No. 14-520

In the Supreme Court of the United States

VALERIE J. HAWKINS AND JANICE A. PATTERSON,
Petitioners,

v.

COMMUNITY BANK OF RAYMORE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENT'S BRIEF

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QUESTION PRESENTED

Petitioners and the Government fail to focus on the determinative *legal* issue now before the Court. The Equal Credit Opportunity Act specifically defines an "applicant" protected from discrimination and authorized to bring a claim under the Act's express right of action as "any person who *applies* to a creditor *directly* for an extension, renewal, or continuation of *credit*," 15 U.S.C. §1691a(b) (emphasis added). The question this case presents is:

Does the ECOA's precise definition of "applicant," when given its ordinary meaning and read in the context of the statute as a whole, include a *guarantor*, who merely signs a contract in support of the borrower's application for credit, or did the Federal Reserve Board attempt to redefine impermissibly the statute's "applicant" provision when the FRB amended its implementing regulation (Regulation B) to expressly *include* guarantors?

CORPORATE DISCLOSURE

Respondent Community Bank of Raymore is a wholly-owned subsidiary of LoLyn Financial Corporation, a Missouri corporation. There is no publicly-held corporation that owns ten percent or more of Respondent's stock.

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STATEMENT OF THE CASE

A. Community Bank Of Raymore Made Four Loans To PHC Development, LLC, From 2005 To 2008, For A Total Of More Than $2 Million. Petitioners Hawkins And Patterson Each Signed Sixteen Guaranties For The Loans To PHC.

In 2004, Gary Hawkins, a successful certified public accountant, and Chris Patterson, one of Gary Hawkins' business clients, formed a limited liability company, PHC Development, LLC ("PHC"), to acquire and develop a residential subdivision in Peculiar, Missouri. PHC is owned by Gary Hawkins personally, and by Chris Patterson in his capacity as a trustee of the Chris L. Patterson and Janice A. Patterson Trust (the "Trust").[1] Petitioners Valerie Hawkins ("Hawkins") and Janice Patterson ("Patterson"), well-educated and sophisticated business and professional women, are married to Hawkins and Patterson, respectively. Pet. App. 1-2; Record on Appeal ("ROA") A689; A732-A733.

Between 2005 and 2008, PHC applied for and obtained four commercial loans totaling more than $2 million from Community Bank of Raymore ("CBR") to finance the acquisition and development of the

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[1] Patterson is a co-trustee and beneficiary of the Trust. Funds to acquire the PHC-membership interest and pay capital contributions were made by Patterson from the Pattersons' jointly-owned account held in the name of their d/b/a, "Patterson Enterprises." ROA A1190, A1368, A1382-A1400, A1408:9-14, A1409:6-A1410:20.

subdivision in Peculiar.[2] From 2007 through 2010, the loans, collectively, were modified, extended and renewed twelve times. Pet. App. 2; ROA A1191-A1192. "In connection with each loan and each modification, Hawkins, Patterson, and their husbands executed personal guaranties in favor of [CBR] to secure the loans." Pet. App. 2; A1192-A1193.[3] Ultimately, Hawkins, Patterson and the other guarantors each signed a total of sixteen guaranties.

Pursuant to the original guaranties Petitioners signed in connection with the first three loans, Petitioners affirmatively represented and warranted, in writing, that the guaranties were "entered into at the request of [PHC]." *See, e.g.,* ROA A96.[4]

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[2] Peculiar and Raymore are adjoining cities just outside of Kansas City, Missouri, and are effectively suburbs of the greater metropolitan area.

[3] The loans and several of the Pattersons' guaranties were secured by one or more deeds of trust on the subdivision and/or one of the Pattersons' convenience stores, known as the "Rush Hour." The Rush Hour was owned by one of the Pattersons' limited liability companies, Patterson Raymore, LLC ("Patterson Raymore"), which is also owned by the Trust. Pet. App. 2; ROA A732, A1191, A1193-A1194.

[4] As the Eighth Circuit recognized, "under Missouri law, which governs the loans and guaranties in this case, 'co-ownership of property by a husband and wife creates a presumption of tenancy by the entirety.'" Pet. App. 10 n. 6 (citation omitted). "The distinctive characteristic of an estate by the entirety is that it is deemed to be owned by a single entity, the marital community . . . . Because the estate is deemed to be owned by a single entity, neither spouse has any . . . interest which may be conveyed, encumbered or devised by his or her *sole* act." *Jennings v.*

In the thirteen additional guaranties Petitioners subsequently signed, Petitioners expressly declared, in writing, that "no representations or agreements of any kind" were made to them "which would limit or qualify in any way the terms of [their guaranties]"; that their guaranties were being "executed at [PHC's] request and not at the request of [CBR]"; that their guaranties "do not result in a violation of any law [or] regulation . . . applicable to Guarantor"; that they read, understood and agreed to the terms of their guaranties; that the guaranties fully reflected their intentions; and that they had an opportunity to consult with legal counsel prior to signing them. *See, e.g.,* ROA A254-A255.[5]

Each of the guaranties Petitioners signed was an "absolute and unconditional" guaranty of payment, rather than a guaranty of collection. Thus, upon default by PHC, Petitioners' guaranties authorized CBR to proceed directly against Petitioners, rather than first attempting to recover from PHC. *See, e.g.,* App. A 2-4, 17-18. 38A C.J.S. *Guaranty* §51 (2015) ("A guaranty of

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Atkinson, 456 S.W.3d 461, 465-66 (Mo. Ct. App. 2014), *reh'g and/or transfer denied* (Jan. 27, 2015), *transfer denied* (Mar. 31, 2015) (internal citations and quotations omitted) (emphasis in original); *accord, Leuzinger v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 396 S.W.2d 570, 579 (Mo. banc 1965). Thus, "[a]n execution arising from a judgment against one spouse alone cannot affect property held by a husband and wife as tenants by the entireties." Pet. App. 10 n. 6 (citation omitted).

[5] For the Court's convenience examples of the two different guaranty forms Petitioners signed are included in this brief as Appendix A. App. A 1-16 (ROA A95-A97); App. A 17-36 (ROA A254-A256).

payment requires the payment of a debt immediately when due if the debtor fails to pay; a guaranty of collection, on the other hand, requires payment only after the lender first uses all legal means to collect payment from the debtor.").

B. PHC Defaulted On The Loans In 2012. CBR Sought To Collect From PHC, And From Petitioners On Their Guaranties.

In April 2012, after PHC failed to make required loan payments, CBR declared the loans in default, accelerated the amounts due, and demanded payment from PHC, from Petitioners and from the other guarantors. Pet. App. 2; ROA A1194-A1195.

Attempting to disavow their guaranties, Petitioners sued CBR, alleging for the first time that CBR "required" their guaranties solely because they were Gary Hawkins' and Chris Patterson's spouses. Petitioners thus claimed that CBR discriminated *against them* on the basis of their marital status in violation of the ECOA, 15 U.S.C. §1691(a), and Regulation B, 12 C.F.R. §202.7(d). Pet. App. 3; ROA A29-A30. Petitioners sought an unspecified amount of actual and punitive damages, equitable and declaratory relief that their guaranties were unenforceable, and an award of attorneys' fees. *Id.*

After Petitioners sued, CBR asserted a counterclaim for breach of their guaranties. ROA A45-A69; A933-A978. In response, Petitioners asserted CBR's alleged ECOA violation as an affirmative defense and right of set-off. A1311-A1312.

When Petitioners filed suit in federal court, a number of related persons and entities—including

PHC, Gary Hawkins, Chris Patterson, Patterson Raymore, and the Pattersons' operating company, Patterson Oil Co., Inc.—also sued CBR in Missouri state court, seeking to avoid liability on (1) the loans to PHC, (2) the guaranties of Gary Hawkins and Chris Patterson, and (3) the deeds of trust securing the loans. *See PHC Development, et al. v. Community Bank of Raymore,* No. 12CA-CV01896 (filed May 31, 2012) and *Patterson Oil Co., et al. v. Community Bank of Raymore,* No. 12CA-CV01932 (filed June 4, 2012). CBR filed counterclaims in those actions to recover on the loans and guaranties and to protect its rights under the deeds of trust.[6] PHC, Gary Hawkins and Chris Patterson have never asserted that CBR discriminated against them on the basis of marital status, nor have they ever brought claims against CBR for alleged ECOA violations.

C. The District Court Granted Summary Judgment To CBR After Concluding That, As Guarantors, Petitioners Are Not "Applicants" Under The ECOA And Were Not Entitled To Relief Under The ECOA.

In federal court, CBR moved for summary judgment on Petitioners' ECOA claim and affirmative defense. ROA A708-A929. The District Court granted judgment to CBR, concluding "Hawkins and Patterson were not 'applicants' within the meaning of the ECOA and

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[6] The state court case dockets can be accessed under their respective case numbers: 12CA-CV01896 and 12CA-CV01932, at https://www.courts.mo.gov/casenet/cases/searchDockets.do.

thus . . . [CBR] had not violated the ECOA" in obtaining Petitioners' guaranties. Pet. App. 3, 22-23.[7]

Focusing on the express ECOA definition of "applicant" as "any person *who applies to a creditor directly for* an extension, renewal, or continuation of *credit,*" the District Court reasoned that "[a]n applicant is not akin to a guarantor," and that a "guarantor does not, by definition, apply for anything." Pet. App. 20, 22 (internal citations and quotations omitted) (emphasis in original). Noting that the purpose of the ECOA "is to eradicate credit discrimination waged against women whom creditors traditionally refused to grant credit," and that "the statute prohibits discrimination [against an applicant], such as denying credit or offering credit on less favorable terms," the District Court concluded

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[7] In their opening brief in this Court, Petitioners' frequently cite materials outside the record, apparently in an effort to address the *merits* of their ECOA claim, *i.e.*, their contention that CBR "required" their guaranties. In particular, Petitioners cite materials from a later-filed summary judgment motion, materials not part of the record here, including Doc. 70 (Defendant's Motion for Summary Judgment on Its Counterclaims for Breach of Guaranties & Plaintiffs' Affirmative Defenses) and Doc. 79 (Plaintiffs' Suggestions in Opposition to Defendant's Motion for Summary Judgment on Its Counterclaims for Breach of Guaranties & Plaintiffs' Affirmative Defenses). In the record before this Court, Petitioners offered no evidence that CBR "required" them to sign any of the guaranties (an allegation flatly contradicted by the express representations they repeatedly made in sixteen guaranties they signed over a five-year period), and the District Court did not address any such claim. Pet. App. 18; ROA A1189-A1195. In any event, any such assertion is an ECOA *merits* determination and irrelevant to the preliminary ECOA gateway question of who is an "applicant," the only question currently before the Court.

that "by sweeping guarantors into the statute, the regulation expands the ECOA beyond its intended purpose and leads to circular and illogical results in cases such as the present one, where a married woman is not being denied anything and is simply guaranteeing her spouse's business loan." *Id.* (citation omitted).

The District Court acknowledged that in 1985 the FRB redefined "applicant" in Regulation B to "extend the [ECOA] to guarantors of credit." *Id.* at 21. But applying the first step of *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837 (1984), the District Court, agreeing with Judge Posner's reasoning in *Moran Foods, Inc. v. Mid-Atlantic Market Dev. Co., LLC,* 476 F.3d 436, 441 (7th Cir. 2007), found that the statutory definition was clear: "there is nothing ambiguous about 'applicant' and no way to confuse an applicant with a guarantor." Pet. App. 22 (quoting *Moran*). The District Court thus did not defer to Regulation B, and instead held that Petitioners, as guarantors, are not "applicants" under the ECOA.[8]

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[8] Notably, the District Court also struck Petitioners' jury demand, finding that Petitioners "knowingly and voluntarily" agreed to waive their right to a jury trial when they signed their guaranties. Further, Petitioners repeatedly represented that they read, understood and agreed to the terms of their guaranties, that their guaranties fully reflected their intentions, and that they had the opportunity to discuss the same with their attorneys. The District Court would not "allow [Petitioners] to evade the agreed-upon waiver simply because they no longer wish[ed] to be bound by it." ROA A689-A691. On appeal, Petitioners did not challenge any of these findings or conclusions of the District Court. Brief of Appellants at 41-44.

D. The Eighth Circuit Affirmed The District Court, Holding That Guarantors Are Not "Applicants" Under The ECOA.

1. The Eighth Circuit Unanimously Concluded That An ECOA "Applicant" Does Not Include Guarantors.

After quoting the ECOA definition of "applicant," the Eighth Circuit observed that the FRB in 1985 by regulation defined "applicant" to include guarantors. Pet. App. 3. Noting that Petitioners *sole* argument for protection under the ECOA was that they qualified as "applicants" because they were guarantors of the loans to PHC, the Eighth Circuit zeroed in on the determinative question whether Petitioners are "applicants" under the ECOA. *Id*. at 4.

In that regard, the Eighth Circuit turned to the familiar *Chevron* analysis, pointing out that the first question is whether the intent of Congress is clear on the question at issue. Pet. App. 4. If the statute clearly answers the question, then that is the end of the matter. *Id*. Only if the statute is silent or ambiguous, would the Eighth Circuit proceed to the second question—whether the FRB's "interpretation" of the ECOA was permissible. *Id*. at 4-5.

The Eighth Circuit began and ended with the first step of *Chevron*, concluding that "the text of the ECOA clearly provides that a person does not qualify as an applicant under the statute solely by virtue of executing a guaranty to secure the debt of another. Pet. App. 6. To "qualify as an applicant under the ECOA, a person must 'appl[y] to a creditor directly for . . . credit, or . . . indirectly by use of an existing credit plan for an

amount exceeding a previously established credit limit.'" *Id*. (quoting 15 U.S.C. §1691a(b)). Quoting Webster's Third New International Dictionary (2002) for the proposition that "to 'apply' means to make an appeal or request esp[ecially] formally and often in writing and usu[ally] for something to benefit oneself," *id*., the Eighth Circuit observed that "the plain language of the ECOA unmistakably provides that a person is an applicant only if she requests credit." *Id*. In contrast, "a person does not, by executing a guaranty, request credit." *Id*.

Recognizing that a guaranty is legally quite different from the primary obligation on a loan, the Eighth Circuit emphasized that a "guaranty is collateral and secondary to the underlying loan transaction between the lender and the borrower." Pet. App. 6. In fact, "[w]hile a guarantor no doubt desires for a lender to extend credit to a borrower, it does not follow from the execution of a guaranty that a guarantor has requested credit. . . ." *Id*. at 7. In a footnote, the Eighth Circuit pointedly observed that "we certainly do not view executing a guaranty as a *direct* request for credit," and Petitioners "have not argued" they qualify as "indirectly" requesting credit within the ECOA definition of "applicant." *Id*. at 7 n. 3 (emphasis in original).

Acknowledging the Sixth Circuit's decision in *RL BB Acquisitions, LLC v. Bridgemill Commons Dev. Group*, 754 F.3d 380 (2014), which found the ECOA definition of "applicant" to be ambiguous with respect to guarantors, the Eighth Circuit disagreed: "We find it to be unambiguous that assuming a secondary, contingent liability does not amount to a request for

credit." Pet. App. 7-8. Thus, the Eighth Circuit did "not defer to the Federal Reserve's [contrary] interpretation of applicant" under the ECOA, and instead concluded that a guarantor is not an ECOA "applicant." *Id*. at 9.

