No. 12-1193

In the Supreme Court of the United States

EDDIE WISE AND DOROTHY MONROE-WISE,
PETITIONERS

v.

THOMAS J. VILSACK, SECRETARY OF AGRICULTURE

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly affirmed the district court's dismissal of petitioners' complaint alleging violations of the Equal Credit Opportunity Act, 15 U.S.C. 1691 *et seq*.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-8) is not published in the *Federal Reporter* but is reprinted in 496 Fed. Appx. 283. The order of the district court (Pet. App. 11-21) is unreported but is available at 2011 WL 381765.

JURISDICTION

The judgment of the court of appeals was entered on November 1, 2012. A petition for rehearing was denied on December 31, 2012 (Pet. App. 27-28). The petition for a writ of certiorari was filed on March 29, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Equal Credit Opportunity Act (ECOA), 15 U.S.C. 1691 *et seq.*, makes it "unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction[,] * * * on the basis of race, color, religion, national origin, sex or marital status, or age." 15 U.S.C. 1691(a)(1). The Act creates a private right of action against creditors, including the United States, who violate its antidiscrimination provisions, and makes such creditors "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." 15 U.S.C. 1691e(a).

2. On October 19, 2000, nine plaintiffs, including petitioners, filed a putative class action against the United States Department of Agriculture (USDA) in the United States District Court for the District of Columbia. The plaintiffs alleged, *inter alia*, that the USDA had discriminated against them on the basis of race and sex, in violation of ECOA, when it denied them credit and other benefits under several farm programs. In 2007, the district court denied the plaintiffs' motion for class certification. The court then transferred the case to the Eastern District of North Carolina, and it severed the discrimination claims of the remaining plaintiffs. See Pet. App. 3.

Petitioners, two African-American farmers, proceeded with their claims as alleged in the putative class action complaint without seeking leave to amend. According to the operative complaint, petitioners had sought to obtain a loan to purchase a farm in the inventory of the Farmers Home Administration (FmHA). Petitioners alleged that the local FmHA official, County Supervisor F. Sidney Long, had discriminated against them based

on their race by failing to provide loan applications, to give them technical support in order to facilitate the submission and approval of their loan application, to submit their application to the USDA in a timely fashion, or to provide them with sufficient information and assistance in obtaining guaranteed loans through outside lenders, as well as by denying their loan application. Petitioners further alleged retaliation for appealing that denial and for filing discrimination complaints with the USDA. See Pet. App. 3-4, 12-14.

The government filed a motion to dismiss or, in the alternative, for summary judgment. The district court granted the motion to dismiss, holding, *inter alia*, that petitioners had failed to state a claim under ECOA. Pet. App. 14-19. The court noted that petitioners were not pursuing a discrimination claim based on "direct evidence" or "disparate impact." *Id.* at 16. Instead, the court explained, petitioners "rel[ied] solely upon [a] disparate treatment" theory of discrimination. *Ibid.* The court explained that the "[d]isparate treatment analysis in the context of an ECOA violation is analogous to the framework outlined in" *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973). Pet. App. 16. Applying that framework, the court concluded that petitioners had sufficiently alleged that they are "members of a protected class"; that they had "applied to the USDA for an extension of credit or credit-related services or assistance"; and that they "were rejected for financing despite their qualifications." *Id.* at 17. After a "searching review of the Complaint," however, the district court found "no colorable allegations" establishing that "other similarly-situated applicants, outside [petitioners'] protected class, were treated more favorably by

the USDA in the provision of credit or in the provision of services or assistance." *Id.* at 17-18.

3. The court of appeals affirmed in an unpublished, per curiam decision. Pet. App. 1-8. The court observed that "[m]ost courts * * * have allowed plaintiffs [in ECOA cases] to proceed under the burden-shifting framework" set forth in *McDonnell Douglas*, and that it had "followed suit" in an unpublished decision. *Id.* at 5. The court noted that petitioners "did not seek leave to amend their complaint after severance, nor after the district court's grant of the motion to dismiss." *Id.* at 3. The court therefore looked to the class complaint to determine whether petitioners had pleaded "sufficient facts to establish 'facial plausibility . . . that [would] allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Id.* at 5 (quoting *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678 (2009)). Like the district court, the court of appeals held that the complaint failed to satisfy that standard because it "does not set forth any facts alleging that non-minority credit applicants were treated different[ly] than [petitioners] were treated." *Id.* at 6.

