The CFPB alleged that Townstone "had discouraged black prospective applicants from applying for mortgage loans with Townstone, in violation of Regulation B, by making, over a period of years, several statements on their long-form commercial advertisement radio show." *Townstone*, 107 F.4th at 771.

action. The district court and the Fifth Circuit correctly concluded he had not.

B. Congress Clearly Intended that Only Actual Applicants, and Not "Prospective Applicants," are Entitled to Maintain an ECOA Private Right of Action

Miller's private right of action arises under 15 U.S.C. §1691e(a), which provides that "any creditor who fails to comply with any requirement imposed under this subchapter shall be liable to the aggrieved *applicant* for any actual damages sustained by such applicant acting either in an individual capacity or as a member of a class." See 15 U.S.C. §1691e(a) (emphasis added). Congress has clearly defined the term "applicant" in the ECOA 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).

The plain language of the statute clearly does not state that a creditor shall be liable to a "prospective applicant" in a private right of action. The plain language of the statute also does not state that a creditor shall be liable in a private right of action for discouraging a "prospective applicant" from submitting an application.

Likewise, the statute does not give an individual the CFPB's enforcement authority. Neither the Tenth Circuit nor any courts of appeals has ever held otherwise. Indeed, the Tenth Circuit has consistently held that individuals must show, in addition to

several other things, that they *applied* for a loan in order to establish a prima facie case under the ECOA. See *Matthiesen* v. *Banc One Mortg. Corp.*, 173 F.3d 1242, 1246 (CA10 1999); see also *Duran* v. *Cmty. First Bankshares, Inc.*, 92 F. App'x 756, 761 (CA10 2004).

The one circuit that has squarely faced the issue of whether a "prospective applicant" has a private right of action under the ECOA for "discouragement" has, in a manner consistent with the statutes, regulations, and the Tenth Circuit's decisions, convincingly said no. A Fifth Circuit panel convincingly explained the decisive difference between an agency's right of administrative enforcement and an individual's private right of action in *Alexander* v. *AmeriPro Funding, Inc.*, 848 F.3d 698 (CA5 2017) In *Alexander*, the Fifth Circuit explained:

> It is true that a regulation pertinent to the ECOA, known as "Regulation B," provides that "[a] creditor shall not make any oral or written statement, in advertising or otherwise, to applicants or prospective applicants that would discourage on a prohibited basis a reasonable person from making or pur-suing an application." 12 C.F.R. § 202.4(b). *But § 202.4(b) does not alter the definition of "applicant," and only an "aggrieved applicant" has standing under the ECOA to bring a private cause of action.* 15 U.S.C. § 1691e. The statute provides no cause of action for an "aggrieved prospective applicant."

> Discouragement of a "prospective applicant" may be regulatorily prohibited, but it cannot form the basis of a private claim or cause of action under the ECOA.

Alexander, 848 F.3d at 708 (emphasis added). The Fifth Circuit correctly pointed out that "[a]dministrative agencies have broader enforcement powers under the ECOA than individuals attempting to bring a private cause of action." *Id.* n.11 (citing 15 U.S.C. §§ 1691c and 1691e).[3] As is the case with the Tenth Circuit's decision below, there is no circuit conflict between the Fifth Circuit's decision in *Alexander*, and the Seventh Circuit's decision in *Townstone*.

C. An Individual Must Provide a Creditor With a *Completed* Application in Order to Maintain an ECOA Private Right of Action

To be an "applicant" within the meaning of 15 U.S.C. §1691e, the statutes, regulations, and federal cases all provide that an individual must have provided a *completed* application to a creditor; "requests" for credit simply do not suffice. See 15 U.S.C. §1691(d); 12 C.F.R. §202.2(f); *Wilson* v. *Cmty. Powered Fed. Credit Union*, 2021 WL 3678017 (D. Del. Aug. 19, 2021); *Howard Oaks, Inc.* v. *Md. Nat. Bank*, 810 F. Supp. 674, 678 (D. Md. 1993); *High* v.

[3] Section 1691c gives the CFPB authority to enforce the ECOA. It does not address or expand the scope of an individual's private right of action under §1691e.

McLean Fin. Corp., 659 F. Supp. 1561, 1564 (D.D.C. 1987). Moreover, as common sense suggests, the creditor's generation of an adverse action notice to a consumer does not bootstrap an incomplete application into a completed application. *Lawrence* v. *Lenders for Cmty. Dev.*, 2010 WL 4922662 (N.D. Cal. Nov. 29, 2010).

As for what constitutes a "completed application," the ECOA regulations provide the following:

> A *completed application* means an application in connection with which a creditor has received all the information that the creditor regularly obtains and considers in evaluating applications for the amount and type of credit requested (including, but not limited to, credit reports, any additional information requested from the applicant, and any approvals or reports by governmental agencies or other persons that are necessary to guarantee, insure, or provide security for the credit or collateral).