The Eighth Circuit then made three further observations in support of its holding that the ECOA definition of "applicant" does not include guarantors. *First*, the dominant purpose of the ECOA was to stop lenders from denying credit to women—particularly married women—on the basis of stereotypical assumptions that married women were not working, would be having children which would preclude them from working, and were always secondary to their husbands' economic and financial resources and power. Pet. App. 9. The Eighth Circuit emphasized that here, in stark contrast, "Hawkins and Patterson do not claim they were excluded from the lending process due to their marital status." *Id*. Instead, "they complain that they were improperly *included* in that process . . . ." *Id*. at 10 (emphasis in original).

Second, the Eighth Circuit emphasized that "Hawkins and Patterson do not argue that they qualify as applicants for *any* reason *other than* their status as guarantors." *Id*. (emphasis added). *Third*, in a footnote, the Eighth Circuit emphasized that, "under Missouri law, which governs the loans and guaranties in this case," spouses hold property in joint tenancy and thus "it likely was necessary for Hawkins and Patterson to execute their guaranties" because, otherwise, CBR would not be able to pursue any marital assets in the event of a default. *Id*. at n. 6. Indeed, given Missouri law, CBR had a "sound commercial practice unrelated to any stereotypical view of a wife's role" for obtaining

spousal guaranties in this situation. *Id*. (quoting *Moran Foods,* 476 F.3d at 442).

Thus, the Eighth Circuit concluded that "Hawkins and Patterson are not *applicants* under the ECOA." Pet. App. 10 (emphasis added).

2. Judge Colloton Identified Additional Reasons To Support The Eighth Circuit's Holding.

Judge Colloton concurred, offering further support for the Court's conclusion in three respects. *First*, he emphasized that the ECOA's definition of "applicant" should be interpreted based on the "ordinary meaning" of the phrase "to apply" as understood when the statute was enacted in 1974. Pet. App. 11. Citing and quoting Webster's Third New International Dictionary from 1971, Judge Colloton observed that "to make an application" usually means to apply for "something of benefit to oneself." *Id*. at 11-12. Thus, under the ECOA, an "applicant" is the "one who requests credit to benefit herself, not credit to benefit a third party." *Id*. at 12. Judge Colloton recognized that there might be "unusual meanings of 'apply,'" but emphasized that the "[a]nalysis under the first step of *Chevron* to determine whether the statutory text is unambiguous begins with ordinary meaning." *Id*.

Second, Judge Colloton considered additional factors, such as the context in which the ECOA was enacted, and other provisions of the statute. He pointed out that the statute often uses the "definite article"—in particular "the"—to refer to "*the* applicant," and such use of the definite article would not sit comfortably with Petitioners' arguments that "applicant" includes anyone and everyone who might in any way be

connected to the lending transaction. Pet. App. 12-13. Instead, "the statutory text confirms that the 'applicant' is the party to whom credit will be extended." *Id*. at 14.

Third, Judge Colloton addressed the FRB's expansive 1985 interpretation of "applicant" under the ECOA. He first pointed out that, in 1976, shortly after the ECOA's enactment and some initial amendments to the statute, "the Board specifically provided that 'a guarantor, surety, endorser, or similar party' is *not* an applicant." Pet. App. 14 (emphasis in original). He emphasized that the Board's 180-degree change in 1985 did not have anything to do with *interpreting* the ECOA's actual language but, instead, "apparently was motivated by [the Board's] dissatisfaction with Congress's decision to limit the cause of action under the ECOA to an "*aggrieved* applicant.'" *Id.* at 15 (emphasis in original).

Thus, he read the FRB's 1985 "redefinition of 'applicant' in 12 C.F.R. §202.2(e) to include 'guarantors'" as a measure "designed to give guarantors independent standing to sue." *Id*. But, as Judge Colloton pointedly observed, "[w]hatever might be the salutary effects of the change in policy, *it was not a choice for the Board to make*." *Id*. (emphasis added). To the contrary, "[a]ny decision to expand the civil liability of creditors and to provide a cause of action for guarantors must come from Congress." *Id*. at 16.

SUMMARY OF THE ARGUMENT

Ultimately, this is a straightforward statutory interpretation case, despite the efforts of Petitioners and the Government to obscure and evade the determinative legal issue. The Court's inquiry begins, and ends, with the language of the Equal Credit Opportunity Act's definition of "applicant." That gateway provision for the entire statutory scheme was defined with precision by Congress and determines both those who are protected from discrimination and those who have a right to sue in the event discrimination occurs.

Both Petitioners and the Government attempt to justify the FRB's purported expansion of the ECOA definition, though in different ways. Petitioners argue for an amorphous "zone of interests" approach to determine who *might*, as a policy matter, be considered an "applicant" in the abstract. That approach is utterly misguided given that the ECOA both creates an express cause of action *and* defines who is authorized to bring such an action. The Government fares little better by arguing that, because the ECOA may give the FRB a broad delegation of authority in *some* respects, such a delegation necessarily includes authority to redefine the statute's gateway definition of "applicant" under the guise of "interpreting" the statute.

Neither approach comes to grips with the precise and explicit definition of "applicant" in the statute, the overall structure of the statute, the particular problems Congress intended to address when it enacted the ECOA in 1974, or the dramatic expansion of potential liability for lenders that would result from Petitioners' and the Government's positions. Contrary to the

suggested approaches of Petitioners and the Government, this Court should begin and end its analysis with the plain and ordinary meaning of the statute's definition of "applicant," read in the context of the entire statute, and with regard for both the purposes behind the statute and the real world consequences of expanding the gateway that Congress very deliberately installed for the overall statutory scheme.

Critically, the ECOA definition of "applicant" is neither unclear nor subject to multiple plausible readings. That definition includes three critical words. In particular, the statutory definition limits applicants to those who "apply" to a lender "directly" for "credit." A guarantor, by definition, does not "apply" for "credit," and certainly does not do so "directly." Instead, a "borrower" does all of those things, seeking to obtain credit by applying directly to a lender, and the borrower does so for its own benefit. A guarantor, by contrast, is a secondarily-liable individual or entity, and neither "applies" for nor obtains "credit" for itself.

Furthermore, the ECOA uses the word "applicant" more than fifty times, suggesting a very deliberate choice of language by Congress. The ECOA also typically refers to "applicant" using the singular article ("the" applicant), further confirming that Congress envisioned and intended a limited class of "applicants," not a wide-ranging and virtually unlimited class of anyone and everyone who might in some way be connected to a lending transaction. Moreover, some ECOA sections referring to "the applicant" would make no sense if that term includes secondary parties such as guarantors. Lastly, the targeted and precise

remedies for violations, including the possibility of punitive damages, strongly suggest Congress did not intend that multiple individuals or entities be able to assert and recover on ECOA claims for a single lending transaction.

Limiting the ECOA definition of "applicant" to its plain terms will in no way frustrate or undermine the purposes of the ECOA. There will always be at least one "applicant" in *every* lending transaction, and that "applicant" can always assert an ECOA claim if a lender discriminates on a prohibited basis. No marital status or gender discrimination will be left without a remedy; the only question is who is entitled to bring the cause of action, and Congress answered that question by deciding the proper claimant is the "applicant."

Finally, no deference to the implementing agencies is due here. The statutory language is clear, and neither the FRB nor the Consumer Financial Protection Bureau ("CFPB") has ever suggested otherwise. Nor, at least until the Government filed its brief in this case, has either agency ever claimed that it was "interpreting" the ECOA when amending Regulation B. Instead, in 1985, the FRB candidly acknowledged that it was rewriting Regulation B to include guarantors "*because section 706 of the act confers standing to sue only upon an 'aggrieved applicant*.'" 50 Fed. Reg. 48,018, 48,020 (Nov. 20, 1985) (emphasis added).

In the end, there is no escaping the conclusion that the FRB, as it did in 1984 with regard to Regulation Y, has attempted to use Regulation B to redefine the gateway statutory provision of the ECOA. *Cf. Bd. of*

Governors of the Federal Reserve System v. Dimension Financial Corp., 474 U.S. 361 (1986) (rejecting, as a matter of statutory interpretation, the FRB's amendments to Regulation Y to extend the Bank Holding Company Act's gateway definition of "bank" beyond the plainly stated statutory definition). Current Regulation B is not a permissible "interpretation" of the ECOA but, instead, is an *ultra vires* attempt "to decide—without any particular fidelity to the text—which policy goals [the FRB/CFPB] wishes to pursue." *Michigan v. EPA*, 576 U.S. ___, 135 S. Ct. ___, ___ (2015) (Thomas, J., concurring).

ARGUMENT

I. The ECOA's Explicit Statutory Definition Of "Applicant" As One Who "Applies" For "Credit" "Directly" Does Not Include Guarantors.

This case begins and ends with the ECOA itself. This Court's *Chevron* analysis has at least two distinct steps: *first*, the Court inquires whether the statutory provision at issue speaks to and resolves the question at issue; if so, the implementing agency has no authority to construe the statute in a way inconsistent with the statutory text Congress enacted. Only if the statutory language is silent or ambiguous with respect to the question does the Court reach the *second* step—determining whether the agency has adopted a "permissible" interpretation of the statute.[9]

Petitioners here ignore the *Chevron* analysis altogether, instead going down a rabbit hole chasing a statutory "zone of interests" analysis that is neither

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[9] This may not be one of those "extraordinary cases," *King v. Burwell*, 576 U.S. ___, 135 S.Ct. ___, ___ (2015), in which the *Chevron* analysis does not apply at all, although an argument can be made that, under "*Chevron* Step Zero," this is a case where *no* deference to the agency is warranted because the agency is purporting to redefine the statutorily-defined gateway provision for an entire statutory scheme, *i.e.*, who qualifies as an "applicant" to invoke the protections, cause of action, and remedies of the ECOA? Ultimately, however, Respondent's position is that it makes no difference whether "*Chevron* Step Zero" is implicated in this case; the result is the same in either event, because the FRB's 1985 amendment to Regulation B to include "guarantors" as ECOA "applicants" cannot be squared with the ECOA's precise statutory definition of "applicant."

applicable nor appropriate where Congress has created an *express* statutory cause of action and *defined* who is entitled to bring such an action. Petitioners misguidedly attempt to rely on either implied right of action cases (notwithstanding that the ECOA expressly creates a right of action), or cases involving statutory rights of action that do not define those authorized to bring a claim (the ECOA, in contrast, specifically defines those authorized to bring a claim, *i.e.*, "applicants").

Notably, the Government goes nowhere near Petitioners' approach, even though the Government supports the ultimate outcome Petitioners seek. Instead, the Government urges the Court to flip the *Chevron* analysis on its head, and start with a premise that "great deference" must be given to the implementing agency's "interpretation" of the ECOA. The Government interestingly attempts to lead the Court straight to a "deference-to-the-agency" argument while urging the Court to ignore altogether the express language and the overall structure of the ECOA.

The Court should see through these efforts to obscure and evade the central, straightforward issue in this case. The first step of the Court's traditional *Chevron* analysis is the determinative one here: Does the ECOA's explicit statutory definition of "applicant"—one who "applies" for "credit" "directly"—include a "guarantor"?[10] Put another way,

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[10] The Eighth Circuit observed that Petitioners "have not argued" they qualify as "indirectly" requesting credit within the ECOA definition of "applicant." Pet. App. at 7 n. 3. Thus, Respondent's argument focuses on the "applies" for credit "directly" language in

giving the words of the ECOA their ordinary meaning and considering the statute as a whole, does "applicant"—explicitly and carefully defined as one who "applies" for "credit" "directly"—exclude from its scope guarantors, *i.e.*, those who may support another's application for credit but who are not seeking credit for themselves?

The simple and irrefutable answer is that the ECOA is clear and excludes guarantors, because guarantors do not "appl[y]" for "credit" "directly." Thus, the FRB's contrary Regulation B is not a permissible "interpretation" of the ECOA but, instead, an *ultra vires* effort to redefine the statutory provision. As a result, the Court should never reach the second step of the *Chevron* analysis.

A. The Proper And Straightforward Inquiry Is To Analyze The Statute Itself. The Petitioners Miss The Mark In Focusing On A "Zone Of Interests" Inquiry When The ECOA Expressly Creates A Private Right Of Action And Defines The "Applicant" Entitled To Bring Suit. The Government Attempts To Flip *Chevron* On Its Head, Starting With Deference To The Implementing Agency, Not The ECOA's Plain And Ordinary Meaning.

This Court must first determine "whether Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. In making that

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the ECOA, because that is the only part of the definition at issue here.

determination, the Court decides whether "the statutory text is plain and unambiguous. If it is, we must apply the statute according to its terms." *Carcieri v. Salazar*, 555 U.S. 379, 387 (2009); *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010). In such a case, statutory interpretation "is the end of the matter." *Chevron*, 467 U.S. at 842. Only if "Congress has not directly addressed the precise question at issue" may the Court consider "whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843.

Chevron dictates that "agencies must operate 'within the bounds of reasonable interpretation,'" *Utility Air Regulatory Group v. EPA*, 573 U.S. ___, 134 S.Ct. 2427, 2442 (2014), "[a]nd reasonable statutory interpretation must account for both 'the specific context in which . . . language is used' and 'the broader context of the statute as a whole.'" *Id.* (internal citations omitted). "Thus, an agency interpretation that is 'inconsistent with the design and structure of the statute as a whole,' does not merit deference." *Id.* (internal citations omitted). The Court has emphasized that an "agency has no power to 'tailor' legislation to bureaucratic policy goals by rewriting unambiguous statutory terms. Agencies exercise discretion only in the interstices created by statutory silence or ambiguity. . . ." *Id.* at 2445. Agencies "must always 'give effect to the unambiguously expressed intent of Congress.'" *Id.*

Here, the Court cannot accept the Government's invitation to simply skip the first step of *Chevron*. If, as the Eighth Circuit concluded and Respondent agrees, the FRB did not "interpret" the ECOA but, instead,

attempted to redefine the statutory "applicant" provision through Regulation B, then necessarily Regulation B is not a *permissible* "interpretation" of the ECOA. Thus, the first and determinative question in this case is whether the explicit and precise ECOA definition of "applicant" is plain and unambiguous, when given its ordinary meaning and considered in the context of the entire statute. If so, the Court must enforce the ECOA as written, not as an agency many years later decided it wished the ECOA had been written.

In deciding whether "applicant" as defined in the ECOA includes a guarantor, the Court must consider the language of the relevant statutory provisions, the overall structure and purposes of the ECOA, and the context in which the ECOA was enacted in 1974. Considering those essential factors leads to the inescapable conclusion that the ECOA plainly and unambiguously excludes "guarantors" from the statutory definition of "applicant."

B. The ECOA's Definition Of "Applicant" As One Who *Applies Directly* For *Credit* Excludes "Guarantors."

When "interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-254 (1992). Thus, "[w]hen the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" *Id*. at 254 (quoting *Rubin v. United States*, 449 U.S. 434, 430 (1981)). Put another way, the

"inquiry ceases 'if the statutory language is unambiguous and the statutory scheme is coherent and consistent.'" *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002); *see also Hartford Underwriters, Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) ("when 'the statute's language is plain, the sole function of the courts' – at least where the disposition required by the text is not absurd – 'is to enforce it according to its terms.'"); *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992) ("when a statute speaks with clarity to an issue judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished").