The court of appeals also noted that, "for the first time on appeal," petitioners had asserted a "pattern or practice" discrimination theory. Pet. App. 7. The court explained that the Fourth Circuit "has not had occasion to decide whether a plaintiff in an ECOA discrimination claim is limited to the standard approach requiring a comparator, or whether a plaintiff can put forward pattern-or-practice evidence to fulfill the fourth prong of a prima facie case." *Ibid.* The court declined to reach that question in this case because petitioners "did not raise the issue below," and because they had failed to "identify any exceptional circumstances that would justi-

fy" consideration of a new theory not presented to the district court. *Id.* at 7-8. The court of appeals likewise declined to address petitioners' contention that they had "successfully pled discrimination under direct evidence and disparate impact theories" because petitioners "did not raise these theories at the district court level." *Id.* at 8.

ARGUMENT

Petitioners contend (Pet. 6-10, 12) that the court of appeals erred in applying the framework set forth in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), to an ECOA discrimination claim, and in articulating the elements necessary to establish a prima facie case of discrimination. Petitioners waived both arguments by advocating the precise legal standard that was ultimately adopted by the courts below. In any event, the court of appeals correctly affirmed the district court's dismissal of petitioners' complaint. The circuit conflicts petitioners identify are overstated, and the choice between competing standards would not change the outcome here. Petitioners' further contention (Pet. 10-12) that the court of appeals erred in denying them an opportunity to amend their complaint is both incorrect and case-specific. Further review of the court of appeals' unpublished decision is not warranted.

1. Petitioners suggest (Pet. 6-7) that the *McDonnell Douglas* burden-shifting framework does not apply to an ECOA discrimination claim. They further argue (Pet. 7-10) that, even if the framework applies, a plaintiff need not allege that the defendant "continued to extend credit to others of similar credit stature not members of the [plaintiff's] protected class" in order to establish a prima face case. Petitioners waived those arguments and,

in any event, the court of appeals correctly affirmed the dismissal of petitioners' complaint.

a. In the courts below, petitioners failed to challenge the application or contours of the *McDonnell Douglas* framework. To the contrary, petitioners repeatedly advanced the same legal analysis that was ultimately adopted by the district court and the court of appeals. This Court's "traditional rule * * * precludes a grant of certiorari" when "the question presented was not pressed or passed upon below." *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (internal quotation marks and citation omitted). The Court should adhere to that rule here.

In the district court, petitioners argued that "[t]here are several elements that must be established in order to demonstrate a prima facie case for an ECOA violation under disparate treatment." 10/15/10 Pet. Resp. 9 (Pet. Resp.). The essential elements identified in that filing included proof that "[a]pplicants who do not belong to the protected class were given loan servicing and/or credit or [were] treated more favorably than plaintiff in the loan servicing and/or credit application process." *Ibid.*[1]

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[1] Petitioners articulated that standard in the context of discussing the government's alternative motion for summary judgment. In the context of the motion to dismiss, however, they also argued that "[t]he facts alleged in the Complaint clearly evidence a prima facie case against [respondent] for discrimination." Pet. Resp. 7. The government's brief, moreover, set forth the same prima facie standard for the motion to dismiss (see Gov't Mem. in Supp. of Mot. to Dismiss or for Summ. J. 17-18), and petitioners did not challenge its application. And, as discussed in the text, petitioners abandoned any potential distinction on appeal. Thus, although petitioners now suggest (Pet. 12) that the *McDonnell Douglas* framework is appro-

On appeal, petitioners argued that they needed to "establish" a "*prima facie* case" of discrimination, and they stated that the "method suggested in *McDonnell Douglas* * * * is a sensible and orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination." Pet. C.A. Br. 13, 16. Petitioners further asserted that, "[t]o establish a *prima facie* case of discrimination" under ECOA, they needed to demonstrate, *inter alia*, that "others of similar credit stature were extended credit or given more favorable treatment than [petitioners]." *Id.* at 14; see *id.* at 11 ("The [f]ourth and final element of an ECOA claim requires [petitioners] to sufficiently allege that other similarly-situated applicants, outside [petitioners'] protected class, were treated more favorably by the USDA in the provision of credit or in the provision of services or assistance."). And petitioners argued that although the "four elements are derived from *McDonnell Douglas*," an employment case, "[t]he method for proving discrimination and the allocation of burdens enunciated in the *McDonnell Douglas* decision are the same whether in employment or consumer cases." *Id.* at 14. Petitioners' argument on appeal was that the district court had "Erred by not Properly Following the McDonnell Douglas Bur[d]en-Shifting Framework," *id.* at 13; see *id.* at 16, not that the *McDonnell Douglas* framework is inapplicable to ECOA suits.