12 C.F.R. §202.2(f) (emphasis in original); see also *High*, 659 F. Supp. at 1564 ("[A]n application is considered 'complete' not when the applicant completes it—as plaintiff would have it—but when the creditor has obtained verifying information and whatever other types of reports or information it ordinarily requires to evaluate a loan.").

Thus, submitting a completed application is truly a prerequisite to an individual having a private right

of action under the ECOA. A creditor's discouraging an individual from applying for a loan may be regulatorily prohibited under Regulation B, but discouragement does not give an individual a private right of action. A private right of action under the ECOA is limited to actual applicants; it does not include prospective applicants. See 15 U.S.C §1691e. *Townstone* does not teach otherwise. The district court and the Tenth Circuit panel in this case thus both correctly held that Miller could not maintain a private right of action because he had not provided a completed application to Legacy Bank.[4]

Miller's claims that a "prospective applicant" who has not provided a completed application to a creditor should have a private right of action under the ECOA belong in the halls of Congress, in the form of advocating for a change in the statutes. They do not belong here. This case is not the case or controversy presented in *Townstone*. *Townstone* had

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[4] Miller's case in the district court hinged on allegations that he had applied to Legacy Bank for a very particular loan with very particular terms. This is what he argued while represented by counsel in his summary judgment response. The district court correctly determined on a Motion for Summary Judgment, not a 12(b)(6) Motion, that there was no admissible evidence to support those allegations. Miller did not claim in his summary judgment response, even though represented by counsel at that time, that he was a prospective applicant entitled to maintain a private right of action for discouragement. He did not make a plain error argument in the Tenth Circuit. He has therefore waived and/or forfeited the argument on appeal, including here. *E.g., Puckett* v. *United States*, 556 U.S. 129, 134 (2009); *United States* v. *Olano*, 507 U.S. 725, 741 (1993); *Richison* v. *Ernest Group, Inc.,* 634 F.3d 1123, 1128-30 (CA10 2011); see also Pet. App. 7a, Tenth Circuit Order and Judgment.

nothing to say about private rights of action. Miller has thus improperly invoked *Townstone* as providing a basis for certiorari review.

II. The *Townstone* Analysis is Too Limited and Debatable to be Persuasive in This Private Right of Action Case

On the issue of "prospective applicants," the court in *Townstone* went no further than to reason that for the purpose of a CFPB enforcement action, "the prohibition against discouragement must include the discouragement of prospective applicants." See *Townstone*, 107 F.4th at 776. *Townstone* does not stand for the proposition that a "prospective applicant" has a private right of action against a lender under the ECOA, whether for alleged "discouragement" or anything else.

Indeed, the notion that the reasoning of *Townstone* extends to granting a private right of action to "prospective applicants" is patently untenable. Doing so would require the Court to, in essence, inappropriately add a word to the statutory language of the ECOA that simply is not there; namely, to add the word "prospective" in front of "applicant."

Such a construction would be especially untenable in light of 15 U.S.C. §1691a(b), which explicitly 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). This plain language, and common sense for that

matter, excludes the notion that someone who has not yet applied for a loan is nevertheless an applicant. It also excludes the notion that someone who has not yet applied for a loan has a private right of action as an aggrieved applicant.

It is also significant that *Loper Bright Enterprises* v. *Raimondo*, 603 U.S. 369 (2024), which overruled the *Chevron* doctrine of deferral to agency interpretations of an ambiguous statute, was decided a scant few days prior to *Townstone*.[5] Even though the court in *Townstone* acknowledged *Loper*, and seemed to disclaim that it was applying the now discarded *Chevron* doctrine, the telltale signs of a court deferring to an agency's interpretation of a statute seem to have permeated the *Townstone* court's analysis. See *Townstone*, 107 F.4th at 775, n.15. Such deference is no longer due.

This need not deter the Court for long, however. Again, this case is not about the extent of the CFPB's authority to bring civil enforcement actions in federal court. It is about whether Miller produced or pointed to sufficient admissible evidence from which a reasonable juror could conclude that he could prevail on his private right of action under the ECOA. The district court and the Tenth Circuit Panel in this case correctly concluded that he had not. Miller is therefore not entitled to certiorari review.

[5] June 28, 2024, and July 11, 2024, respectively.

CONCLUSION

This is not a case of race discrimination on the part of Legacy Bank. Miller simply did not do what he needed to do to be an applicant entitled to maintain a private right of action under the ECOA. The plain language of the ECOA statutes, regulations, and consensus of the federal courts require an individual to have submitted a completed application to a creditor in order to have a private right of action under the ECOA. *Townstone* does not change any of that. *Townstone* deals only with CFPB enforcement authority.

Miller did not submit a completed application to Legacy Bank. He balked at pledging good collateral to Legacy Bank. Because he did not do these things, the courts below correctly concluded that he had failed to make a prima facie case of race discrimination under the ECOA.

This Court should deny certiorari.

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