Here, the plain and ordinary meaning of "applicant" in the ECOA—one who "applies" "directly" for "credit"—excludes "guarantors" from the statute's scope. The Court does not go on a search for unusual or idiosyncratic meanings of the terms a statute uses. Instead, "[i]t is axiomatic that the statutory definition of the term excludes unstated meanings of that term." *Meese v. Keene*, 481 U.S. 465, 484-485 (1987). Thus, the Court long has emphasized that, "[a]s a rule, '[a] definition which declares what a term 'means' . . . excludes any meaning that is not stated." *Burgess v. United States*, 553 U.S. 124, 130 (2008) (quoting *Colautti v. Franklin*, 439 U.S. 379, 392-393 n. 10 (1979)).

The Government's invitation to instead start with a presumption of "great deference" to the agency and search for any possible ambiguity to justify the agency's counter-statutory "interpretation" of the ECOA's plain and ordinary meaning is exactly backwards. Interpreting statutes is not an exercise in

speculating about "the outer limits of [a word's] definitional possibilities." *Dolan v. U.S. Postal Service*, 546 U.S. 481, 486 (2006). Instead, "[a]mbiguity is a creature not of definitional possibilities but of statutory context," *Brown v. Gardner*, 513 U.S. 115, 118 (1994), and the ECOA definition of "applicant" is neither vague on its face nor ambiguous in the greater context of the ECOA as a whole.

1. The Plain And Ordinary Meaning Of The ECOA Definition Of "Applicant" Excludes Guarantors Of Loan Transactions.

In the ECOA, Congress specifically defined the "applicant" who is both protected from discrimination and authorized to bring a claim under the statute's express cause of action. Critically, Congress utilized two key words that it did not otherwise define in the ECOA: an *applicant* is one who "applies" for credit "directly." 15 U.S.C. §1691a(b). Interpreting these two key words—"applies" and "directly"—is a straightforward analysis, one in which this Court often has turned to dictionaries for assistance in ascertaining the plain and ordinary meaning of statutory terms not otherwise defined by Congress.

During the time period leading up to the enactment of the ECOA and immediately following the statute's enactment and amendment in 1976,[11] Webster's Third New International Dictionary consistently defined "apply" as follows:

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[11] The Court has observed that "the most relevant time for determining a statutory term's meaning" is the time period when it "became law." *MCI Telecommunications Corp. v. American Tel. & Tel. Co.*, 512 U.S. 218, 228 (1994).

> to make an appeal or a request esp. formally and often in writing and usu. for something *of benefit to oneself* (~ to an employer for a job) (~ *to a bank for a loan*).

See p. 105 (definition of "apply") in 1965, 1973, and 1981 editions (emphasis added). Legal dictionaries effectively define "apply" in the same fashion as Webster's. For example, Black's Law Dictionary defines "apply" as "[t]o make a formal request or motion (*apply for a loan*)." *Black's*, at 120 (10th ed. 2014) (Bryan A. Garner, ed.) (emphasis added). Ballentine's Law Dictionary defines "apply" as "[a] request; a seeking, usually in the form of writing." *Ballentine's*, at 84 (3d ed. 1969).

"Directly," though having more possible meanings and usages than "apply," commonly is defined as "without any intervening space or time," or "without any intervening agency or instrumentality or determining influence," and even "FACE-TO-FACE: in person." *Webster's*, at 641. Certainly, the borrower-applicant is the individual or entity that "applies" "directly" for "credit,"[12] not a guarantor, as Webster's pointedly illustrates by using "apply to a bank for a loan" as a paradigmatic example of usage.

Thus, giving the critical, undefined words of the ECOA—"applies" and "directly"—their plain and

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[12] The word "credit" is defined in the ECOA as "the right granted by a creditor to a debtor to defer payment of debt or to incur debts and defer its payment. . . ." 15 U.S.C. § 1691a(d). This definition is fully consistent with common usage, and also makes clear that guarantors are not applicants for "credit," as further discussed in this brief at pp. 26-27.

ordinary meaning permits only one conclusion, and that conclusion resolves this case: a guarantor neither "applies" for credit nor seeks anything "directly" from the lender. Thus, a "guarantor" cannot qualify as an "applicant" under the ECOA. Instead, the plain statutory language precludes the FRB (and now the CFPB) from "interpreting" the ECOA to include guarantors.

Petitioners cannot evade the plain statutory language by invoking a misguided "zone of interests" test that applies only in implied right of action situations or under statutes that create an express cause of action but fail to define those authorized to bring a claim. Neither of those circumstances is present here.[13] Instead, the ECOA expressly creates a cause of action and specifically defines who is authorized to bring a claim.

Nor can the Government dodge the import of the plain statutory text by flipping the *Chevron* analysis on its head and trying to start with the inquiry whether, as a policy matter, it might be valid to include "guarantors" within the ECOA's scope. The Government may be correct that the ECOA gave the FRB broad authority to implement the ECOA in *some* respects, but Congress did not give the agency *carte blanche* in *all* respects. In particular, the Government

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[13] Furthermore, Petitioners have waived any statutory standing / zone of interest argument because they never made such an argument in either the District Court or the Eighth Circuit. *See generally,* ROA A1183-A1211; Brief of Appellants; Reply Brief of Appellants. *City & Cnty. of San Francisco, Calif. v. Sheehan*, 575 U.S. ___, 135 S.Ct. 1765, 1773 (2015) ("The Court does not ordinarily decide questions that were not passed on below.").

is flat out wrong that the ECOA gave the agency *any* power to *redefine* the ECOA's explicit statutory definition of "applicant," the gateway provision for the entire statute.

In the financial world and as a legal matter, an "applicant," *i.e.*, a "borrower," simply cannot be equated with or mistaken for a "guarantor." Instead, "guarantor" has a well-established meaning in the law, and a "guarantor" is not a "borrower" or "debtor," all of which Congress is presumed to have recognized when it enacted the ECOA. In fact, Congress defined "credit" in the ECOA as "the right granted by a creditor to a debtor to defer payment of debt or to incur debts and defer payment. . . ." 15 U.S.C. §1691a(d). That definition only covers an "applicant," *i.e.*, a borrower who obtains credit and becomes a "debtor"; it cannot include a "guarantor" who has obtained no right to "defer payment of debt" from a creditor or "to incur debts and defer payment."[14]

Furthermore, legal authorities make clear that "a guaranty is an undertaking by a guarantor to answer for payment of some debt, or performance of some contract, *of another person* in the event of default." 38 Am.Jur.2d *Guaranty* §1 (2015) (emphasis added). By definition, a "guarantor" holds a different legal status

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[14] Petitioners' citation to UCC-cases under R.S.Mo. §400.9-504(3) is disingenuous. That section, titled "Secured party's right to dispose of collateral *after default*—effect of disposition," by its express terms only applies after the borrower has defaulted and the guarantor's liability is no longer contingent. *Id.* (emphasis added). That a guarantor becomes a debtor after default, however, does not change the fact a guarantor never receives the right to *defer* payment.

than a borrower or debtor: "[a] guaranty is, by its very nature, a conditional promise to pay because the guarantor promises to pay only on the condition that the principal debtor fails to pay and is immediately enforceable if that event occurs." *Id*.; *accord* 38A C.J.S. *Guaranty* §122 (2015) ("[T]he obligations of the guarantor are not predicated on the debt, but upon the contract expressed in the guaranty and the potential collateral liability undertaken by a guarantor flows from the independent written guaranty agreement."). Indeed, Petitioners here explicitly recognized this distinction in their guaranties, stating: "I acknowledge that you [CBR] are relying on this Guaranty in extending credit *to the Borrower* [PHC]. . . ." App. A. 12 (emphasis added).[15]

In fact, until the FRB amended Regulation B in 1985 to purportedly redefine the ECOA "applicant" provision, *no* court had ever held or even suggested that the ECOA's statutory definition included guarantors or other secondarily-liable parties to a lending transaction. Quite the contrary, the lower courts followed the plain and ordinary meaning of the statutory definition. *See, e.g*., *Anderson v. United Finance Company*, 666 F.2d 1274, 1277-1278 (9th Cir. 1982) (allowing award of punitive damages and attorney's fees solely to the woman who, as the "applicant," was required to provide her husband's signature on loan documents); *Bank of America Nat. Trust & Sav. Ass'n v. Hotel Rittenhouse Associates*, 595 F.Supp. 800 (E.D. Pa. 1984) (neither husband nor wife

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[15] Petitioners admitted in both the District Court and the Eighth Circuit that, prior to default by PHC, they had only a contingent liability to CBR. *See, e.g.,* ROA A1206; Brief of Appellants at 39.

who signed guaranties in support of application by business entity could bring ECOA claims because it "was the entity which applied for and received credit," and the statutory definition excludes guarantors); *Morse v. Mut. Federal Sav. & Loan Ass'n*, 536 F.Supp. 1271, 1278 (D. Mass. 1982) (claim by spouse who signed guaranty was "a total misconception" because she was "implicitly excluded from the statutory definition" [of "applicant"] and "the affront was not to her, but to [her husband], who was unable to secure 'credit' without the signature of his wife"); *Delta Diversified, Inc. v. Citizens & Southern Nat. Bank*, 320 S.E.2d 767, 771 (Ga. Ct. App. 1984) (spouses who signed guaranties "were not 'applicants' as defined by" the ECOA).

Ultimately, after even a cursory, much less a careful, analysis of the ECOA's deliberately chosen language defining "applicant," there is only one plausible conclusion. As the Seventh Circuit aptly put it, "there is nothing ambiguous about 'applicant' and no way to confuse an applicant with a guarantor." *Moran*, 476 F.3d at 441. "In sum, the text and reasonable inferences from it give a clear answer against the Government, and that, as we have said, is 'the end of the matter.'" *Brown*, 513 U.S. at 120 (quoting *Chevron*).

2. The Overall Structure Of The ECOA And Numerous Other Provisions In The Statute Confirm That A Guarantor Is Not An "Applicant."

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." *Deal v. United States*, 508 U.S. 129, 132 (1993). Further, the Court "must read the words 'in their context and with a view to their place in the overall statutory scheme.'" *King*, 135 S.Ct. at ___ (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)). Doing so here leads the Court to the same inexorable conclusion that results from focusing on the language of the ECOA definition of "applicant." The context here is that the word "applicant" appears in the ECOA over 50 times. The ECOA uses the term "debtor" only rarely, and then only in the context either of defining "credit," 15 U.S.C. §1691a(d), or in a circumstance where it is clear that the loan already has been made, making the "applicant" a "debtor," *i.e.*, one who has received credit. *E.g.*, 15 U.S.C. § 1691a(d) (defining "credit").

Never does the ECOA refer to a "guarantor" or any other such secondarily-liable parties to a loan transaction. If Congress intended the ECOA to apply as broadly as Petitioners and the Government now suggest, Congress easily could have accomplished that result. For example, Congress could have provided that the ECOA prohibits discrimination against any "person" rather than just "applicants," 15 U.S.C. §1691(a), and Congress could have created a cause of action for any "aggrieved person" instead of an "aggrieved applicant." *Id.* §§ 1691e(a), (b), (c). But Congress did not do that; instead, Congress repeatedly (more than 50 times) used the word "applicant" in the ECOA. Further, Congress carefully and specifically defined that term in the statute, prohibited discrimination only against "applicants," and created a civil cause of action only in favor of the "aggrieved applicant."

In almost every instance, the ECOA refers to *the* applicant, a notable and consistent use of the singular article, not a plural article as one would expect if the term encompassed all persons or entities connected in any way to a lending transaction. In fact, the ECOA contemplates that there often, if not usually, will be a single applicant-borrower, and the ECOA both protects that individual or entity from discrimination and gives the applicant an express statutory cause of action (including possible damages, and declaratory and equitable relief) if a lender discriminates against it on a prohibited basis. That is the most natural reading of the ECOA scheme, and such a reading makes perfect sense.

Take the hypothetical Petitioners repeatedly raise: Suppose an LLC owned by two minority women seeks a loan, but the lender denies the LLC's application, or grants it but charges a higher interest rate, because the owners are minority women. That would be an ECOA violation, and the LLC (as the "applicant" for credit) would have a statutory cause of action for prohibited discrimination. Further, the LLC could recover any actual damages it could prove, an award of attorney's fees, and possibly punitive damages up to $10,000. That result fully serves the ECOA's purposes.

No prohibited discrimination is beyond redress if "applicant" is given its plain and ordinary meaning. There will always be an "applicant," *i.e.*, a borrower or prospective borrower, in the lending context, and that applicant can bring a claim under the ECOA against a lender that discriminates against the applicant-borrower on any of the prohibited bases, including marital status, irrespective of whether the married or

single person that motivates the lender's actions is the actual "applicant." *Cf. Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470 (2006) (company that entered contract with Domino's could assert race bias claim under 42 U.S.C. §1981, but the sole shareholder of the company—an African-American—could not do so). Apparently, Petitioners and the Government instead want *anyone* in any way connected to a lending transaction to partake in the statutory cause of action. But that result is not supported by the statutory definition of "applicant" or the overall structure and provisions of the ECOA. *Cf. McDonald*, *supra* at 479 ("Trying to make [the statute] a cure-all not only goes beyond any expression of congressional intent but would produce satellite . . . litigation of immense scope.").

Several times the ECOA uses "applicant" in a context that only makes sense if the individual or entity applying for credit directly is the "applicant." For instance, with respect to the creditor giving "notice" of the reasons for a denial of credit, the statute says that each "applicant" is entitled to such notice. 15 U.S.C. §1691(d)(2). The statute then goes on to state that when "a creditor has been requested by a third party to make" an extension of credit "to an applicant," the notice requirement can be satisfied by providing notice either to the applicant "or indirectly through the third party." *Id*. at (d)(4). Such a provision for "indirect" notice to a "third party" makes no sense if every individual or entity connected to the loan in some fashion is already considered an "applicant" who has sought credit "directly" from the lender.

Similarly, when the ECOA identifies "Civil Liability" for violations of the Act, it pointedly declares that a creditor "shall be liable to *the* aggrieved applicant for any actual damages," and "to *the* aggrieved applicant for punitive damages in an amount not greater than $10,000. . . ." 15 U.S.C. §§ 1691e(a), (b) (emphasis added). These provisions on their face contemplate a single, aggrieved "applicant," as a general matter, not multiple "applicants" as a matter of course.

Furthermore, under Petitioners' and the Government's view, a creditor could be liable for punitive damages up to $10,000 to each and every individual or entity connected to a loan transaction. But there is no indication in the statute or its legislative history that Congress intended to authorize multiple punishments (or lawsuits or attorney fee awards) for a single loan made or denied in violation of the ECOA. "Where a statute . . . names the parties granted [the] right to invoke its provisions, . . . such parties only may act." *Hartford Underwriters*, 530 U.S. at 6-7 (quoting 2A N. Singer, *Sutherland on Statutory Construction* §47.23, p. 217 (5th ed. 1992)).[16]

Current Regulation B, however, necessarily opens the door to multiple damage claims for a single lending transaction by authorizing claims to be brought by multiple non-applicants, parties whom Congress never

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[16] All banks and lending institutions, including CBR, are subject to regulatory supervision and are frequently examined by state and/or federal regulators, including, the FRB, the FDIC and/or the OCC and, in Missouri, the Missouri Division of Finance. The federal examiners all have administrative enforcement powers under the ECOA. 15 U.S.C. §1691c.

authorized to invoke the ECOA and its remedies. Such a result would fly in the face of the ECOA's plain language, the overwhelming focus of the ECOA on the "applicant," the statute's overall structure, and Congress' precise efforts to tailor rather than leave open-ended the remedies available under the express statutory cause of action.

3. The Context In Which Congress Enacted The ECOA In 1974 And Subsequent Amendments Confirm That Congress Purposely Crafted A Precise Definition Of "Applicant."