Petitioners did suggest that "some [c]ourts have concluded that under ECOA, it is not necessary for [plaintiffs] to establish the fourth element used in *McDonnell Douglas*." Pet. C.A. Br. 14-15. But they argued only that "[e]vidence of a pattern or practice of discrimina-

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priate only at the summary judgment stage, they failed to make that argument below and it is not properly before the Court.

tion is very useful and relevant" to prove, *inter alia*, the "fourth element of a *prima facie* case of discrimination under the *McDonnell Douglas* framework." *Ibid.* The court of appeals declined to consider that argument because petitioners had failed to raise it in the district court. See Pet. App. 7 (declining to consider "whether a plaintiff in an ECOA discrimination claim is limited to the standard approach requiring a comparator, or whether a plaintiff can put forward pattern-or-practice evidence to fulfill the fourth prong of a prima facie case"). This case therefore does not present the question whether an ECOA plaintiff must show that similarly situated individuals outside the protected class were treated differently, or whether other types of evidence could be sufficient to establish a prima facie case of discrimination under the statute.

b. Regardless of whether or how *McDonnell Douglas*'s burden-shifting framework applies to ECOA claims, the court of appeals correctly affirmed the dismissal of petitioners' complaint. As petitioners acknowledge (Pet. 5), to survive a motion to dismiss, a complaint must satisfy the standards set forth by this Court in *Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009), and *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544 (2007). The complaint must contain sufficiently specific allegations to "allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ibid.*

The ultimate question in any ECOA case is whether the defendant took the adverse credit action based on one of the forbidden criteria (in this case, petitioners' race). Even if petitioners could adequately allege the

elements of an ECOA violation without alleging that similarly situated nonminority applicants were treated more favorably by the USDA, they were still required to identify *some* basis for concluding that USDA officials discriminated against them *because* of their race. Petitioners have identified no reason to draw that conclusion. Because petitioners failed to point to any allegations that would satisfy the pleading standard set forth in *Twombly* and *Iqbal*, the court of appeals correctly affirmed the district court's dismissal of petitioners' ECOA claim.[2]

2. Petitioners contend (Pet. 6-8) that this Court should grant review because the court of appeals' unpublished, nonprecedential decision implicates two conflicts among the courts of appeals. The asserted conflicts are overstated, and the choice between competing standards would have no impact on the outcome here. Further review is not warranted.

First, petitioners suggest (Pet. 6-7) that the court of appeals' decision conflicts with the Seventh Circuit's decision in *Latimore* v. *Citibank Federal Savings Bank*, 151 F.3d 712 (1998). In *Latimore*, the court of appeals rejected "wholesale transposition" of the *McDonnell Douglas* standard to the ECOA context. *Id.* at 714. The court explained that, in contrast to employees or applicants competing for the same job, individuals do not usually compete directly for the same loan. *Ibid.* The

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[2] Even if the allegations in petitioners' complaint had been sufficient to survive a motion to dismiss, petitioners could not ultimately prevail in this case because the government was entitled to summary judgment. Petitioners failed to raise a genuine issue of material fact with respect to whether local USDA officials discriminated against them because of their race in processing their loan application. See Gov't Mem. in Supp. of Mot. to Dismiss or for Summ. J. 19-24.

court indicated that ECOA plaintiffs might utilize other means of comparing a bank's treatment of similarly situated applicants of different races that would suggest differential treatment "sufficient to impose on [the bank] a duty of expla[nation]." *Id.* at 715. The court also faulted the plaintiff's proposed alternative, however, because it "lack[ed] any comparison between the [bank's] treatment of blacks and the treatment of whites" with respect to the extension of credit. *Ibid.* In the absence of an appropriate comparator, the *Latimore* court found it inappropriate to shift the burden to the defendant *at all*. It instead required the plaintiff to prove discrimination "without relying on any special doctrines of burden-shifting." *Ibid.* Because petitioners failed to allege any facts supporting a disparate treatment theory (see pp. 8-9, *supra*), they would not benefit from the standard announced in *Latimore*.[3]