There is no dispute about the origins of the ECOA and its primary purpose of protecting women from discrimination with respect to obtaining credit. The Congress that enacted the ECOA conducted hearings and considered extensive evidence regarding the difficulties women in general—single, married, separated, divorced and widowed—encountered in seeking and obtaining credit. After extensive hearings, the Senate found there was "widespread discrimination on the basis of sex and marital status in the granting of credit to women." S. Rep. No. 278, 93rd Cong., 1st Sess. 16 (1973) ("Sen. Rep. 93-278"). In particular, the Senate identified several categories of discrimination:

> 1. Single women have more trouble obtaining credit, especially mortgage credit, than single men.
>
> 2. Creditors generally require a woman who has credit to reapply for credit when she marries, usually in her husband's name. Similar reapplication is not asked of men when they marry.

> 3. Creditors are often unwilling to extend credit to a married woman in her own name.
>
> 4. Women who are divorced or widowed have trouble reestablishing credit. Women who are separated have a particularly difficult time since their accounts may still be in the husband's name.
>
> 5. Creditors are often unwilling to count the wife's income when a married couple applies for credit.

Id. The Senate emphasized, however, that it was "this kind of discrimination, not the right of banks to insure their loans," *id*. at 18, that the Senate was enacting the ECOA to address. Further, it was "not the purpose of [the ECOA] to require any creditor or card issuer to extend credit to any person when such person is not deemed creditworthy." *Id*. at 20.

Subsequent hearings in the House essentially echoed the Senate process,[17] and resulted in a very short House Report that adds little to the more extensive Senate Report. Nowhere in the legislative history is there any discussion or suggestion that the express definition of "applicant" includes, or should include, third parties such as guarantors. Instead, the legislative history makes clear that Congress was equating "the applicant" with "the borrower," not the

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[17] Part of the record before the House was a law review article on this topic. *See* Margaret J. Gates, *Credit Discrimination Against Women: Causes and Solutions*, 27 Vand. L. Rev. 363 (1974).

much broader notions now being urged by Petitioners and the Government.[18]

What is clear from the ECOA's legislative history, as well as the statutory statement of purposes and findings, is that Congress intended that women—whether single, married, separated, divorced, or widowed—be treated equally to men in seeking, accessing, obtaining, holding and renewing credit. Ironically, of course, Petitioners are complaining precisely because they were *included* in the credit process and treated as the financial equals of their husbands, not because they were excluded, or because their husbands would have faced different rules if Petitioners had been the borrowers.

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[18] *See, e.g., Credit Discrimination: Hearings Before the Subcomm. on Consumer Affairs of the House Comm. on Banking and Currency,* 93rd Cong., 2d Sess. 89 (1974) (Statement of Bernard V. Parrett, Acting General Counsel, Dept. of Commerce; using "credit applicant" and "borrower" interchangeably); *id.* at 33 (Statement of Jeffrey M. Bucher, Member, Board of Governors of the Fed. Reserve System; referring to the "interests of borrowers"); *id.* at 126 (Statements by Congressman Stewart B. McKinney, Connecticut; referring to the "borrower" and "prospective borrower"); *To Amend the Equal Credit Opportunity Act of 1974: Hearings Before the Subcomm. on Consumer Affairs of the of the House Comm. on Banking and Currency,* 93rd Cong., 1st Sess. 10-12, 69 (1975) (Statements by Congressman Frank Annuzio, Chairman; referring to the "borrower" and "discrimination against a borrower"); *id.* at 17 (Statement of Stephen S. Gardner, Deputy Secretary of the Treasury; referring to the "would be borrower" and the "prospective borrower"); H. Rep. No. 210, 94th Cong., 1st Sess. 4, 6 (1975) ("H. Rep. 94-210") (General Comments; referring to the "potential borrower," "borrower" and "applicant" interchangeably). Nothing in the ECOA's legislative history evidences any intent by Congress to protect guarantors or other secondarily-liable parties.

The Seventh Circuit recognized "it is apparent that what the Act was intended to do was forbid a creditor to deny credit to a woman on the basis of a belief that she would not be a good credit risk because she would be distracted by child care or some other stereotypically female responsibility." *Moran Foods*, 476 F.3d at 441. Other Circuits have agreed after reviewing the legislative history. As the Ninth Circuit put it, "[t]he purpose of the ECOA is to eradicate credit discrimination waged against women, especially married women whom creditors traditionally refused to consider for individual credit." *Anderson*, 666 F.2d at 1277; *see also Mayes v. Chrysler Credit Corp.*, 37 F.3d 9, 11 (1st Cir. 1994) ("The statute was initially designed, at least in part, to curtail the practice of creditors who refused to grant a wife's credit application without a guaranty from her husband."); *Midkiff v. Adams*, 409 F.3d 758, 771 (6th Cir. 2005) (quoting and citing *Mayes* and *Anderson*).

To include guarantors such as Petitioners within the scope of the ECOA would fly in the face of the original reasons for enacting the statute. The ECOA is about equality, and that is exactly the treatment Petitioners received here—equal financial stature and responsibility as their husbands. The ECOA definition of "applicant" has remained unchanged in the statute since first enacted in 1974. There is no discussion of that definition in the legislative history of subsequent amendments to the ECOA in 1976, 1988, or 2010. Thus, the overriding original purpose of the ECOA is yet another reason to interpret the statute's unchanged definition of "applicant" to exclude guarantors.

4. Expanding The ECOA Definition Of "Applicant" To Include Guarantors Would Open Unintended "Vistas Of Liability" Under The Statute.

The Government urges the Court to ignore any question of remedies available for ECOA violations in determining whether the statutory definition of "applicant" is ambiguous, U.S. Br. at 34-35, but such an approach would ignore statutory context and structure, as well as legislative history and common sense. Instead, the statutory remedies the ECOA creates, and Congress' concern about not imposing ruinous liability on lenders for ECOA violations (which often, even if they occur, will not result in any significant harm, if any harm at all), counsel strongly in favor of taking the statutory remedies into account when interpreting the ECOA definition of "applicant."[19] Those concerns also counsel in favor of considering the dramatic expansion of ECOA liability that would potentially occur if the Court permits the Government through Regulation B to "interpret" the statute to include guarantors and others who may be connected in some fashion to a lending transaction.

The Seventh Circuit honed in on this very issue when it rejected the position the Government takes here. In *Moran Foods*, the Seventh Circuit observed that, "to interpret 'applicant' as embracing 'guarantor'

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[19] While the comprehensive remedial scheme Congress enacted in favor of aggrieved applicants under §1691e is pertinent to the question presented, Respondent agrees with the Government that the Court need not resolve any particular remedies questions in order to decide the question presented.

opens vistas of liability that the Congress that enacted the Act would have been unlikely to accept." 476 F.3d, at 441. As the Seventh Circuit explained, as a general rule "the damages will be modest" if an applicant is "denied credit, or given credit but charged a higher interest rate. . . ." *Id*. A situation in which a failure to obtain credit from one lender who violated the ECOA resulted in the loss of "a tremendous business opportunity," would be "rare and difficult to prove." *Id*.

Instead, damages in the typical case "will be limited to the cost of the higher interest, or the inconvenience of arranging alternative credit. . ." or other minimal financial consequences. 476 F.3d, at 436. But the liability exposure of a lender for allegedly violating the ECOA with respect to a guarantor is potentially massive. A violation of the ECOA in that context could have the result—precisely the result Petitioners seek here—of making the guaranty "unenforceable" so that the creditor would "lose the entire debt." *Id*.

Here, if CBR violated the ECOA with respect to PHC (by engaging in marital status discrimination), then PHC could have brought a claim under the ECOA seeking its actual damages, any appropriate declaratory or equitable relief, and potentially up to $10,000 in punitive damages.[20] That is the "vista of liability" Congress envisioned and intended in cases

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[20] CBR is a small community bank, with only $16 million in capital. Losing a $2 million debt would be a substantial loss for CBR, just as it would for thousands of other small community banks across the country. *See* CBR's March 31, 2015 Call Report filed with the FDIC, which is a matter of public record and can be found through a name search at https://cdr.ffiec.gov/public/ManageFacsimiles.aspx.

such as this one, not the extreme and harsh result Petitioners seek.

C. The FRB's (And Now CFPB's) Current Regulation B Definition Of "Applicant" Cannot Be Squared With The ECOA Definition, A Fact The FRB Candidly Acknowledged In 1985.

1. The Original Regulation B Adopted In 1975 Tracked The ECOA Definition Of "Applicant."

When it first adopted Regulation B in 1975, the FRB saw no ambiguity in the statutory definition of "applicant." Indeed, the original Regulation B tracked the carefully crafted statutory definition. Because the ECOA covers the applicant prior to an extension of credit and the applicant *qua* debtor after an extension of credit, the FRB interpreted "applicant" as follows:

> Applicant means any person who applies to a creditor directly for an extension, renewal or continuation of credit, or who applies to a creditor indirectly by use of an existing credit plan for an amount exceeding a previously established credit limit. With respect to any creditor the term also includes any person to whom credit is or has been extended by that creditor.

40 Fed. Reg. 49,298, 49,306 (Oct. 27, 1975); *see also id.* at 49,298 (the expanded definition was intended to "embrace[] two terms used by Congress in the Act, 'applicant' and 'debtor' . . . [t]o simplify [the] terminology").

2. After The 1976 ECOA Amendments, The FRB Amended Regulation B To Expressly *Exclude* "Guarantors."

Following the 1976 amendments to the ECOA, which did not change the statutory definition of "applicant," the FRB proposed that it might amend Regulation B to include additional parties such as guarantors, 41 Fed. Reg. 29,870, 29,871, 29,878 (July 20, 1976), but quickly reversed course.[21] 41 Fed. Reg. 49, 123, 49,124, 49,132 (Nov. 8, 1976). Instead, to "resolve confusion regarding the scope of ['applicant']" potentially created by the FRB's proposed amendments, *id.* at 49,124, the FRB amended Regulation B to *expressly* provide that "applicant" did *not* include a guarantor, surety, endorser or other similar party:

> Applicant means any person who requests or who has received an extension of credit from a creditor, and includes any person who is or may be contractually liable regarding an extension of credit *other than a guarantor, surety, endorser or similar party*.

42 Fed. Reg. 1242, 1252 (Jan. 6, 1977) (emphasis added).

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[21] Notably, the FRB never expressed doubt or uncertainty about the plain and ordinary meaning of "applicant"; instead, the FRB throughout the 1976 amendment process referred to a guarantor as a "nonapplicant," 41 Fed. Reg. 29,874, or an "additional party." 42 Fed. Reg. 1256.

3. In 1985, The FRB Did An About-Face And Amended Regulation B To *Include* Guarantors, Even While Explicitly Acknowledging That A "Guarantor" Is Not An "Applicant" Under The ECOA Itself.

For the better part of a decade after the ECOA was enacted, consistent with Congress' express intent "that the essential prohibition in [the] legislation is directed at discrimination *against applicants*," S. Rep. No. 589, 94th Cong., 2nd Sess. 3 (1976) ("Sen Rep. 94-589") (emphasis added), the FRB followed the statutory definition of "applicant," and expressly recognized that the ECOA only prohibits discrimination against the credit *applicant* (*i.e.*, the borrower). In 1985, however, after apparently becoming dissatisfied with Congress' definition of "applicant," the FRB decided to redefine that term in Regulation B to include guarantors, a 180-degree turn from the position the FRB adopted in both 1975 and 1976.

The FRB made no pretense that its about-face was a result of "interpreting" or "clarifying" an ambiguous term. Rather, the FRB candidly acknowledged that a guarantor or similar party is *not* an "applicant" under the statutory definition; in fact, the FRB effectively declared that it was amending Regulation B to redefine "applicant" as Congress defined that gateway term in the ECOA, and that it was doing so for the express purpose of *creating a new class* of persons entitled to sue for alleged violations of the ECOA. 50 Fed. Reg. 48,018, 48,020, 48,025 (Nov. 20, 1985) ("If a creditor violates [12 C.F.R. §202.7(d)] . . . a guarantor whose signature has been illegally required has no legal remedy *because section 706 of the [A]ct confers standing*

to sue only upon an "aggrieved applicant.") (emphasis added).

Thus, the FRB proposed "a substantive change to the definition of 'applicant,'" in particular "to revise the definition of 'applicant' [in Regulation B] to include guarantors, sureties, endorsers, and similar parties." 50 Fed. Reg. 10, 890, 10,891 (Mar. 18, 1985). Numerous interested parties provided comment on the proposed change, and many pointed out that the proposed change expanded the statutory definition. Nonetheless, the FRB "made changes . . . in the definition of 'applicant' to give guarantors legal standing to sue in the courts when there is an alleged violation of the signature provisions of the act or the regulation." 50 Fed. Reg. 48,018. The FRB itself reiterated that it was making "a substantive change to the definition of 'applicant'. . . ." *Id*. at 48,020. Most notably, however, the FRB acknowledged it was attempting to redefine the statutory definition:

> If a creditor violates this provision, however, a guarantor whose signature has been illegally required currently has no legal remedy *because section 706 of the act confers standing to sue only upon an "aggrieved applicant*." The Board has included guarantors and similar parties within the definition of "applicant" to resolve this question of standing.

50 Fed. Reg. 48,020. (emphasis added); *id.* at 48,025 (describing the 1985 amendment as a "[r]edefinition of 'applicant' to include guarantors[,]" and acknowledging that under the ECOA, only "an applicant for credit has standing to sue . . . but a guarantor does not.").

Ultimately, the FRB redefined "applicant" in §202.2(e) in 1985 to provide:

> Applicant means any person who requests or who has received an extension of credit from a creditor, and includes any person who is or may become contractually liable regarding an extension of credit. *For purposes of §202.7(d), the term includes guarantors, sureties, endorsers and similar parties.*

50 Fed. Reg. 48,027 (emphasis added). *See* 12 C.F.R. §202.2(e).

Despite this 180-degree change to Regulation B, the FRB (and the CFPB), continued to recognize that a guarantor is *not* an applicant within the natural meaning of that term. *See, e.g.*, 12 C.F.R. §202.7(d) (distinguishing between the "applicant" and an "additional party," whether the latter is a "spouse" or some "other person"); Official Staff Interpretations, 12 C.F.R. Pt. 202, Supp. I, comment 202.7, ¶¶ 7(d)(5), 7(d)(6) (distinguishing between the "applicant," also specifically referred to as the "borrower," and an "additional party," again whether a "spouse" or some "other person"); 54 Fed. Reg. 29,734, 29,735 (July 14, 1989) (referring to a "guarantor" as the "nonapplicant spouse"). In addition, because a guarantor—unlike an "applicant"—neither applies for nor receives credit, the FRB long recognized, and the CFPB recently has acknowledged (at least until the Government filed its brief in this Court) that a guarantor suffers no adverse action with respect to a prospective or existing loan. *See* 76 Fed. Reg. 41,590, 41,597 (July 15, 2011) (distinguishing between an "applicant" and a guarantor, and explaining that "[u]nder section

701(d)(6) of the ECOA and §202.2(c) of Regulation B, only an *applicant* can experience adverse action") (emphasis added).

Petitioners and the Government go to great lengths to gin up a litany of unnatural and unusual meanings of "applicant" in an attempt to defend the FRB's actions, but their arguments and those creative meanings ring hollow. This Court does not construe statutes by seeking uncommon or unusual meanings for the words Congress used. *Better Bus. Bureau of Washington, D.C. v. United States*, 326 U.S. 279, 283, (1945) ("Even the most liberal of constructions does not mean that statutory words and phrases are to be given unusual or tortured meanings unjustified by legislative intent. . . .").[22]

The Government, citing *Global Crossing Telecommunications, Inc. v. Metrophones Telecommunications, Inc.,* 550 U.S. 45 (2007) and *Alexander v. Sandoval,* 532 U.S. 275 (2001), relies on manufactured "ambiguity" to now argue that the FRB's 1985 amendment was a permissible "interpretation" of the ECOA. U.S. Br. at 33-34. But when the FRB amended Regulation B in 1985, it explicitly recognized that its expanded definition of "applicant" could not be squared with the ECOA definition. 50 Fed. Reg. 48,018,

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[22] The Government's belated claim of ambiguity also runs counter to "the foundational principle of administrative law that a court may uphold agency action only on the grounds that the agency invoked when it took the action." *Michigan v. EPA*, 576 U.S. __, 135 S.Ct. ___, ___ (2015) (citing *SEC v. Chenery Corp.,* 318 U.S. 80, 87 (1943)). Until the Government filed its *amicus* brief in this Court, neither the FRB nor the CFPB had claimed or even suggested that the ECOA definition is ambiguous.

48,020, 48,025 ("If a creditor violates [12 C.F.R. §202.7(d)] . . . a guarantor whose signature has been illegally required has no legal remedy because section 706 of the [A]ct confers standing to sue only upon an "aggrieved *applicant*.") (emphasis added).

In fact, the cases the Government cites undermine rather than support its argument that the FRB's 1985 amendment to Regulation B was a permissible "interpretation" of the ECOA. *Sandoval* in particular speaks to the situation here, and makes clear that an agency cannot expand the scope of an explicit and defined statutory right of action:

> Language in a regulation may invoke a private right of action that Congress through statutory text created, but it may not create a right that Congress has not. . . . "[A regulation cannot] conjure up a private cause of action that has not been authorized by Congress. Agencies may play the sorcerer's apprentice but not the sorcerer himself.

Sandoval, 532 U.S. at 291 (internal citation omitted).

Petitioners may claim, rightly or wrongly, that they are the indirect victims of discrimination against PHC (the "applicant" under the ECOA for the loans at issue here), but Congress deliberately chose to prohibit only discrimination *against the applicant*, 15 U.S.C. §1691(a), and it likewise deliberately created a private right of action only for the aggrieved *applicant*. *Id.* §§ 1691e(a), (b), (c). "There is a basic difference between filling a gap left by Congress's silence and *rewriting rules that Congress has affirmatively and specifically enacted*." *Lamie v. U.S. Trustee*, 540 U.S.

526, 538 (2004) (quoting *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978)) (emphasis added).[23]

Any claim here lies, if at all, only in favor of the applicant, *i.e.*, the borrower, which is PHC, not Petitioners. The FRB lacked authority to redefine the ECOA definition of "applicant." The 1985 amendment to Regulation B—which purported to expand the statutory definition to include guarantors and others—therefore is *ultra vires*, and not a permissible "interpretation" of the ECOA. *Demarest v. Manspeaker*, 498 U.S. 184, 190 (1991) ("administrative interpretation of a statute contrary to language as plain as we find here is not entitled to deference.").[24]

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[23] *Global Crossing* is plainly distinguishable on its facts. There, the statute at issue created a cause of action in favor of "[a]ny person claiming to be damaged" by a violation of the statute. Nowhere did the statute define "person" or in any other way identify or limit potential claimants. *See* 550 U.S. at 52.

[24] Nor can Congress' "legislative silence" regarding the FRB's interpretive flip-flops be given any consequence, "particularly where administrative regulations are inconsistent with the controlling statute," *Brown*, 513 U.S. at 121, as here. "Where the law is plain, subsequent reenactment does not constitute an adoption of a previous administrative construction." *Demarest*, 498 U.S. at 190. Moreover, there is no evidence here that Congress was aware, let alone approved, of the 1985 version of Regulation B when Congress amended the ECOA in 1988 or 2010. *U.S. v. Rutherford*, 442 U.S. 544, 554 n. 10 (1979) (It is only where "an agency's statutory construction has been 'fully brought to the attention of the public and the Congress,' and the latter has not sought to alter that interpretation although it has amended the statute in other respects," that the Court will presume that "the legislative intent has been correctly discerned.") (internal citation

D. This Case Is On All Fours With *Bd. Of Governors Of The Federal Reserve System v. Dimension Financial Corp.*, 474 U.S. 361 (1986).

This case bears remarkable similarities to *Bd. of Governors of the Federal Reserve System v. Dimension Financial Corp*., 474 U.S. 361 (1986). In that case, the federal Bank Holding Company Act included an express and precise statutory definition of "bank" as the gateway provision for the entire statutory scheme. In particular, the Act defined a "bank" as an institution that "(1) accepts deposits that the depositor has a legal right to withdraw on demand, and (2) engages in the business of making commercial loans." 474 U.S. at 363. In 1984—one year before the FRB amended Regulation B to expand "applicant" under the ECOA to include "guarantors"—the Board amended Regulation Y both to include institutions that accept deposits which "as a matter of practice" were payable on demand and to expand the definition of "commercial loans" to include various money market transactions, none of which the Board previously had regulated. *Id*. at 364. Various entities filed suit, challenging the expanded Regulation Y as being inconsistent with the statute's gateway definition of "bank."

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omitted); *see also* 2B N. Singer, *et al.*, *Sutherland Statutes and Statutory Construction*, §49:9, at pp. 134-135 (7th ed. 2008) (presumption of congressional-acquiescence is inapplicable "where nothing indicates that the legislature had its attention directed to the administrative interpretation upon reenactment"). Most importantly, "[a] regulation's age is no antidote to clear inconsistency with a statute, and the fact . . . [that a regulation] flies against the plain language of the statutory text exempts courts from any obligation to defer to it." *Brown*, 513 U.S. at 122.

This Court agreed with the challengers, and concluded that the Board had attempted to rewrite and expand the Bank Holding Company Act, not to construe or interpret an ambiguity. The Court began by noting that the Act gave the Board broad regulatory power, 474 U.S. at 365, but pointed out that the "breadth of that regulatory power rests on the Act's definition of the word 'bank.'" *Id*. The Court identified the reasons the Board chose to expand Regulations Y, and did not question those justifications as a policy matter. *Id*. at 367-368.

Applying the *Chevron* analysis, however, the Court observed that in "determining whether the Board was empowered to make such a change, we begin, of course, with the language of the statute." 474 U.S. at 368. Further, the "traditional deference courts pay to agency interpretation is not to be applied to alter the clearly expressed intent of Congress." *Id*. Considering first the Board's effort to expand the Act's gateway definition of "bank" to cover institutions that "as a matter of practice" provided deposits payable on demand, the Court concluded that the Board's regulation could not be squared with the statutory definition of institutions for which depositors had a "legal right" to demand payment. *Id*. Thus, "no amount of agency expertise – however sound may be the result – can make the words 'legal right' mean a right to do something 'as a matter of practice.'" *Id*.

Nor did the Board's effort to rewrite the statutory requirement of "commercial loans" to include money market transactions fare any better. Instead, the Court discussed the "common understanding of the term 'commercial loan,'" 474 U.S. at 370, and found no

reason that "the language 'commercial loan' should be given something other than its commonly accepted meaning." *Id*. at 371. Ultimately, the Court concluded that '[n]othing in the statutory language or the legislative history, therefore, indicates that the term 'commercial loan' meant anything different from its accepted ordinary commercial usage." *Id*. at 373. As a result, the "Board's definition of 'commercial loan'" was not a permissible interpretation of the Act. *Id*.

The Court similarly rejected the Board's arguments that its amendments to Regulation Y were consistent with the "purposes" of the Act. The Court noted that the Board's broad authority to implement the Act "only permits the Board to police within the boundaries of the Act; it does not permit the Board to expand its jurisdiction beyond the boundaries established by Congress. . . ." 474 U.S. at 373 n. 6. Furthermore, the "'plain purpose' of legislation . . . is determined in the first instance with reference to the plain language of the statute itself." *Id*. at 373. Even though "there is much to be said for regulating financial institutions that are the functional equivalent of banks," *id*. at 374, the Court found the Board exceeded its authority:

> Congress defined with specificity certain transactions that constitute banking subject to regulation. The statute may be imperfect, but the Board has no power to correct flaws that it perceives in the statute it is empowered to administer. Its rulemaking power is limited to adopting regulations to carry into effect the will of Congress as expressed in the statute.

Id. If the statute "falls short of providing safeguards desirable or necessary to protect the public interest,

that is a problem for Congress, and not the Board or the courts, to address." *Id*. Instead, the Court's inquiry "must come to rest with the conclusion that the action of the Board in this case is inconsistent with the language of the statute. . . ." *Id*. at 375.

Here, as in *Dimension Financial Corp*., the governing federal statute explicitly defines its gateway provision, and thus necessarily limits the authority granted to the FRB to implement the statute. Here, the very same agency that amended Regulation Y in 1984 in an attempt to rewrite the Bank Holding Company Act's definition of "bank," also decided in 1985 to try and rewrite the ECOA's definition of "applicant" through Regulation B. Here, just as in *Dimension Financial Corp*., the FRB's regulatory "interpretation" is contrary to the plain statutory language. Here, as in that case, the Government attempts to justify the FRB's rewriting of the statutory gateway definition by pointing to the broad delegation of authority the FRB was given in *some* respects and the reasons why rewriting the statute may make sense as a matter of policy.

But none of that alters the inevitable conclusion that the ECOA's gateway definition of "applicant" is clear and excludes guarantors. Indeed, with a few word substitutions, the Court's conclusion in *Dimension Financial Corp*. is equally applicable here:

> Congress defined with specificity [the "applicants"] subject to [protection]. The [ECOA] may be imperfect, but the Board has no power to correct flaws that it perceives in the statute it is empowered to administer. Its rulemaking power is limited to adopting regulations to carry into

> effect the will of Congress as expressed in the [ECOA].

Id. at 683.

The FRB of the mid-1980s apparently took a view of statutory "interpretation" not authorized by this Court's jurisprudence. Just as in *Dimension Financial Corp*., the FRB here attempted to amend one of its regulations to redefine a statute and significantly expand the agency's statutory authority. The Court repeatedly has held, however, that "an agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear." *MCI Telecommunications*, 512 U.S. at 229. Whether or not to expand the ECOA statutory cause of action is the prerogative of Congress, not the FRB or the CFPB.

II. Petitioners Make A Number Of Arguments That Are Beyond The Scope Of The Questions Presented And Are Not Properly Before The Court.

A. Petitioners' Various Factual Allegations Regarding Their Guaranties Go To The Merits Of Any Potential ECOA Claim, Not The Question Of Who Is An ECOA "Applicant."

Petitioners argue that they did not voluntarily sign their guaranties, and claim they only did so because Respondent *required* them to in alleged violation of 12 C.F.R. §202.7(d). Pet. Br. at 2. Neither the validity of the "additional party" rule, however (a focal point of the Government's *amicus* brief), nor the merits of Petitioners' claim that CBR violated that regulation, is

before the Court because neither issue is encompassed by the questions presented.

Even assuming for the sake of argument that the "additional party" regulation itself is valid, Petitioners at most allege only a factual dispute on the merits under that regulation. The additional party rule only prohibits a creditor from *requiring* the signature of an applicant's spouse and then, only if the spouse lacks an interest in the borrowing entity or does not receive a benefit from the loan. 12 C.F.R. §202.7(d); Official Staff Interpretations, 12 C.F.R. Pt. 202, Supp. I, comment 202.7, ¶7(d)(6).[25] Nothing in the regulation or the ECOA prohibits a creditor from accepting a spousal guaranty when such a guaranty is offered by the borrower, or given by a spouse at the applicant-borrower's request. *Id.; see also U.S. v. Meadors,* 753

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[25] The Government selectively points to Petitioners' representation that they each "expect[ed] to derive substantial benefits" from the guaranteed loans, to suggest that Petitioners impliedly requested an extension of credit. U.S. Br. at 23. The Government, however, conveniently ignores the first part of that *same sentence* where Petitioners confirmed that they each had "a direct and substantial economic interest in [PHC]. . . ," as well as their representation in the immediately preceding paragraph that their guaranties were "entered into at the request of the Borrower." *See, e.g.,* App. A 12. The Government, like Petitioners, cannot pick and choose the guaranty provisions it likes and conveniently discard the rest. Accepting Petitioners' representations as true, as this Court should, there could be no ECOA violation under any scenario. The same is true with regard to Petitioner Patterson—even if the Court disregards her written representations—where she admitted under oath that she and the Trust through which the PHC-membership interest is held, and for which she is a trustee and beneficiary, are one and the same: "I am me, I am the trust, I am every [Patterson] LLC. . . . We're all one." ROA A1412:23-24, A1413:8-A1414:5.

F.2d 590, 593 (7th Cir. 1985) (the ECOA was not implicated where wife voluntarily signed a guaranty, but was not required by the lender to do so). Nor is a creditor precluded from engaging in the common (and eminently sensible) practice of asking an applicant who, if anyone, will sign as guarantors, leaving it to the applicant to decide whom to offer as potential guarantors.[26]

The irony of Petitioners' argument on this point is striking. The Court must remember that Petitioners are seeking protection under the ECOA, a law designed to empower women in the credit markets and to treat them as the legal/financial equals of their male spouses in particular, and of men in general. Yet Petitioners ask the Court to find that their guaranty contracts should be relegated to an inferior class, less enforceable than guaranties signed by men, apparently because Petitioners are invoking gender stereotypes that they are hapless, unsophisticated wives of borrowers. Petitioners make this argument even though they acknowledged by their signatures that they *read*, *understood* and *agreed* to the terms of their guaranties, their guaranties accurately reflected their *intentions*, and they had an opportunity to consult with legal counsel prior to signing them.[27] App. A 30, 34.

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[26] Indeed, when a debtor defaults, as PHC did here, and the guarantors are called upon to answer for more than a mere potential loss, that is prima facie evidence that the creditor sought guaranties in the first instance for a valid reason, *i.e.*, because of legitimate concerns about the creditworthiness of the applicant.

[27] Petitioners also represented that providing their guaranties did not violate any law or regulation applicable to them. *See, e.g.,* App.

(continued...)

Petitioners made these representations in *thirteen* of the sixteen guaranties they each signed over the course of *five years*. Further, each of the sixteen times they signed a guaranty, they expressly represented that they were signing *at the request of the borrower* (PHC), and *not* at the request of CBR.[28] App. A 12, 23.

Petitioners make no claim that CBR somehow *forced* them to sign their guaranties, nor could they. To the contrary, they admitted (and the District Court found), that Petitioners voluntarily signed without objection. ROA A686, A689-A691. Petitioners nonetheless argue that they should be able to avoid their written obligations now by showing that the explicit and repeated representations they made in

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[27](...continued)
A 24. That statement necessarily included the ECOA and Regulation B.