Second, petitioners identify (Pet. 7-8) a conflict among the courts of appeals that apply the *McDonnell Douglas* framework in ECOA cases. Petitioners argue that, unlike the courts below, the Third Circuit did not require any comparator to establish a prima facie case in *Chiang* v. *Veneman*, 385 F.3d 256 (2004). Petitioners' reliance on that decision is misplaced. In *Chiang*, the court's articulation of the elements of a prima facie case

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[3] Other courts of appeals to consider the issue have held that the burden-shifting approach set forth in *McDonnell Douglas* is available in the ECOA context. See, *e.g.*, *Rowe* v. *Union Planters Bank of S.E. Mo.*, 289 F.3d 533, 535 (8th Cir. 2002) (ECOA discrimination claim); *Rosa* v. *Park W. Bank & Trust Co.*, 214 F.3d 213, 215 (1st Cir. 2000) (same); *Lewis* v. *ACB Bus. Servs., Inc.*, 135 F.3d 389, 406 (6th Cir. 1998) (ECOA retaliation claim); cf. *Anderson* v. *Wachovia Mortg. Corp.*, 621 F.3d 261, 268 n.5 (3d Cir. 2010) (applying *McDonnell Douglas* framework to claim under 42 U.S.C. 1981, and noting potential application of that framework to ECOA claim).

under ECOA was mere dicta. *Id.* at 259. The plaintiffs in *Chiang* undisputedly alleged that similarly situated loan applicants outside the protected class had received more favorable treatment, *id.* at 260; the issue on appeal was whether the district court had properly certified a class action. Accordingly, the Third Circuit had no occasion to address the issue raised by petitioners here.[4]

The Third Circuit, moreover, later held in an unpublished decision that ECOA plaintiffs "must establish, inter alia, that others not in their protected class were treated more favorably." *Visconti* v. *Veneman*, 204 Fed. Appx. 150, 154 (2006). The court included a "cf." cite to its prior decision in *Chiang*, and it affirmed the district court's grant of summary judgment in favor of the government because the plaintiffs had failed to show that they "were treated differently than other loan recipients who were delinquent in repaying." *Ibid.*; see *Anderson* v. *Wachovia Mortg. Corp.*, 621 F.3d 261, 268 n.5 (3d Cir. 2010) (citing *Chiang* alongside an Eighth Circuit case that required a showing that "the Bank continued to approve loans for applicants with similar qualifications"). The elements of a prima facie case in the Third Circuit, therefore, are at best unsettled.

Other courts of appeals have described the prima facie case in somewhat different terms, but they have often done so without substantial analysis or without acknowledging other decisions from the same circuit articulating different elements. See, *e.g.*, *Matthiesen* v. *Banc One Mortg. Corp.*, 173 F.3d 1242, 1246 (10th Cir. 1999) (omitting reference to similarly situated compara-

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[4] Indeed, the court of appeals in *Chiang* noted the Seventh Circuit's decision in *Latimore* and declined to reach the question whether burden-shifting was appropriate in ECOA cases. See 385 F.3d at 267 n.7.

tor in describing elements of a prima facie case); *Hood* v. *Midwest Sav. Bank*, 95 Fed. Appx. 768, 778 & n.7 (6th Cir. 2004) (including similarly situated comparator element in description of prima facie case, and explaining that prior decision in *Mays* v. *Buckeye Rural Electric Cooperative, Inc.*, 277 F.3d 873, 877 (2002), which had omitted that element, "simply overlooked the existing Sixth Circuit formulation"); *Rowe* v. *Union Planters Bank of S.E. Mo.*, 289 F.3d 533, 535 (8th Cir. 2002) (including similarly situated comparator element in describing prima facie case). Accordingly, there is presently no square conflict that would warrant this Court's review.

3. Petitioners contend (Pet. 10-12) that the court of appeals erred in affirming the district court's dismissal of their complaint without affording them an opportunity to amend. Petitioners failed to raise that issue below. They never sought leave to amend their complaint in the district court—after the denial of class certification, after transfer of the case to the Eastern District of North Carolina, after the government filed its motion to dismiss or for summary judgment, or after the court granted the government's motion to dismiss. See Pet. App. 3. And petitioners never asked the court of appeals to remand the case to the district court so that they could belatedly seek leave to amend. See Pet. C.A. Br. 12-32; Pet. C.A. Reply Br. 4-7. This Court ordinarily does not review issues that were neither pressed nor passed upon below, see p. 6, *supra*, and this case provides no cause for an exception. Further review of such a case-specific issue, moreover, would be unwarranted even if the question had been properly preserved.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 2013