[28] Petitioners are presumed to have known the law when they signed their guaranties. *U.S. to Use of Hine v. Morse*, 218 U.S. 493, 510-11 (1910); 31A C.J.S. *Evidence* §228 (2015). Thus, Petitioners knew that CBR could not *require* their guaranties (assuming their allegations that they have no interest in PHC are true; though they then misrepresented that in their guaranties, as well). Petitioners could have crossed out the now allegedly false representations in their guaranties before signing them, or they could have simply refused to sign. Petitioners chose not to do either and, instead, signed their guaranties, enabling PHC to reap the benefits of CBR's $2 million in loans for more than *seven years*. Petitioners reneged on and disavowed their multiple, express representations only after they were called upon to perform under their guaranties. The ECOA does not authorize guarantors to game the system in this manner.

sixteen guaranties were in fact *false*. In Missouri,[29] however, as in most jurisdictions, it is black letter law that a person is presumed to have read and agreed to a contract she signs, *Warren v. Paragon Technologies Group, Inc.*, 950 S.W.2d 844, 846 (Mo. 1997) ("[p]arties are presumed to read what they sign]"), and cannot use her own fraud or intentional ignorance to escape her written representations in a contract. *Henderson v. Henderson's Ex'r,* 13 Mo. 151, 1850 WL 4163, 2 (1850) (a party cannot use its own fraud to vary or contradict a contract); *accord* 17A C.J.S. *Contracts* §193 (2015) ("[O]ne who refrains from reading a contract and in conscious ignorance of its terms voluntarily assents thereto . . . cannot be heard to say that the instrument signed does not express the real contract, that the provisions are contrary to . . . her intentions or understanding, that . . . she failed to comprehend and assent to the plain meaning of the language employed in the contract or did not understand the terms used, or that . . . she neglected to insert a stipulation essential to . . . her protection.").

The ECOA's overriding original purpose was to place women on equal footing with men in credit transactions. To find that Petitioners are less bound by their written representations in credit transactions than their husbands (or not bound at all), simply because they are women and wives, and despite their explicit, repeated representations, would be a perversion of the ECOA and its goal. Petitioners ask for

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[29] Petitioners' guaranties provide that they are "governed by federal law applicable to Lender and, to the extent not preempted by federal law, the laws of the State of Missouri, without regard to its conflicts of law provisions." *See, e.g.,* App. A 29.

nothing less than a step backwards into renewed reliance on gender stereotypes, rather than the strong step forward towards gender equality that Congress sought to achieve in the ECOA. In any event, the factual disputes Petitioners attempt to raise regarding their guaranties are not before the Court.

B. Petitioners Made No Claim Below For Declaratory Relief Separate From Their Assertion That They Are "Applicants" Under The ECOA.

Petitioners suggest that regardless of whether they are "aggrieved applicants," the Court must remand this case to the Eighth Circuit, because the District Court allegedly erred in finding that Petitioners lacked standing to seek declaratory relief to challenge the legality of their guaranties, and the Eighth Circuit allegedly also erred in affirming that ruling. Pet. Br. at 54. Petitioners' claim for declaratory relief in their complaint, however, was limited to the statutorily-conferred right to obtain declaratory and equitable relief under §1691e(c), and was predicated *solely* on Petitioners' argument that they are ECOA *applicants*. ROA A29. In the District Court, Petitioners did not bring a separate claim under the Declaratory Judgment Act, 28 U.S.C. §§ 2201, *et seq.* Nor did they make the declaratory relief argument they make in this Court. ROA A1183-A1211.

Rather, Petitioners' argument in the District Court was limited to their contention that they are ECOA "applicants" under Regulation B. ROA A1183-A1211. Thus, any separate argument or claim for declaratory relief (apart from the ECOA) was waived on appeal. *See, e.g., Smith v. City of Des Moines, Iowa,* 99 F.3d

1466, 1473 (8th Cir. 1996) ("We will not reverse a grant of summary judgment on the basis of an argument not presented below."); *Exeter Bancorporation, Inc. v. Kemper Securities Group, Inc.*, 58 F.3d 1306, 1318 (8th Cir. 1995) (plaintiff's argument on appeal was waived by failure to raise it in summary judgment briefing).

Petitioners' argument that the Eighth Circuit purportedly or implicitly rejected their argument on the merits ignores that the Eighth Circuit only addressed the ECOA issue, and did not address any other arguments Petitioners made. In any event, like their factual arguments about their guaranties, Petitioners' alleged alternative basis for declaratory relief is outside the questions presented.

CONCLUSION

CBR requests that the Court give the precise ECOA definition of "applicant"—one who "applies" for "credit" "directly"—its ordinary meaning, as construed in light of the history, context and structure of the ECOA. Doing so leaves only one supportable conclusion: a *guarantor* is not an ECOA "applicant."

Regulation B's purported redefinition of "applicant" to include "guarantors" is *ultra vires*. Regulation B is not an "interpretation" of the ECOA, much less a "permissible" one. Instead, it represents an improper agency attempt to redefine a statute Congress enacted. The Court should affirm the decision of the Eighth Circuit which correctly interpreted the ECOA.

Respectfully submitted,

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APPENDIX A

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APPENDIX A

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GUARANTY*

(Specific Debt - Unlimited)

DATE AND PARTIES. The date of this Guaranty is March 31, 2005. The parties and their addresses are:

LENDER:

COMMUNITY BANK OF RAYMORE
801 W Foxwood Drive
P O Box 200
Raymore, Missouri 64083-0200
Telephone: (816) 322-2100

BORROWER:

PHC DEVELOPMENT, L.L.C.
a Limited Liability Company
200 NW Executive Way
Lee's Summit, Missouri 64063

GUARANTOR:

VALERIE J. HAWKINS
25819 S. Stark Road
Peculiar, Missouri 64078

1. DEFINITIONS. As used in this Guaranty, the terms have the following meanings:

A. Pronouns. The pronouns "I", "me" and "my" refer to all persons or entities signing this Guaranty, individually and together. "You" and "your" refer to the Lender.

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* Non-substantive print appearing in the header and/or footer of the original document has been omitted.

B. Note. "Note" refers to the document that evidences the Borrower's indebtedness, and any extensions, renewals, modifications and substitutions of the Note.

C. Property. "Property" means any property, real, personal or intangible, that secures performance of the obligations of the Note, Debt, or this Guaranty.

2. SPECIFIC DEBT GUARANTY. For good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, and to induce you, at your option, to make loans or engage in any other transactions with the Borrower from time to time, I absolutely and unconditionally agree to all terms of and guaranty to you the payment and performance of the following described Debt(s) of the Borrower including without limitation, all principal, accrued interest, attorneys' fees and collection costs, when allowed by law, that may become due from the Borrower to you in collecting and enforcing the Debt and all other agreements with respect to the Borrower.

A promissory note or other agreement, No. 9035923, dated March 31, 2005, from PHC Development, L.L.C. (Borrower) to you, in the amount of $249,900.00.

In addition, Debt refers to debts, liabilities, and obligations of the Borrower (including, but not limited to, amounts agreed to be paid under the terms of any notes or agreements securing the payment of any debt, loan, liability or obligation, overdrafts, letters of credit, guaranties, advances for taxes, insurance, repairs and storage, and all extensions, renewals, refinancings and modifications of these debts) whether now existing or

created or incurred in the future, due or to become due, or absolute or contingent, including obligations and duties arising from the terms of all documents prepared or submitted for the transaction such as applications, security agreements, disclosures, and the Note.

You may, without notice, apply this Guaranty to such Debt of the Borrower as you may select from time to time.

3. EXTENSIONS. I consent to all renewals, extensions, modifications and substitutions of the Debt which may be made by you upon such terms and conditions as you may see fit from time to time without further notice to me and without limitation as to the number of renewals, extensions, modifications or substitutions.

4. UNCONDITIONAL LIABILITY. I am unconditionally liable under this Guaranty, regardless of whether or not you pursue any of your remedies against the Borrower, against any other maker, surety, guarantor or endorser of the Debt or against any Property. You may sue me alone, or anyone else who is obligated on this Guaranty, or any number of us together, to collect the Debt. My liability is not conditioned on the signing of this Guaranty by any other person and further is not subject to any condition not expressly set forth in this Guaranty or any instrument executed in connection with the Debt. My obligation to pay according to the terms of this Guaranty shall not be affected by the illegality, invalidity or unenforceability of any notes or agreements evidencing the Debt, the violation of any applicable usury laws, forgery, or any other

circumstances which make the indebtedness unenforceable against the Borrower. I will remain obligated to pay on this Guaranty even if any other person who is obligated to pay the Debt, including the Borrower, has such obligation discharged in bankruptcy, foreclosure, or otherwise discharged by law.

5. BANKRUPTCY. If a bankruptcy petition should at any time be filed by or against the Borrower, the maturity of the Debt, so far as my liability is concerned, shall be accelerated and the Debt shall be immediately payable by me. I acknowledge and agree that this Guaranty, and the Debt secured hereby, will remain in full force and effect at all times, notwithstanding any action or undertakings by, or against, you or against any Property, in connection with any obligation in any proceeding in the United States Bankruptcy Courts. Such action or undertaking includes, without limitation, valuation of Property, election of remedies or imposition of secured or unsecured claim status upon claims by you, pursuant to the United States Bankruptcy Code, as amended. In the event that any payment of principal or interest received and paid by any other guarantor, borrower, surety, endorser or co-maker is deemed, by final order of a court of competent jurisdiction, to have been a voidable preference under the bankruptcy or insolvency laws of the United States or otherwise, then my obligation will remain as an obligation to you and will not be considered as having been extinguished.

6. REVOCATION. I agree that this is an absolute and unconditional Guaranty. This Guaranty cannot be

revoked and will remain in effect until the Debt is paid in full.

7. PROPERTY. I agree that any Property may be assigned, exchanged, released in whole or in part or substituted without notice to me and without defeating, discharging or diminishing my liability. My obligation is absolute and your failure to perfect any security interest or any act or omission by you which impairs the Property will not relieve me or my liability under this Guaranty. You are under no duty to preserve or protect any Property until you are in actual or constructive possession. For purposes of this paragraph, you will only be in "actual" possession when you have physical, immediate and exclusive control over the Property and have accepted such control in writing. Further, you will only be deemed to be in "constructive" possession when you have both the power and intent to exercise control over the Property.

8. DEFAULT. I will be in default if any of the following occur:

A. Payments. I fail to make a payment in full when due.

B. Insolvency or Bankruptcy. The death, dissolution or insolvency of, appointment of a receiver by or on behalf of, application of any debtor relief law, the assignment for the benefit of creditors by or on behalf of, the voluntary or involuntary termination of existence by, or the commencement of any proceeding under any present or future federal or state insolvency, bankruptcy, reorganization, composition or debtor relief law by or against me, Borrower, or any co-

signer, endorser, surety or guarantor of this Guaranty or any Debt.

C. Death or Incompetency. I die or am declared legally incompetent.

D. Failure to Perform. I fail to perform any condition or to keep any promise or covenant of this Guaranty.

E. Other Documents. A default occurs under the terms of any other document relating to the Debt.

F. Other Agreements. I am in default on any other debt or agreement I have with you.

G. Misrepresentation. I make any verbal or written statement or provide any financial information that is untrue, inaccurate, or conceals a material fact at the time it is made or provided.

H. Judgment. I fail to satisfy or appeal any judgment against me.

I. Forfeiture. The Property is used in a manner or for a purpose that threatens confiscation by a legal authority.

J. Name Change. I change my name or assume an additional name without notifying you before making such a change.

K. Property Transfer. I transfer all or a substantial part of my money or property.

L. Property Value. The value of the Property declines or is impaired.

M. Insecurity. You reasonably believe that you are insecure.

9. WAIVERS AND CONSENT. To the extent not prohibited by law and except for a required notice of right to cure for the failure to make a required payment, if any, I waive protest, presentment for payment, demand, notice of acceleration, notice of intent to accelerate and notice of dishonor.

A. Additional Waivers. In addition, to the extent permitted by law, I consent to certain actions you may take, and generally waive defenses that may be available based on these actions or based on the status of a party to the Debt or this Guaranty.

(1) You may renew or extend payments on the Debt, regardless of the number of such renewals or extensions.

(2) You may release any Borrower, endorser, guarantor, surety, accommodation maker or any other co-signer.

(3) You may release, substitute or impair any Property.

(4) You, or any institution participating in the Debt, may invoke your right of set-off.

(5) You may enter into any sales, repurchases or participations of the Debt to any person in any amounts and I waive notice of such sales, repurchases or participations.

(6) I agree that the Borrower is authorized to modify the terms of the Debt or any instrument securing, guarantying or relating to the Debt.

(7) You may undertake a valuation of any Property in connection with any proceedings under the United States Bankruptcy Code concerning the Borrower or me, regardless of any such valuation, or actual amounts received by you arising from the sale of such Property.

(8) I agree to consent to any waiver granted the Borrower, and agree that any delay or lack of diligence in the enforcement of the Debt, or any failure to file a claim or otherwise protect any of the Debt, in no way affects or impairs my liability.

(9) I agree to waive reliance on any anti-deficiency statutes, through subrogation or otherwise, and such statutes in no way affect or impair my liability. In addition, I waive any right of subrogation, contribution, reimbursement, indemnification, exoneration, and any other right I may have to enforce any remedy which you now have or in the future may have against the Borrower or another guarantor or as to any Property.

Any Guarantor who is an "insider," as contemplated by the United States Bankruptcy Code, 11 U.S.C. 101, as amended, makes these waivers permanently. (An insider includes, among others, a director, officer, partner, or other person in control of the Borrower, a person or an entity that is a co-partner with the Borrower, an entity in which the Borrower is a general partner, director, officer or other person in control or a close relative of any of these other persons.) Any Guarantor who is not an insider

makes these waivers until all Debt is fully repaid.

B. No Waiver By Lender. Your course of dealing, or your forbearance from, or delay in, the exercise of any of your rights, remedies, privileges or right to insist upon my strict performance of any provisions contained in the Debt instruments, shall not be construed as a waiver by you, unless any such waiver is in writing and is signed by you.

C. Waiver of Claims. I waive all claims for loss or damage caused by your acts or omissions where you acted reasonably and in good faith.

10. REMEDIES. After the Borrower or I default, and after you give any legally required notice and opportunity to cure the default, you may at your option do any one or more of the following.

A. Acceleration. You may make all or any part of the amount owing by the terms of this Guaranty immediately due.

B. Sources. You may use any and all remedies you have under state or federal law or in any documents relating to the Debt.

C. Insurance Benefits. You may make a claim for any and all insurance benefits or refunds that may be available on default.

D. Payments Made on the Borrower's Behalf. Amounts advanced on the Borrower's behalf will be immediately due and may be added to the balance owing under the Debt.

E. Termination. You may terminate my right to obtain advances and may refuse to make any further extensions of credit.

F. Attachment. You may attach or garnish my wages or earnings.

G. Set-Off. You may use the right of set-off. This means you may set-off any amount due and payable under the terms of this Guaranty against any right I have to receive money from you.

My right to receive money from you includes any deposit or share account balance I have with you; any money owed to me on an item presented to you or in your possession for collection or exchange; and any repurchase agreement or other non-deposit obligation. "Any amount due and payable under the terms of this Guaranty" means the total amount to which you are entitled to demand payment under the terms of this Guaranty at the time you set-off.

Subject to any other written contract, if my right to receive money from you is also owned by someone who has not agreed to pay the Debt, your right of set-off will apply to my interest in the obligation and to any other amounts I could withdraw on my sole request or endorsement.

Your right of set-off does not apply to an account or other obligation where my rights arise only in a representative capacity. It also does not apply to any Individual Retirement Account or other tax-deferred retirement account.

You will not be liable for the dishonor of any check when the dishonor occurs because you set-off against any of my accounts. I agree to hold you harmless from any such claims arising as a result of your exercise of your right of set-off.

H. Waiver. Except as otherwise required by law, by choosing any one or more of these remedies you do not give up your right to use any other remedy. You do not waive a default if you choose not to use a remedy. By electing not to use any remedy, you do not waive your right to later consider the event a default and to use any remedies if the default continues or occurs again.

11. COLLECTION EXPENSES AND ATTORNEYS' FEES. On or after Default, to the extent permitted by law, I agree to pay all expenses of collection, enforcement or protection of your rights and remedies under this Guaranty or any other document relating to the Debt. To the extent permitted by law, expenses include, but are not limited to, reasonable attorneys' fees, court costs and other legal expenses. All fees and expenses will be secured by the Property I have granted to you, if any. In addition, to the extent permitted by the United States Bankruptcy Code, I agree to pay the reasonable attorneys' fees incurred by you to protect your rights and interests in connection with any bankruptcy proceedings initiated by or against me.

12. WARRANTIES AND REPRESENTATIONS. I have the right and authority to enter into this Guaranty. The execution and delivery of this Guaranty

will not violate any agreement governing me or to which I am a party.

In addition, I represent and warrant that this Guaranty was entered into at the request of the Borrower, and that I am satisfied regarding the Borrower's financial condition and existing indebtedness, authority to borrow and the use and intended use of all Debt proceeds. I further represent and warrant that I have not relied on any representations or omissions from you or any information provided by you respecting the Borrower, the Borrower's financial condition and existing indebtedness, the Borrower's authority to borrow or the Borrower's use and intended use of all Debt proceeds.

13. RELIANCE. I acknowledge that you are relying on this Guaranty in extending credit to the Borrower, and I have signed this Guaranty to induce you to extend such credit. I represent and warrant to you that I have a direct and substantial economic interest in the Borrower and expect to derive substantial benefits from any loans and financial accommodations resulting in the creation of indebtedness guarantied hereby.

14. APPLICABLE LAW. This Guaranty is governed by the laws of Missouri, the United States of America and to the extent required, by the laws of the jurisdiction where the Property is located.

15. AMENDMENT, INTEGRATION AND SEVERABILITY. This Guaranty may not be amended or modified by oral agreement. No amendment or modification of this Guaranty is effective unless made in writing and executed by you and me. This Guaranty and the other Loan Documents are the complete and

final expression of the agreement. If any provision of this Guaranty is unenforceable, then the unenforceable provision will be severed and the remaining provisions will still be enforceable.

16. ASSIGNMENT. If you assign any of the Debts, you may assign all or any part of this Guaranty without notice to me or my consent, and this Guaranty will inure to the benefit of your assignee to the extent of such assignment. You will continue to have the unimpaired right to enforce this Guaranty as to any of the Debts that are not assigned. This Guaranty shall inure to the benefit of and be enforceable by you and your successors and assigns and any other person to whom you may grant an interest in the Debts and shall be binding upon and enforceable against me and my personal representatives, successors, heirs and assigns.

17. INTERPRETATION. Whenever used, the singular includes the plural and the plural includes the singular. The section headings are for convenience only and are not to be used to interpret or define the terms of this Guaranty.

18. NOTICE, FINANCIAL REPORTS AND ADDITIONAL DOCUMENTS. Unless otherwise required by law, any notice will be given by delivering it or mailing it by first class mail to the appropriate party's address listed in the DATE AND PARTIES section, or to any other address designated in writing. Notice to one Guarantor will be deemed to be notice to all Guarantors. I will inform you in writing of any change in my name, address or other application information. I will provide you any financial statement or information you request. All financial statements and information I give you will be correct and complete.

I agree to sign, deliver, and file any additional documents or certifications that you may consider necessary to perfect, continue, and preserve my obligations under this Guaranty and to confirm your lien status on any Property. Time is of the essence.

19. CREDIT INFORMATION. I agree that from time to time you may obtain credit information about me from others, including other lenders and credit reporting agencies, and report to others (such as a credit reporting agency) your credit experience with me. I agree that you will not be liable for any claim arising from the use of information provided to you by others or for providing such Information to others.

20. AGREEMENT TO ARBITRATE. You or I may submit to binding arbitration any dispute, claim or other matter in question between or among you and me that arises out of or relates to this Transaction (Dispute), except as otherwise indicated in this section or as you and I agree to in writing. For purposes of this section, this Transaction includes this Guaranty and any other document relating to the Debt, and proposed loans or extensions of credit that relate to this Guaranty. You or I will not arbitrate any Dispute within any "core proceedings" under the United States bankruptcy laws.

You and I must consent to arbitrate any Dispute concerning the Debt secured by real estate at the time of the proposed arbitration. You may foreclose or exercise any powers of sale against real property securing the Debt underlying any Dispute before, during or after any arbitration. You may also enforce the Debt secured by this real property and underlying the Dispute before, during or after any arbitration.

You or I may seek provisional remedies at any time from a court having jurisdiction to preserve the rights of or to prevent irreparable injury to you or me. Foreclosing or exercising a power of sale, beginning and continuing a judicial action or pursuing self-help remedies will not constitute a waiver of the right to compel arbitration.

The arbitrator will determine whether a Dispute is arbitrable. A single arbitrator will resolve any Dispute, whether individual or joint in nature, or whether based on contract, tort, or any other matter at law or in equity. The arbitrator may consolidate any Dispute with any related disputes, claims or other matters in question not arising out of this Transaction. Any court having jurisdiction may enter a judgment or decree on the arbitrator's award. The judgment or decree will be enforced as any other judgment or decree.

You and I acknowledge that the agreements, transactions or the relationships which result from the agreements or transactions between and among you and me involve interstate commerce. The United States Arbitration Act will govern the interpretation and enforcement of this section.

The American Arbitration Association's Commercial Arbitration Rules, in effect on the date of this Guaranty, will govern the selection of the arbitrator and the arbitration process, unless otherwise agreed to in this Guaranty or another writing.

21. WAIVER OF TRIAL FOR ARBITRATION. You and I understand that the parties have the right or opportunity to litigate any Dispute through a trial by judge or jury, but that the

parties prefer to resolve Disputes through arbitration instead of litigation. If any Dispute is arbitrated, you and I voluntarily and knowingly waive the right to have a trial by jury or judge during the arbitration.

ORAL AGREEMENTS OR COMMITMENTS TO LOAN MONEY, EXTEND CREDIT OR TO FORBEAR FROM ENFORCING REPAYMENT OF A DEBT INCLUDING PROMISES TO EXTEND OR RENEW SUCH DEBT ARE NOT ENFORCEABLE, REGARDLESS OF THE LEGAL THEORY UPON WHICH IT IS BASED THAT IS IN ANY WAY RELATED TO THE CREDIT AGREEMENT. TO PROTECT YOU (GUARANTOR) AND US (LENDER) FROM M I S U N D E R S T A N D I N G O R DISAPPOINTMENT, ANY AGREEMENTS WE REACH COVERING SUCH MATTERS ARE CONTAINED IN THIS WRITING, WHICH IS THE COMPLETE AND EXCLUSIVE STATEMENT OF THE AGREEMENT BETWEEN US, EXCEPT AS WE MAY LATER AGREE IN WRITING TO MODIFY IT.

22. SIGNATURES. By signing under seal, I agree to the terms contained in this Guaranty. I also acknowledge receipt of a copy of this Guaranty.

GUARANTOR:

(Seal)

Valerie J. Hawkins

Individually

[Loan No: 9037410]

COMMERCIAL GUARANTY*

Principal	Loan Date	Maturity	Loan No.	Call / Coll	Account	Officer JW	Initials
References in the boxes above are for Lender's use only and do not limit the applicability of this document to any particular loan or item. Any item above containing "* * *" has been omitted due to text length limitations.							

Borrower: PHC Development LLC
3550 NE Ralph Powell Road
Lees Summit, MO 64064

Lender: Community Bank of Raymore
801 W. Foxwood Dr
P O Box 200
Raymore, MO 64083

Guarantor: Janice A Patterson
RR2 Box 169
Adrian, MO 64720

CONTINUING GUARANTEE OF PAYMENT AND PERFORMANCE. For good and valuable consideration, Guarantor absolutely and unconditionally guarantees full and punctual payment and satisfaction of Guarantor's Share of the Indebtedness of Borrower to Lender, and the performance and discharge of all Borrower's obligations

* Non-substantive print appearing in the header and/or footer of the original document has been omitted.

under the Note and the Related Documents. This is a guaranty of payment and performance and not of collection, so Lender can enforce this Guaranty against Guarantor even when Lender has not exhausted Lender's remedies against anyone else obligated to pay the Indebtedness or against any collateral securing the Indebtedness, this Guaranty or any other guaranty of the Indebtedness. Guarantor will make any payments to Lender or its order on demand, in legal tender of the United States of America, in same-day funds, without set-off or deduction or counterclaim, and will otherwise perform Borrower's obligations under the Note and Related Documents. Under this Guaranty, Guarantor's obligations are continuing.

INDEBTEDNESS. The word "Indebtedness" as used in this Guaranty means all of the principal amount outstanding from time to time and at any one or more times, accrued unpaid interest thereon and all collection costs and legal expenses related thereto permitted by law, attorneys' fees, arising from any and all debts, liabilities and obligations of every nature or form, now existing or hereafter arising or acquired, that Borrower individually or collectively or interchangeably with others, owes or will owe Lender. "Indebtedness" includes, without limitation, loans, advances, debts, overdraft Indebtedness, credit card indebtedness, lease obligations, liabilities and obligations under any interest rate protection agreements or foreign currency exchange agreements or commodity price protection agreements, other obligations, and liabilities of Borrower, and any present or future judgments against Borrower, future advances, loans or transactions that renew, extend, modify, refinance, consolidate or substitute these debts,

liabilities and obligations whether: voluntarily or involuntarily incurred; due or to become due by their terms or acceleration; absolute or contingent; liquidated or unliquidated; determined or undetermined; direct or indirect; primary or secondary in nature or arising from a guaranty or surety; secured or unsecured; joint or several or joint and several; evidenced by a negotiable or non-negotiable instrument or writing; originated by Lender or another or others; barred or unenforceable against Borrower for any reason whatsoever; for any transactions that may be voidable for any reason (such as infancy, insanity, ultra vires or otherwise); and originated then reduced or extinguished and then afterwards increased or reinstated.

If Lender presently holds one or more guaranties, or hereafter receives additional guaranties from Guarantor, Lender's rights under all guaranties shall be cumulative. This Guaranty shall not (unless specifically provided below to the contrary) affect or invalidate any such other guaranties. Guarantor's liability will be Guarantor's aggregate liability under the terms of this Guaranty and any such other unterminated guaranties.

GUARANTOR'S SHARE OF THE INDEBTEDNESS. The words "Guarantor's Share of the Indebtedness" as used in this Guaranty mean 100.000% of the principal amount of the Indebtedness that is outstanding from time to time and at any one or more times. "Guarantor's Share of the Indebtedness" also includes all accrued unpaid interest on the Indebtedness and all collection costs, expenses and attorneys' fees whether or not there is a lawsuit, and if

there is a lawsuit, any fees and costs for trial and appeals paid or incurred by Lender for the collection of the Indebtedness, the realization on any collateral securing the Indebtedness or any guaranty of the Indebtedness (including this Guaranty), or the enforcement of this Guaranty.

Lender shall determine Guarantor's Share of the Indebtedness when Lender makes demand on Guarantor. After a determination, Guarantor's Share of the Indebtedness will only be reduced by sums actually paid by Guarantor under this Guaranty, but will not be reduced by sums from any other source including, but not limited to, sums realized from any collateral securing the Indebtedness or this Guaranty, or payments by anyone other than Guarantor, or reductions by operation of law, judicial order or equitable principles. Lender has the sole and absolute discretion to determine how sums shall be applied among guaranties of the Indebtedness.

The above limitation on liability is not a restriction on the amount of the Note of Borrower to Lender either in the aggregate or at any one time.

CONTINUING GUARANTY. THIS IS A "CONTINUING GUARANTY" UNDER WHICH GUARANTOR AGREES TO GUARANTEE THE FULL AND PUNCTUAL PAYMENT, PERFORMANCE AND SATISFACTION OF THE INDEBTEDNESS OF BORROWER TO LENDER, NOW EXISTING OR HEREAFTER ARISING OR ACQUIRED, ON AN OPEN AND CONTINUING BASIS. ACCORDINGLY, ANY PAYMENTS MADE ON THE INDEBTEDNESS WILL NOT DISCHARGE OR DIMINISH GUARANTOR'S OBLIGATIONS AND LIABILITY

UNDER THIS GUARANTY FOR ANY REMAINING AND SUCCEEDING INDEBTEDNESS EVEN WHEN ALL OR PART OF THE OUTSTANDING INDEBTEDNESS MAY BE A ZERO BALANCE FROM TIME TO TIME.

DURATION OF GUARANTY. This Guaranty will take effect when received by Lender without the necessity of any acceptance by Lender, or any notice to Guarantor or to Borrower, and will continue in full force until all the Indebtedness incurred or contracted before receipt by Lender of any notice of revocation shall have been fully and finally paid and satisfied and all of Guarantor's other obligations under this Guaranty shall have been performed in full. If Guarantor elects to revoke this Guaranty, Guarantor may only do so in writing. Guarantor's written notice of revocation must be mailed to Lender, by certified mail, at Lender's address listed above or such other place as Lender may designate in writing. Written revocation of this Guaranty will apply only to new Indebtedness created after actual receipt by Lender of Guarantor's written revocation. For this purpose and without limitation, the term "new Indebtedness" does not include the Indebtedness which at the time of notice of revocation is contingent, unliquidated, undetermined or not due and which later becomes absolute, liquidated, determined or due. For this purpose and without limitation, "new Indebtedness" does not include all or part of the Indebtedness that is: incurred by Borrower prior to revocation; incurred under a commitment that became binding before revocation; any renewals, extensions, substitutions, and modifications of the Indebtedness. This Guaranty shall bind Guarantor's estate as to the Indebtedness

created both before and after Guarantor's death or incapacity, regardless of Lender's actual notice of Guarantor's death. Subject to the foregoing, Guarantor's executor or administrator or other legal representative may terminate this Guaranty in the same manner in which Guarantor might have terminated it and with the same effect. Release of any other guarantor or termination of any other guaranty of the Indebtedness shall not affect the liability of Guarantor under this Guaranty. A revocation Lender receives from any one or more Guarantors shall not affect the liability of any remaining Guarantors under this Guaranty. It is anticipated that fluctuations may occur in the aggregate amount of the Indebtedness covered by this Guaranty, and Guarantor specifically acknowledges and agrees that reductions in the amount of the Indebtedness, even to zero dollars ($0.00), shall not constitute a termination of this Guaranty. This Guaranty is binding upon Guarantor and Guarantor's heirs, successors and assigns so long as any of the Guarantor's Share of the Indebtedness remains unpaid and even though the Guarantor's Share of the Indebtedness may from time to time be zero dollars ($0.00).

GUARANTOR'S AUTHORIZATION TO LENDER. Guarantor authorizes Lender, either before or after any revocation hereof, without notice or demand and without lessening Guarantor's liability under this Guaranty from time to time: (A) prior to revocation as set forth above, to make one or more additional secured or unsecured loans to Borrower, to lease equipment or other goods to Borrower, or otherwise to extend additional credit to Borrower; (B) to alter, compromise, renew, extend, accelerate, or otherwise change one or

more times the time for payment or other terms of the Indebtedness or any part of the Indebtedness, including increases and decreases of the rate of interest, principal amount, fees or other charges on the Indebtedness; extensions may be repeated and may be for longer than the original loan term; (C) to take and hold security for the payment of this Guaranty or the Indebtedness, and exchange, enforce, waive, subordinate, fail or decide not to perfect, and release any such security, with or without the substitution of new collateral; (D) to release, substitute, agree not to sue, or deal with any one or more of Borrower's sureties, endorsers, or other guarantors on any terms or in any manner Lender may choose; (E) to determine how, when and what application of payments and credits shall be made on the Indebtedness; (F) to apply such security and direct the order or manner of sale thereof, including without limitation, any nonjudicial sale permitted by the terms of the controlling security agreement or deed of trust, as Lender in its discretion may determine; (G) to sell, transfer, assign or grant participations in all or any part of the Indebtedness; and (H) to assign or transfer this Guaranty in whole or in part.

GUARANTOR'S REPRESENTATIONS AND WARRANTIES. Guarantor represents and warrants to Lender that (A) no representations or agreements of any kind have been made to Guarantor which would limit or qualify in any way the terms of this Guaranty; (B) this Guaranty is executed at Borrower's request and not at the request of Lender; (C) Guarantor has full power, right and authority to enter into this Guaranty; (D) the provisions of this Guaranty do not conflict with or result in a default under any agreement

or other Instrument binding upon Guarantor and do not result in a violation of any law, regulation, court decree or order applicable to Guarantor; (E) Guarantor has not and will not, without the prior written consent of Lender, sell, lease, assign, encumber, hypothecate, transfer, or otherwise dispose of all or substantially all of Guarantor's assets, or any interest therein; (F) upon Lender's request, Guarantor will provide to Lender financial and credit information in form acceptable to Lender, and all such financial information which currently has been, and all future financial information which will be provided to Lender is and will be true and correct in all material respects and fairly present Guarantor's financial condition as of the dates the financial information is provided; (G) no material adverse change has occurred in Guarantor's financial condition since the date of the most recent financial statements provided to Lender and no event has occurred which may materially adversely affect Guarantor's financial condition; (H) no litigation, claim, investigation, administrative proceeding or similar action (including those for unpaid taxes) against Guarantor is pending or threatened; (I) Lender has made no representation to Guarantor as to the creditworthiness of Borrower; and (J) Guarantor has established adequate means of obtaining from Borrower on a continuing basis information regarding Borrower's financial condition. Guarantor agrees to keep adequately informed from such means of any facts, events, or circumstances which might in any way affect Guarantor's risks under this Guaranty, and Guarantor further agrees that, absent a request for information, Lender shall have no obligation to disclose to Guarantor any information or documents acquired

by Lender in the course of its relationship with Borrower.

GUARANTOR'S WAIVERS. Except as prohibited by applicable law, Guarantor waives any right to require Lender (A) to continue lending money or to extend other credit to Borrower; (B) to make any presentment, protest, demand, or notice of any kind, including notice of any nonpayment of the Indebtedness or of any nonpayment related to any collateral, or notice of any action or nonaction on the part of Borrower, Lender, any surety, endorser, or other guarantor in connection with the Indebtedness or in connection with the creation of new or additional loans or obligations; (C) to resort for payment or to proceed directly or at once against any person, including Borrower or any other guarantor; (D) to proceed directly against or exhaust any collateral held by Lender from Borrower, any other guarantor, or any other person; (E) to give notice of the terms, time, and place of any public or private sale of personal property security held by Lender from Borrower or to comply with any other applicable provisions of the Uniform Commercial Code; (F) to pursue any other remedy within Lender's power; or (G) to commit any act or omission of any kind, or at any time, with respect to any matter whatsoever.

Guarantor also waives any and all rights or defenses based on suretyship or impairment of collateral including, but not limited to, any rights or defenses arising by reason of (A) any "one action" or "anti-deficiency" law or any other law which may prevent Lender from bringing any action, including a claim for deficiency, against Guarantor, before or after Lender's commencement or completion of any

foreclosure action, either judicially or by exercise of a power of sale; (B) any election of remedies by Lender which destroys or otherwise adversely affects Guarantor's subrogation rights or Guarantor's rights to proceed against Borrower for reimbursement, including without limitation, any loss of rights Guarantor may suffer by reason of any law limiting, qualifying, or discharging the Indebtedness; (C) any disability or other defense of Borrower, of any other guarantor, or of any other person, or by reason of the cessation of Borrower's liability from any cause whatsoever, other than payment in full in legal tender, of the Indebtedness; (D) any right to claim discharge of the Indebtedness on the basis of unjustified impairment of any collateral for the Indebtedness; (E) any statute of limitations, if at any time any action or suit brought by Lender against Guarantor is commenced, there is outstanding Indebtedness which is not barred by any applicable statute of limitations; or (F) any defenses given to guarantors at law or in equity other than actual payment and performance of the Indebtedness. If payment is made by Borrower, whether voluntarily or otherwise, or by any third party, on the Indebtedness and thereafter Lender is forced to remit the amount of that payment to Borrower's trustee in bankruptcy or to any similar person under any federal or state bankruptcy law or law for the relief of debtors, the Indebtedness shall be considered unpaid for the purpose of the enforcement of this Guaranty.

Guarantor further waives and agrees not to assert or claim at any time any deductions to the amount guaranteed under this Guaranty for any claim of setoff, counterclaim, counter demand, recoupment or similar

right, whether such claim, demand or right may be asserted by the Borrower, the Guarantor, or both.

GUARANTOR'S UNDERSTANDING WITH RESPECT TO WAIVERS. Guarantor warrants and agrees that each of the waivers set forth above is made with Guarantor's full knowledge of its significance and consequences and that, under the circumstances, the waivers are reasonable and not contrary to public policy or law. If any such waiver is determined to be contrary to any applicable law or public policy, such waiver shall be effective only to the extent permitted by law or public policy.

COLLATERAL. This Guaranty is secured by 2nd Deed of Trust on property located at 715 W Foxwood Drive, Raymore, MO, in addition to any property that may be governed by R.S.MO. Section 443.055.

RIGHT OF SETOFF. To the extent permitted by applicable law, Lender reserves a right of setoff in all Guarantor's accounts with Lender (whether checking, savings, or some other account). This includes all accounts Guarantor holds jointly with someone else and all accounts Guarantor may open in the future. However, this does not include any IRA or Keogh accounts, or any trust accounts for which setoff would be prohibited by law. Guarantor authorizes Lender, to the extent permitted by applicable law, to hold these funds if there is a default, and Lender may apply the funds in these accounts to pay what Guarantor owes under the terms of this Guaranty.

SUBORDINATION OF BORROWER'S DEBTS TO GUARANTOR. Guarantor agrees that the Indebtedness, whether now existing or hereafter

created, shall be superior to any claim that Guarantor may now have or hereafter acquire against Borrower, whether or not Borrower becomes insolvent. Guarantor hereby expressly subordinates any claim Guarantor may have against Borrower, upon any account whatsoever, to any claim that Lender may now or hereafter have against Borrower. In the event of insolvency and consequent liquidation of the assets of Borrower, through bankruptcy, by an assignment for the benefit of creditors, by voluntary liquidation, or otherwise, the assets of Borrower applicable to the payment of the claims of both Lender and Guarantor shall be paid to Lender and shall be first applied by Lender to the Indebtedness. Guarantor does hereby assign to Lender all claims which it may have or acquire against Borrower or against any assignee or trustee in bankruptcy of Borrower; provided however, that such assignment shall be effective only for the purpose of assuring to Lender full payment in legal tender of the Indebtedness. If Lender so requests, any notes or credit agreements now or hereafter evidencing any debts or obligation of Borrower to Guarantor shall be marked with a legend that the same are subject to this Guaranty and shall be delivered to Lender. Guarantor agrees, and Lender is hereby authorized, in the name of Guarantor, from time to time to file financing statements and continuation statements and to execute documents and to take such other actions as Lender deems necessary or appropriate to perfect, preserve and enforce its rights under this Guaranty.

MISCELLANEOUS PROVISIONS. The following miscellaneous provisions are a part of this Guaranty:

Amendments. This Guaranty, together with any Related Documents, constitutes the entire understanding and agreement of the parties as to the matters set forth in this Guaranty. No alteration of or amendment to this Guaranty shall be effective unless given in writing and signed by the party or parties sought to be charged or bound by the alteration or amendment.

Attorneys' Fees; Expenses. Guarantor agrees to pay upon demand all of Lender's costs and expenses, including Lender's attorneys' fees and Lender's legal expenses, incurred in connection with the enforcement of this Guaranty. Lender may hire or pay someone else to help enforce this Guaranty, and Guarantor shall pay the costs and expenses of such enforcement. Costs and expenses include Lender's attorneys' fees and legal expenses whether or not there is a lawsuit, including attorneys' fees and legal expenses for bankruptcy proceedings (including efforts to modify or vacate any automatic stay or injunction), and appeals. Guarantor also shall pay all court costs and such additional fees as may be directed by the court.

Caption Headings. Caption headings in this Guaranty are for convenience purposes only and are not to be used to interpret or define the provisions of this Guaranty.

Governing Law. This Guaranty will be governed by federal law applicable to Lender and, to the extent not preempted by federal law, the laws of the State of Missouri without regard to its conflicts of law provisions.

Integration. **Guarantor further agrees that** Guarantor has read and fully understands the terms of this Guaranty; Guarantor has had the opportunity to be advised by Guarantor's attorney with respect to this Guaranty; the Guaranty fully reflects Guarantor's intentions and parol evidence is not required to interpret the terms of this Guaranty. Guarantor hereby indemnifies and holds Lender harmless from all losses, claims, damages, and costs (including Lender's attorneys' fees) suffered or incurred by Lender as a result of any breach by Guarantor of the warranties, representations and agreements of this paragraph.

Interpretation. In all cases where there is more than one Borrower or Guarantor, then all words used in this Guaranty in the singular shall be deemed to have been used in the plural where the context and construction so require; and where there is more than one Borrower named in this Guaranty or when this Guaranty is executed by more than one Guarantor, the words "Borrower" and "Guarantor" respectively shall mean all and any one or more of them. The words "Guarantor," "Borrower," and "Lender" include the heirs, successors, assigns, and transferees of each of them. All of the obligations of Guarantor under this Guaranty (if more than one Guarantor) shall be joint and several. If a court finds that any provision of this Guaranty is not valid or should not be enforced, that fact by itself will not mean that the rest of this Guaranty will not be valid or enforced. Therefore, a court will enforce the rest of the provisions of this Guaranty even if a provision of this Guaranty may be found to be invalid or

unenforceable. If any one or more of Borrower or Guarantor are corporations, partnerships, limited liability companies, or similar entities, it is not necessary for Lender to inquire into the powers of Borrower or Guarantor or of the officers, directors, partners, managers, or other agents acting or purporting to act on their behalf, and any indebtedness made or created in reliance upon the professed exercise of such powers shall be guaranteed under this Guaranty.

Notices. Any notice required to be given under this Guaranty shall be given in writing, and, except for revocation notices by Guarantor shall be effective when actually delivered, when actually received by telefacsimile (unless otherwise required by law), when deposited with a nationally recognized overnight courier, or, if mailed, when deposited in the United States mail, as first class, certified or registered mail postage prepaid, directed to the addresses shown near the beginning of this Guaranty. All revocation notices by Guarantor shall be in writing and shall be effective upon delivery to Lender as provided in the section of this Guaranty entitled "DURATION OF GUARANTY." Any party may change its address for notices under this Guaranty by giving formal written notice to the other parties, specifying that the purpose of the notice is to change the party's address. For notice purposes, Guarantor agrees to keep Lender informed at all times of Guarantor's current address. Unless otherwise provided or required by law, if there is more than one Guarantor, any notice given by Lender to any Guarantor is deemed to be notice given to all Guarantors.

No Waiver by Lender. Lender shall not be deemed to have waived any rights under this Guaranty unless such waiver is given in writing and signed by Lender. No delay or omission on the part of Lender in exercising any right shall operate as a waiver of such right or any other right. A waiver by Lender of a provision of this Guaranty shall not prejudice or constitute a waiver of Lender's right otherwise to demand strict compliance with that provision or any other provision of this Guaranty. No prior waiver by Lender, nor any course of dealing between Lender and Guarantor, shall constitute a waiver of any of Lender's rights or of any of Guarantor's obligations as to any future transactions. Whenever the consent of Lender is required under this Guaranty, the granting of such consent by Lender in any instance shall not constitute continuing consent to subsequent instances where such consent is required and in all cases such consent may be granted or withheld in the sole discretion of Lender.

Successors and Assigns. This Guaranty shall be understood to be for the benefit of Lender and for such other person or persons as may from time to time become or be the holder or owner at any of the Indebtedness or any interest therein, and this Guaranty shall be transferable to the same extent and with the same force and effect as any such Indebtedness may be transferable.

DEFINITIONS. The following capitalized words and terms shall have the following meanings when used in this Guaranty. Unless specifically stated to the contrary, all references to dollar amounts shall mean

amounts in lawful money of the United States of America. Words and terms used in the singular shall include the plural, and the plural shall include the singular, as the context may require. Words and terms not otherwise defined in this Guaranty shall have the meanings attributed to such terms in the Uniform Commercial Code:

Borrower. The word "Borrower" means PHC Development LLC and includes all co-signers and co-makers signing the Note and all their successors and assigns.

Guarantor. The word "Guarantor" means everyone signing this Guaranty, including without limitation Janice A Patterson, and in each case, any signer's successors and assigns.

Guarantor's Share of the Indebtedness. The words "Guarantor's Share of the Indebtedness" mean Guarantor's indebtedness to Lender as more particularly described in this Guaranty.

Guaranty. The word "Guaranty" means this guaranty from Guarantor to Lender.

Indebtedness. The word "Indebtedness" means Borrower's indebtedness to Lender as more particularly described in this Guaranty.

Lender. The word "Lender" means Community Bank of Raymore, its successors and assigns.

Note. The word "Note" means and includes without limitation all of Borrower's promissory notes and/or credit agreements evidencing Borrower's loan obligations in favor of Lender, together with all

renewals of, extensions of, modifications of, refinancings of, consolidations of and substitutions for promissory notes or credit agreements.

Related Documents. The words "Related Documents" mean all promissory notes, credit agreements, loan agreements, environmental agreements, guaranties, security agreements, mortgages, deeds of trust, security deeds, collateral mortgages, and all other instruments, agreements and documents, whether now or hereafter existing, executed in connection with the Indebtedness.

WAIVE JURY. Lender and Guarantor hereby waive the right to any jury trial in any action, proceeding, or counterclaim brought by either Lender or Guarantor against the other.

EACH UNDERSIGNED GUARANTOR ACKNOWLEDGES HAVING READ ALL THE PROVISIONS OF THIS GUARANTY AND AGREES TO ITS TERMS. IN ADDITION, EACH GUARANTOR UNDERSTANDS THAT THIS GUARANTY IS EFFECTIVE UPON GUARANTOR'S EXECUTION AND DELIVERY OF THIS GUARANTY TO LENDER AND THAT THE GUARANTY WILL CONTINUE UNTIL TERMINATED IN THE MANNER SET FORTH IN THE SECTION TITLED "DURATION OF GUARANTY". NO FORMAL ACCEPTANCE BY LENDER IS NECESSARY TO MAKE THIS GUARANTY EFFECTIVE. THIS GUARANTY IS DATED MARCH 6, 2008.

GUARANTOR: