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 Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT COMMUNITY BANK OF RAYMORE

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COUNTERSTATEMENT OF QUESTION PRESENTED

Did the Federal Reserve Board exceed its authority when it purported to re-define who is an "applicant" for credit under 15 U.S.C. §1691a(b) of the Equal Credit Opportunity Act to include guarantors in Regulation B, 12 C.F.R. §202.2(e), thereby purporting to expand the conduct made unlawful and the persons protected by the ECOA's non-discrimination provisions, despite the unambiguous definition of that term provided by Congress?

CORPORATE DISCLOSURE

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

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INTRODUCTION

Petitioners request that the Court grant a writ of certiorari to review the Eighth Circuit's decision in *Hawkins v. Community Bank of Raymore,* 761 F.3d 937 (8th Cir. 2014). In *Hawkins,* the Eighth Circuit held that a guarantor is not an "applicant" for credit under the plain meaning of the statutory definition provided by Congress in the Equal Credit Opportunity Act ("ECOA"), 15 U.S.C. §1691, *et seq.,* and that the Federal Reserve Board ("FRB") exceeded its authority when, more than 10 years after the ECOA's enactment, and though the original regulatory definition—consistent with the plain meaning of the statutory definition—expressly excluded guarantors, it attempted to re-define the regulatory definition to include guarantors.

Although the Eighth Circuit reached a different result than the Sixth Circuit did two months earlier in *RL BB Acquisition, LLC v. Bridgemill Commons Development Group, LLC,* 754 F.3d 380 (6th Cir. 2014), the petition should be denied because Petitioners have failed to demonstrate that the Eighth Circuit, applying the two-step inquiry dictated by *Chevron, U.S.A. Inc. v. Natural Res. Def. Council,* 467 U.S. 837, 104 S.Ct. 2778 (1984), and well-defined rules of statutory construction, erred in finding that the statutory definition is unambiguous and does not include guarantors. Nor have Petitioners shown that the disagreement between the Eighth and Sixth Circuits creates an intolerable conflict.

Recognizing the inherent weakness in the Sixth Circuit's "ambiguity" finding, Petitioners argue that the Court should examine the statute using the definition they wish Congress had used: "The question for this Court is whether...guarantors are 'applicants' for 'any aspect of a credit transaction' under the ECOA." (Pet. at 4). But that is not the statutory definition Congress provided. And neither Petitioners nor the Court are at liberty to rewrite Congress' unambiguous definition under the guise of statutory construction. Moreover, Congress re-confirmed in the 2010 amendments to the ECOA that the "applicant" is the first-party loan applicant who applies for credit directly for its own benefit, and not third parties "connected with" the applicant, such as the borrower's owners or guarantors. *See* 15 U.S.C. §1691c-2.

Further, contrary to Petitioners' assertion, the Eighth Circuit's decision does not "conflict" with the decision of any state court of last resort. Rather, in the Alaska, Iowa, Missouri and Virginia Supreme Court decisions to which Petitioners cite, the courts merely assumed—without challenge by the litigants, without performing the required *Chevron*-analysis, and without actually deciding the issue—that the FRB's regulatory re-definition is valid. Thus, those decisions do not conflict with the Eighth Circuit's decision in *Hawkins*, because the courts in those cases did not address or decide the issue.

More importantly, however, the petition should be denied because any decision this Court reaches regarding the FRB's authority to re-define who is an

"applicant" under the ECOA will have no impact on the ultimate outcome of this case. That is because Regulation B, even if it is valid, only prohibits a bank from *requiring* a spousal-guaranty, and expressly permits requiring a spousal-guaranty when the guarantor-spouse has an interest in the borrowing entity or otherwise benefits from the loan. Here, over the course of five years, Petitioners repeatedly represented to CBR that their guaranties were being provided "at the request of the Borrower" and that they had "a direct and substantial economic interest in the Borrower and expect[ed] to derive substantial benefits from [the] loans...." Because Petitioners are bound by their representations, they cannot show that CBR required their guaranties. Further, Petitioners waived any alleged ECOA-violations pursuant to the valid, retrospective waivers in their guaranties.

Thus, even though the Eighth and Sixth Circuits disagree over whether the FRB's regulatory redefinition of the term "applicant" to include guarantors is valid, resolution of that issue is irrelevant to the ultimate outcome of this case. Accordingly, this case does not present the proper vehicle for the Court to address that issue. The petition should therefore be denied.

STATEMENT OF THE CASE

In 2004, Gary Hawkins, a successful certified public accountant, and Chris Patterson, as co-trustee

of the Chris L. Patterson and Janice A. Patterson Living Trust dated June 14, 2000 (the "Trust"), decided to embark on a speculative, side venture to develop a residential subdivision in Peculiar, Missouri (the "PHC-Property"), in the hope of capitalizing on the booming real estate market. To avoid personal liability with regard to their development activities, they chose to acquire and develop the PHC-Property through PHC Development, LLC, a Missouri limited liability company ("PHC") they formed for that purpose. Gary Hawkins and the Trust[1] are two of PHC's members.

Petitioners Valerie Hawkins ("Hawkins") and Janice Patterson ("Patterson") are Gary Hawkins' and Chris Patterson's spouses. Hawkins is a Missouri-licensed speech-language pathologist. She received her undergraduate degree in 1986 and her Master's degree in 2011. Patterson received her bachelor's degree in business administration in 1977 and, together with her husband, owns and operates several companies that own and operate a number of convenience stores/gas stations in Missouri. The Pattersons' companies are owned by the Trust, and the Pattersons are the Trust's sole trustees and lifetime beneficiaries.

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[1] The Trust's capital contributions to PHC came from the Patterson's jointly-owned account, held in the name of their d/b/a, "Patterson Enterprises." All of the checks for the Trust's capital contributions were written and signed by Janice Patterson.

Between 2005 and 2008, PHC applied for and obtained four commercial loans from CBR in the total sum of $2,077,900 to acquire and develop the PHC-Property. Collectively, the loans were modified, extended and renewed twelve times. At PHC's request, each of the loans and renewals was guaranteed by Petitioners and Gary Hawkins and Chris Patterson.[2] Petitioners each signed a total of sixteen guaranties.

In signing their first three guaranties, Petitioners affirmatively represented and warranted, in writing, that they were being provided "at the request of [PHC]," and that they each had "a direct and substantial economic interest in [PHC] and expect[ed] to derive substantial benefits from any loans and financial accommodations resulting in the creation of the indebtedness guarantied...."

In signing their remaining thirteen guaranties, Petitioners represented and warranted, 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 they read, understood and agreed to the terms of their guaranties;

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[2] The loans and several of the Pattersons' guaranties were secured by deeds of trust on the PHC-Property 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.

that the guaranties fully reflected their intentions; and that they had an opportunity to consult with their own counsel prior to signing them. Petitioners also unambiguously waived any claims or defenses against CBR, other than actual payment:

> **GUARANTOR'S WAIVERS**....
>
> 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...(C) any disability or other defense of Borrower, of any other guarantor, or of any other person...other than payment in full..., of the Indebtedness;...or (F) any defenses given to guarantors at law or in equity other than actual payment and performance of the Indebtedness.
>
> 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....
>
> **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....

On April 16, 2012, after PHC refused to make required loan payments, CBR declared the loans in default and made demand for payment on PHC,

Petitioners and the other guarantors. CBR subsequently foreclosed on the PHC-Property and the Rush Hour.

Attempting to retract their prior, repeated representations made to induce CBR to make and renew the loans, on May 31, 2012, Petitioners sued CBR in the District Court, claiming for the first time that they had no interest in PHC and that CBR "required" their guaranties. Petitioners claimed that by doing so, without first performing a creditworthiness-analysis of their husbands,[3] 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).[4] Petitioners made these assertions notwithstanding that (1) Hawkins admitted in sworn testimony that Gary Hawkins did not have the financial wherewithal to do the PHC-project on his own; (2) Chris Patterson signed numerous loan documents acknowledging that the PHC-membership interest is

[3] Patterson also asserted that as a trustee and beneficiary of the Trust she had a direct interest in Patterson Raymore and the Rush Hour, and that CBR violated the ECOA by "requiring" her to sign the Patterson Raymore deeds of trust on its behalf.

[4] At the same time, PHC, Gary Hawkins, Chris Patterson, Patterson Raymore and the Patterson's operating company, Patterson Oil Co., Inc., sued CBR in the Circuit Court of Cass County, Missouri, seeking to escape liability on the loans, Gary Hawkins' and Chris Patterson's guaranties and the deeds of trust. *See PHC Development, et al. v. Community Bank of Raymore,* No. 12CA-CV001896 and *Patterson Oil Co., et al. v. Community Bank of Raymore,* No. 12CA-CV001932. Those actions remain pending.

held by the Trust, rather than by himself, individually; and (3) Patterson admitted in sworn testimony that she, the Trust, and the Pattersons' LLC's are one and the same: "I am me, I am the trust, I am every LLC....We're all one."

After Petitioners sued CBR, it asserted a counterclaim for breach of Petitioners' guaranties, and subsequently amended its counterclaim to include a claim for fraud, based on Petitioners' assertion that the representations they made in their guaranties were false. Petitioners asserted CBR's alleged ECOA-violation as an affirmative defense.

On summary judgment, the District Court held that Petitioners, as guarantors, were not "applicants," and that CBR did not violate the ECOA by obtaining their guaranties. (Petitioners' Appendix ("Pet.App.") 20-23).[5] The District Court entered judgment against Petitioners on their ECOA-claim and struck their ECOA-defense (the "ECOA Ruling"). *Id.* In an earlier ruling, the District Court struck Petitioners' jury demand (the "Jury Waiver Ruling"), finding that Petitioners were educated and sophisticated and that they "knowingly and voluntarily" agreed to waive their right to a jury trial when they signed their guaranties. In doing so, the District Court found that Petitioners repeatedly represented that they read,

[5] The District Court also held that Patterson could not state an ECOA-claim based on the Patterson Raymore deeds of trust. (Pet.App. 23). Petitioners did not appeal that ruling.

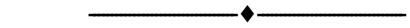
understood and agreed to the terms of their guaranties, that their guaranties fully reflected their intentions, and that they had the opportunity to discuss the same with their attorneys, and held that it would not "allow the Plaintiffs to evade the agreed-upon waiver simply because they no longer wish to be bound by it." (Respondent's Appendix ("Resp.App.") 8-9).

After declining to exercise supplemental jurisdiction over CBR's counterclaims,[6] the District Court entered its Amended Judgment on September 10, 2013. Petitioners appealed the ECOA and Jury Waiver Rulings. However, on appeal, Petitioner's did not challenge the District Court's conclusion that they "knowingly and voluntarily" waived their right to a jury trial or any of the factual findings supporting that conclusion.

On August 5, 2014, the Eighth Circuit affirmed the ECOA Ruling and declined to review the Jury Waiver Ruling, finding it was moot. (Pet.App. 10-11). *Hawkins,* 761 F.3d 937. In affirming the ECOA Ruling, the Eighth Circuit, applying the two-step inquiry required by *Chevron,* correctly determined that (1) the statutory definition of the term "applicant" in 15 U.S.C. §1691a(b) is unambiguous and does not include a guarantor, and (2) the FRB exceeded its

[6] CBR subsequently re-filed its counterclaims in state court. *See Community Bank of Raymore v. Valerie Hawkins, et al.,* Case No. 13CA-CV002998. That action is still pending.

authority when it purported to re-define that term to include guarantors in 12 C.F.R. §202.2(e).



REASONS FOR DENYING THE PETITION

I. Review is not warranted because it will have no effect on the outcome of this case where Petitioners repeatedly represented that they have an interest in PHC, and actually do, and that their guaranties were provided at PHC's request, and Petitioners waived any alleged ECOA-violations.

The ECOA was enacted in 1974[7] "to eradicate discrimination waged against women, especially married women whom creditors traditionally refused to consider for individual credit." *Anderson v. United Fin. Co.,* 666 F.2d 1274, 1277 (9th Cir. 1982); *see also Mayes v. Chrysler Credit Corp.,* 37 F.3d 9, 11 (1st Cir. 1994). Prior to its enactment, creditors traditionally refused to extend individual credit to married women and required that husbands co-sign their wives' loan applications as a condition of approving such loans. *Anderson,* 666 F.2d at 1277. Thus, as Judge Posner recognized in *Moran Foods, Inc. v. Mid-Atlantic Market Development Co., LLC,* 476 F.3d 436 (7th Cir.

[7] The ECOA was amended in 1976 to prohibit discrimination against an applicant on the basis of race, color, religion, national origin and age, in addition to sex and marital status. Equal Credit Opportunity Act, Pub.L. No. 94-239, §2, 90 Stat. 251 (1976).

2007), "[s]o far as the prohibition against discrimination on the basis of marriage is concerned...it is apparent that what the [ECOA] was intended to do was to forbid a creditor to deny credit to a woman on the basis of a belief that she would be not be a good credit risk because she would be distracted by child care or some other stereotypically female responsibility." *Id.* at 441 (citations omitted).

The ECOA provides that "[i]t shall be unlawful for any creditor to discriminate *against any applicant*, with respect to any aspect of a credit transaction...on the basis of...marital status...." 15 U.S.C. §1691(a)(emphasis added). For purposes of the proscribed conduct, Congress unambiguously defined an "applicant" as:

> [A]ny person who applies to a creditor directly for an extension, renewal, or continuation of credit, or applies to a creditor indirectly by use of an existing credit plan for an amount exceeding a previously established credit limit.

15 U.S.C. §1691a(b).

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), *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 403, 407

("S.Rep. No. 94-589")(emphasis added),[8] the original regulations adopted by the FRB, acknowledging the unambiguous, statutory definition, expressly *excluded* guarantors from the regulatory definition:

> 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*.

12 C.F.R. §202.2(e) (1977)(emphasis added).

However, effective December 16, 1985, in direct conflict with Congress' clear intent, the FRB purported to substantively change the ECOA's scope by re-defining the term "applicant" to include guarantors. 12 C.F.R. §202.2(e) (1985).[9] Despite the FRB's attempt

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[8] Not surprisingly, the word "guarantor" does not appear anywhere in the ECOA's legislative history. *Id.*

[9] In re-defining who is an "applicant" for credit, the FRB claimed that "the principal effect of the amendment [was] to give guarantors...standing to seek legal remedies when a violation occurs under §202.7(d)." Revision of Regulation B, 50 Fed.Reg. 48,018, 48,020 (1985). However, the Official Staff Interpretations confirmed that the effect of the amendment was much broader than simply granting "standing" to a guarantor where requiring a guaranty constituted discrimination against the "applicant" for credit and that, under the FRB's re-definition, the ECOA and Regulation B would now "bar a creditor from requiring the signature of a *guarantor's* spouse just as they bar the creditor from requiring the signature of an *applicant's* spouse." 50 Fed.Reg. 48,018, 48,052 (emphasis added). Thus, the FRB's re-definition purports to substantively change both the

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to re-define the term "applicant" to include guarantors, Congress has *never* amended the statutory definition to include anyone other than those persons that come within the term's plain meaning, *i.e.*, a borrower. And it has *never* expanded the conduct prohibited by the ECOA to encompass anything other than discrimination *against an "applicant*."

Petitioners suggest that the disagreement between the Eighth Circuit in *Hawkins,* 761 F.3d 937 and the Sixth Circuit in *RL BB Acquisition,* 754 F.3d 380, regarding the validity of the FRB's re-definition of the term "applicant" to include guarantors, warrants review of that issue in this case. But resolution of that issue is irrelevant to the ultimate outcome of this case, which, irrespective of the FRB's re-definition, can be sustained on a number of alternative grounds. *See Noriega v. Pastrana*, 130 S.Ct. 1002, 1009 (2010)(noting that review of a statute's validity is not warranted where decision can be sustained on alternate grounds); STEPHEN M. SHAPIRO, *et al.*, SUPREME COURT PRACTICE, Ch. 4.4(f) at 249 (10th ed. 2013)(noting that where resolution of an issue "is irrelevant to the ultimate outcome of the case before the Court," review is not warranted).

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conduct prohibited and the persons afforded protection. *See Mayes,* 37 F.3d at 11 ("the regulation's change in 'standing' was actually a surrogate for an enlarged view of what is unlawful....").

A. Petitioners are bound by their admission that their guaranties were provided at PHC's request. Thus, Petitioners cannot show that they were required to provide their guaranties in purported violation of the ECOA.

The fundamental prohibition in the regulations implemented by the FRB is that a creditor shall not *require* the signature of the applicant's spouse on a credit instrument except in limited circumstances. 12 C.F.R. §202.7(d). But nothing in the ECOA or the regulations prohibits a creditor from obtaining a spousal-guaranty when it is offered or provided at the borrower's request. *Id.*; *see also U.S. v. Meadors,* 753 F.2d 590, 593 (7th Cir. 1985)(holding that the ECOA was not implicated where wife was not required to sign guaranty, but voluntarily did so).

Here, over the course of *five years*, in order to induce CBR to loan PHC over $2 million for a speculative real estate venture, Petitioners represented on *sixteen* separate occasions that their guaranties were being provided "*at the request of [PHC].*" On each occasion, Petitioners also acknowledged 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 consult with counsel prior to signing them. And while Petitioners had no qualms in making these representations to induce CBR to make the loans, now that they no longer find them convenient, Petitioners seek

to cavalierly toss their solemn, written representations aside.

The District Court, finding that Petitioners were sophisticated and educated and that they "knowingly and voluntarily" waived their right to a jury trial when they signed their multiple guaranties, refused to allow Petitioners to evade their repeated, written representations when they similarly sought to recant that agreement "simply because they no longer wish[ed] to be bound by it." (Resp.App. 5-9). Petitioners did not appeal that ruling and are bound by the District Court's findings and conclusions. *Coney v. Union Pacific R.R.*, 136 F.3d 1195, 1197 (8th Cir. 1998). And just like Petitioners are bound by their knowing and voluntary waiver of their right to a jury trial, they are equally bound by their repeated representations that their guaranties were provided *at PHC's request*. *Warren v. Paragon Technologies Group, Inc.*, 950 S.W.2d 844, 846 (Mo. 1997)("Parties are presumed to read what they sign.").

Because CBR did not require Petitioners' guaranties, whether the FRB's re-definition of "applicant" to include guarantors is valid or not is irrelevant to the outcome of this case, as neither the ECOA nor Regulation B prohibit a spouse from voluntarily providing a guaranty, as Petitioners did here. Thus, the petition should be denied.

B. Petitioners cannot contradict their representation that they have "a direct and substantial economic interest in [PHC] and expect[ed] to derive substantial benefits from any loans" they guaranteed. Thus, CBR could properly require their guaranties.

Petitioners claim that they have no interest in PHC or the loans. But that is not what they represented to CBR when they signed their first three guaranties. Rather, to induce CBR to loan PHC over $2 million, Petitioners confirmed, in writing, that:

> **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 [PHC] and expect to derive substantial benefits from any loans and financial accommodations...guarantied hereby.

The Official Staff Interpretations of Regulation B permit a lender to require the owners of the borrower to guarantee a loan. Official Staff Interpretations, 12 C.F.R. Pt. 202, Supp. I, §202.7(d)(6). And the cases hold that "a lender can require the signature of a borrower's spouse who co-owns the entity benefiting from the loan." *Ballard v. Bank of America,* 734 F.3d 308, 310-11 (4th Cir. 2013); *see, e.g., Midlantic Nat'l Bank v. Hansen,* 48 F.3d 693, 700 (3d Cir. 1995)(where loans financed company co-owned by

spouses, "at the very least," wife was a *de facto* joint applicant who could be required to guarantee loans); *Riggs Nat'l Bank v. Webster,* 832 F.Supp. 147, 151 (D.Md. 1993)(where loan was obtained to renovate property owned by borrower's wife, she was a "*de facto* joint applicant" who could be required to sign loan); *Baybank v. Bornhofft*, 694 N.E.2d 854, 859 (Mass. 1998)(where co-maker owned a 25% interest in trust that received loan proceeds and trust's assets were collateral for the loan, co-maker/ beneficiary was a joint applicant and could be required to sign loan).

Despite their belated protestations that they have no interest in PHC or the loans, Petitioners' assertions contradict the express representations they made to induce CBR to make the loans.[10] If those representations were untrue, Petitioners could easily have struck those statements from their guaranties and given CBR a fair chance to protect itself against after-the-fact charges of wrongdoing. Permitting Petitioners to disavow those representations now, only after the loans have been fully funded and are in default, would violate Missouri's parol evidence rule, destroying the sanctity of written contracts. *Johnson*

[10] In Missouri, spouses have a marital interest in the other spouse's property which is subject to a forced, elective-share at death. Mo. Rev. Stat. Ann. §§ 474.160, 474.170. This marital interest is more than a "mere expectancy," and permits a wife to maintain an action during her husband's lifetime to recover property transferred in fraud of her martial interest. *Id.* at §474.150.

ex rel. Johnson v. JF Enterprises, LLC, 400 S.W.3d 763, 769 (Mo. 2013)(the parol evidence rule is a substantive rule that precludes the use of extrinsic evidence to contradict an integrated agreement, and is intended to preserve the sanctity of contracts). Missouri law prohibits Petitioners from using their own fraud to escape the bar of the parol evidence rule. *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). Thus, because Petitioners cannot contradict their written representations, and because obtaining their guaranties was permissible in light of Petitioners' representations, any decision by this Court regarding the FRB's authority to re-define "applicant" to include guarantors will not change the outcome of this case.[11]

Moreover, while Petitioners claim that Chris Patterson, as a co-trustee, and not the Trust, is the PHC-member, Patterson admitted that she and the

[11] As the Eighth Circuit noted, under Missouri law, "co-ownership of property [and accounts] by a husband and wife creates a presumption of tenancy by the entireties," such that "execution against one spouse alone cannot affect property held...as tenants by the entirety." *Hawkins,* 761 F.3d at 942, n. 6 (internal citations omitted). Considering that Missouri spouses can move their property in and out of tenancy by the entirety status at whim, depriving a creditor of access to assets and accounts it took into consideration in deciding to extend credit prior to default and before the lending relationship failed, requiring Petitioners' guaranties would have been a "sound commercial practice unrelated to any stereotypical view of a wife's role." *Id.* (quoting *Moran Foods,* 476 F.3d at 442).

Trust are one and the same: "I am me, I am the trust, I am every LLC....We're all one." Further, all capital contributions made to PHC came from jointly-owned funds in the Pattersons' joint account, held in the name of their d/b/a, "Patterson Enterprises," giving Patterson a direct interest in PHC. And Patterson, as a co-trustee and lifetime beneficiary of the Trust, holds a legal and beneficial interest in the PHC-membership interest. *Horn v. Muckerman*, 307 S.W.2d 482, 485 (Mo. 1957); *Thompson v. Koenen,* 396 S.W.3d 429, 435 (Mo. Ct. App. 2013). Because Patterson has an interest in the PHC-membership interest and hence, PHC, even under the FRB's re-definition, Patterson's guaranties could have properly been required. *See Baybank*, *supra.* Thus, the validity of 12 C.F.R. §202.2(e) is irrelevant to the ultimate outcome of this case, and the petition should therefore be denied.

C. Petitioners waived any ECOA-claims in the valid, retrospective waivers in their guaranties.

Rights under the ECOA, like other federal statutory rights, can be waived. *Ballard,* 734 F.3d at 313-314; *CB 2010 LLC v. Ithaca Coatings,* No. 12-13930, 2013 WL 2250168, 9 (E.D.Mich. May 22, 2013); *see also Truckenbrodt v. First Alliance Mortgage Co.,* No. 96-C-822, 1996 WL422150, 2 (N.D.Ill. July 24, 1996) ("There is no indication that Congress intended to preclude a waiver of judicial remedies under the ECOA.").

In *CB 2010,* the court held that although such rights can only be waived retrospectively, where the conduct complained of was the bank's obtaining guaranties without first making a creditworthiness determination, as Petitioners claim here, the alleged ECOA-violation *had already occurred at the time the defendants signed their guaranties*. 2013 WL 2250168, 9. Thus, the waiver of claims and defenses in the defendants' guaranties operated retrospectively and barred their ECOA-claim. *Id.*; *Ballard,* 734 F.3d at 313-314 (declining to enforce waiver in original guaranties, but holding that waivers in subsequent loan-restructuring was valid).

Like the retrospective waivers in the *CB 2010* guaranties, which are identical to the waivers in the last *thirteen* guaranties Petitioners signed, Petitioners waived "any defenses given to guarantors at law or in equity other than actual payment and performance of the Indebtedness," and waived and agreed not to assert "any claim of setoff, counterclaim, counter demand, recoupment or similar right." 2013 WL 2250168, 9. Petitioners similarly warranted that "each of the waivers...[was] made with Guarantor's full knowledge of its significance and consequences," that they fully read, understood and agreed to the guaranties' terms, that the guaranties fully reflected their intentions, and that they had an opportunity to consult with counsel prior to signing them. *Id.*

Because any alleged ECOA-violations occurred *before* Petitioners signed their guaranties, the waivers in those guaranties are valid, retrospective waivers

and bar Petitioners' ECOA-claims and defenses. *CB 2010, supra* at 3, 9; *accord, Warnebold v. Union Pacific R.R.,* 963 F.2d 222, 223 (8th Cir. 1992). Thus, whether the FRB's re-definition is valid is irrelevant to the outcome of this case. The petition should therefore be denied.

II. The Eighth Circuit's recent disagreement with the Sixth Circuit on the issue of whether the statutory definition of the term "applicant" in the ECOA is unambiguous does not warrant review. The Eighth Circuit correctly interpreted the statutory definition according to its plain meaning, whereas the Sixth Circuit ignored basic rules of statutory construction and its prior holdings in order to manufacture an ambiguity. Further, in its most recent amendment of the ECOA in 2010, Congress made clear that the "applicant" is the borrower, not third parties who participate in the larger loan transaction, such as guarantors.

This case raises the unremarkable question of a federal agency's authority to adopt regulations that directly contradict Congress' clear intent, as unambiguously expressed in a statute. Although the Court has not previously addressed Regulation B's

validity,[12] there is nothing exceptional about applying the now-canonical, two-step analysis dictated by the Court in *Chevron* to determine whether the FRB's re-definition of the term "applicant" to include guarantors is valid.

Under *Chevron*'s framework, a court must first determine "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." 467 U.S. at 842, 104 S.Ct. at 2781. Thus, "[i]f a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Id.* at 843, n. 9, 104 S.Ct. 2782, n. 9. "Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Schindler Elevator Corp. v. U.S. ex rel. Kirk*, 131 S.Ct. 1885, 1891 (2011)(citation omitted). Thus, "[w]hen the words of a statute are unambiguous...[the] first canon [of statutory construction] is also the last," and the "judicial inquiry is complete." *Connecticut Nat. Bank v.*

[12] The ECOA was amended in 2010 to transfer rule-making authority to the Consumer Financial Protection Bureau ("CFPB"). *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub.L. No. 111-203, §§ 1085(1), (3), 124 Stat. 2083 (2010) ("Dodd-Frank Act").

Germain, 503 U.S. 249, 253-254, 112 S.Ct. 1146, 1149 (1992). It is only where "the statute is silent or ambiguous with respect to the specific issue" presented that a court proceeds to *Chevron*'s second step, requiring that the court determine whether "the agency's reading fills a gap or determines a term in a reasonable way in light of the Legislature's design." *Regions Hosp. v. Shalala,* 522 U.S. 448, 450, 118 S.Ct. 909, 911 (1998)(citing *Chevron,* 467 U.S. at 843, n. 11, 104 S.Ct. at 2782, n. 11).

A. Recognizing its paramount obligation to interpret the ECOA according to its plain meaning, the Eighth Circuit refused to manufacture an ambiguity to validate an invalid regulation.

In *Hawkins*, the Eighth Circuit, applying well-defined rules of statutory construction, held that the statutory definition of the term "applicant" is not ambiguous and that under that definition, a guarantor is not an "applicant" and thus, is not entitled to protection from marital-status discrimination under the ECOA. *Hawkins,* 761 F.3d at 941-943.

In reaching this conclusion, the Eighth Circuit noted that Congress explicitly provided that "[t]o qualify as an applicant under the ECOA, a person must 'appl[y] to a creditor directly for...credit....'" *Id.* at 941 (quoting §1691a(b)). Looking to the definition of the term "apply," which means "to make an appeal or request esp[ecially] formally and often in writing

and usu[ally] for something of benefit to oneself," *id.* (quoting Webster's Third New International Dictionary 105 (2002)), the court concluded that "the plain language of the ECOA unmistakably provides that a person is an applicant only if she requests credit." *Id.* Recognizing that "a guaranty is an undertaking...to answer for payment of some debt, or performance of some contract, of another person in the event of default," which is "collateral and secondary to the underlying loan transaction between the lender and borrower,"[13] the court reasoned that by signing a guaranty, a person does not request credit. 761 F.2d

[13] Seizing upon the Eighth Circuit's use of the term "secondary," Petitioners argue that the court ignored that their guaranties render them "primarily and unconditionally" liable. Petitioners, however, admitted in the Eighth Circuit that their liability was contingent on PHC's default. Moreover, their argument ignores the very nature of a guaranty, which only subjects them to liability in the event of default. *Central Bank of Kansas City v. Perry*, 427 S.W.3d 285, 288 (Mo. Ct. App. 2014)("A guaranty is a contract in which a guarantor agrees to become secondarily liable for the obligation of a debtor in the event the debtor does not perform the primary obligation....The heart of a contract for guaranty is that the signor has agreed to be liable principally for another's debt," upon default.). That contingent liability distinguishes a guarantor from a co-maker, who is responsible for making payments both before and after default. Further, Petitioners failed to raise this argument in the District Court, and only raised it for the first time in their reply in the Eighth Circuit, thereby waiving it. *Cole v. Intern. Union, United Auto., Aerospace & Agr. Implement Workers of America*, 533 F.3d 932, 936 (8th Cir. 2008)(arguments not raised in the district court in opposing summary judgment are waived on appeal); *U.S. v. Wilkens*, 742 F.3d 354, 360 (8th Cir. 2014)(arguments not raised in an opening brief on appeal are waived).

at 941-942 (internal citation omitted). And because a guarantor does not request credit, the court concluded that a guarantor does not "qualify as an applicant under the unambiguous text of the ECOA." *Id.* at 941. In reaching this conclusion, the court agreed with Judge Posner, who similarly found that "there is nothing ambiguous about [the term] 'applicant' and no way to confuse an applicant with a guarantor." *Id.* at 942 (quoting *Moran Foods,* 476 F.3d at 441). The court therefore held that it would not defer to the FRB's re-definition, and that "a guarantor is not protected from marital-status discrimination by the ECOA." *Id.* at 942. Thus, because Petitioners only argued that they qualified as "applicants" based on their status as guarantors and did not assert that they participated in the loan application process,[14] the court held that Petitioners are not "applicants," and that CBR did not violate the ECOA by "requiring" their guaranties. *Id.* at 943.

Judge Colloton, in his concurring opinion, noted that under the "usual meaning" of the term "to apply,"

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[14] Petitioners suggest that even if they were not applicants in connection with the original loans, they were on each renewal because they "certainly wanted 'an extension, renewal or continuation of credit.'" Petitioners waived this argument by failing to raise it in the District Court. *Cole*, 533 F.3d at 936. Further, Petitioners' argument, bereft of any facts, fails to explain how a guarantor's mere hope that the maturity date of a loan will be postponed constitutes a request or application "for an extension, renewal or continuation of credit." 15 U.S.C. §1691a(b).

as understood at the time the ECOA was enacted, "an 'applicant' who 'applies for credit' is the one who requests credit to benefit herself, not credit to benefit a third party." *Id.* at 943 (citing Webster's Third New International Dictionary 105 (1971)). Examining the text of the ECOA, as a whole, Judge Colloton found that "[t]he context of the ECOA confirms that Congress employed the ordinary meaning of the term 'apply' in the phrase 'applies for credit,'" and that the statute "contemplates a first-party applicant who requests credit to benefit herself." *Id.* For example, Judge Colloton noted that "the use of the definite article" in §1691(d)(1), which requires that within 30 days "after receipt of a completed application for credit, a creditor shall notify *the applicant* of its action on the application," *id.* (emphasis in original), "shows that the applicant is the single person to whom credit would be extended, not a third party asking on behalf of the putative debtor." 761 F.3d at 943.

Further confirming that the "applicant" is the borrower to whom credit is extended, Judge Colloton looked to the 1991 amendment adding §1691(e)(1), which "refers to a creditor taking action in connection with 'the applicant's application for a loan,'" and pointed out that "it would be unnatural to conclude that a third party who offers a promise in support of an application thereby submits what the statute describes as an 'application for a loan'...and a 'completed application for credit[.]'" 761 F.2d at 943-944 (citing §§ 1691(d)(1) and (e)(1)). Likewise, Judge

Colloton noted that in §1691(d)(4), the statute "specifically envisions the involvement of a third party who requests an extension of credit to a first-party applicant, but distinguishes between the third-party requestor and the 'applicant.'" *Id.* at 944. Judge Colloton concluded that this distinction between the applicant and a third party in the statutory text, again, confirms that "the 'applicant' is the party to whom credit will be extended." *Id.*

Because "an agency has no power to 'tailor' legislation to bureaucratic policy goals by rewriting unambiguous statutory terms," and can only exercise its discretion in the "interstices created by statutory silence or ambiguity," *Utility Air Regulatory Group v. E.P.A.*, 134 S.Ct. 2427, 2445 (2014), as Judge Colloton aptly acknowledged, "[w]hen the ordinary meaning [of a term] aligns with a natural reading of [that] term in the context of the statute, there is no ambiguity that gives an agency license to adopt an alternative meaning. *Id.* (citing *Carcieri v. Salazar*, 555 U.S. 379, 388, 129 S.Ct. 1058, 1064 (2009)). If Congress had wanted to include guarantors within the protection of the statute, it could have easily done so. By only providing protection to the "applicant," it did not. Under *Chevron,* that should be the end of the inquiry. Any dissatisfaction with that result lies with Congress, not this Court.

B. The Sixth Circuit manufactured an "ambiguity" in order to impose its own view of what would best effectuate the ECOA's goal of preventing marital-status discrimination.

In contrast to the plain meaning adopted by the Eighth Circuit, two months earlier, in *RL BB Acquisition,* 754 F.3d 380, the Sixth Circuit, in order to achieve what it perceived are the ECOA's broad remedial goals, focused its analysis on two words in the statutory definition ("applies" and "credit"), in isolation, to conclude that the statutory definition is "ambiguous" and "could" be construed to "encompass all those who offer promises in support of an application—including guarantors," who the court rationalized "make a formal request for aid in the form of credit for a third party." *Id.* at 384-385. The Sixth Circuit reached this result under the guise of statutory construction, notwithstanding its acknowledgment that the statute does not "overtly include guarantors," and although it recognized that "[a] guarantor does not traditionally approach a creditor herself asking for credit," but instead, "is a third party to the larger application process." *Id.*[15] Rather than assuming that the ordinary meaning of the term "applies" "accurately expresses the legislative purpose," *see Schindler*

[15] As the Eighth Circuit concluded, recognition that a guarantor does not apply for credit in the "traditional" and usual sense of the word should have ended the Sixth Circuit's inquiry because it "demonstrates that a guarantor unambiguously does not request credit." *Hawkins,* 761 F.3d at 941.

Elevator Corp., 131 S.Ct. at 1891, the Sixth Circuit, stretching to find an ambiguity, rationalized that because a guarantor offers her guaranty "in consideration for the credit she hopes the borrower will receive," a guarantor "does formally approach a creditor in the sense that [she] offers up her own personal liability to the creditor if the borrower defaults." *Id.* But a guarantor does not "apply" for a loan by the mere "hope" that credit will be extended to the borrower, and the act of providing a guaranty has never been thought of as applying for anything directly, within the traditional, plain meaning of that term.

Significantly, the Sixth Circuit's conclusion ignored the context in which the term "applies" is used (including that, by the statute's express terms, it is limited to the person who "applies for credit *directly*"), 15 U.S.C. §1691a(b)(emphasis added), and that Congress explicitly distinguished between the applicant and a third party who requests credit on the applicant's behalf. 15 U.S.C. §1691(d)(4). The court also ignored that when Congress has intended to include someone other than the person applying for something for its own benefit within the term "applicant," it has expressly said so. *See, e.g.,* 18 U.S.C. §923(d)(1)(B)(providing that the "applicant" under the Gun Control Act includes, "in the case of a corporation, partnership, or association, any individual possessing, directly or indirectly, the power to direct or cause the direction of the management and policies of the corporation, partnership, or association...."). Congress' refusal to broadly define the "applicant" in

the ECOA makes clear that it intended that the term be interpreted according to its plain meaning and only encompass those persons requesting credit for their own benefit.

Compounding its error, the court found that the definition of the term "credit" in §1691a(d), which uses the word "debtor" rather than "applicant," furthered the purported ambiguity by somehow suggesting that the "applicant" and the "debtor" "are not always the same person." 754 F.3d at 385. From that, the court jumped to the illogical conclusion that "[i]f an applicant is not necessarily the debtor, it would be reasonable to conclude that the applicant could be a third party, such as a guarantor." *Id.* Its conclusion, however, ignored its prior decision in *Barney v. Holzer Clinic, Ltd.*, 110 F.3d 1207 (6th Cir. 1997), where it acknowledged that the debtor and the applicant are one and the same; the only distinction being that prior to an extension of credit, that person is an "applicant," whereas after the extension of credit, he becomes a "debtor." *Id.* at 1209. It also ignored that Congress explicitly distinguished between the applicant and a third party requestor, and chose to only prohibit discrimination against and confer rights on the former. *See* 15 U.S.C. §1691(d)(4).

The Sixth Circuit found comfort in its conclusion based on its erroneous belief that it "accords with the vast majority of courts that have examined the issue," 754 F.3d at 386 (citing *Empire Bank v. Dumond,* No. 13-CV-388, 2013 WL 6238605, 6 (N.D.Okla. Dec. 3, 2013)), and that Congress has remained silent and

done nothing to "clarif[y] that the term 'applicant' cannot include guarantors." *Id*.[16]

But the so-called "vast majority" to which the Sixth Circuit referred *never* decided whether the statutory definition is ambiguous, or whether the regulatory definition is valid.[17] Rather, other than the Sixth Circuit, itself, the *only* courts that have actually decided the issue *after* conducting the required *Chevron*-analysis, have uniformly held that the statutory definition is *unambiguous* and does *not* include

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[16] Petitioners acknowledge the tenuous nature of the Sixth Circuit's "ambiguity" finding by arguing not that the statutory definition is ambiguous, but that it contains a "gap" because it does not expressly exclude guarantors. According to Petitioners, in order to prevent the FRB from usurping its legislative role, not only was Congress required to plainly state who the applicant is, as it did, but it was apparently required to also state everyone it isn't. No rule of statutory construction requires such useless redundancy.

[17] The *Dumond* court, without discussion, found that "[w]hether the term 'applicant' includes guarantors is not unambiguous," and held, *ipso facto,* that the FRB's re-definition in §202.2(e) is valid. 2013 WL 6238605, 6. It did so, however, *without* examining the statutory language, *without* conducting a *Chevron*-analysis, and *without* even attempting to explain what it thought was "not unambiguous" with the statutory definition. Like the Sixth Circuit, the court's conclusion appears to have been based on its own self-justification that "[a]ccepting that the term includes guarantors would best effectuate the ECOA's goal of preventing discrimination on the basis of marital status," and a reluctance to invalidate the FRB's regulatory scheme unless it was directed to do so by the Tenth Circuit. *Id.* (citing *Citgo Petroleum Corp. v. Bulk Petroleum Corp.,* No. 08-CV654-TCK-PJC, 2010 WL 3931496 (N.D.Okla. Oct. 5, 2010)).

guarantors. *Hawkins,* 761 F.3d 937; *Moran Foods,* 476 F.3d 436; *Smithville 169 v. Citizen's Bank & Trust,* No. 4:11-CV-0872-DFK, 2013 WL 434044 (W.D.Mo. Feb. 5, 2013); *Arvest Bank v. Uppalapati,* No. 11-03175-S-DGK, 2013 WL 85336 (W.D.Mo. Jan. 7, 2013); *Champion Bank v. Regional Development, LLC,* No. 4:08CV1807-CDP, 2009 WL 1351122 (E.D.Mo. May 13, 2009).[18]

C. Congressional silence is not a license for courts to ignore a statute's plain meaning. But here, Congress has not remained silent. In the 2010 amendments to the ECOA, Congress reconfirmed that the "applicant" is the person who applies for a loan to benefit itself.

Moreover, while the Sixth Circuit justified its ambiguity finding in perceived congressional silence, this Court has been clear that legislative silence is no aid to interpretation where, as in this case, there is

[18] The other circuits that have touched on the issue of whether guarantors are protected under the ECOA did so *without* performing the required *Chevron*-analysis, and merely *assumed*, without challenge, that the FRB's re-definition is valid. *See, e.g., Silverman v. Eastrich Multiple Investor Fund, L.P.,* 51 F.3d 28 (3d Cir. 1995); *Mayes,* 37 F.3d 9. Significantly, these courts were never asked to decide whether the FRB's re-definition is valid, nor did they purport to decide that issue. The fact that these and other courts, as well as the litigants, simply assumed that the regulatory re-definition is valid is not an excuse to flout the usual rules of statutory construction.

no evidence that the FRB's re-definition was ever brought to Congress' attention. 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." *U.S. v. Rutherford*, 442 U.S. 544, 554, n. 10, 99 S.Ct. 2470, 2476, n. 10 (1979)(quoting *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 489, 60 S.Ct. 982, 989 (1940)); *see also* 2B NORMAN J. SINGER, *et al.*, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION, §49:9 at 134-135 (7th ed. 2008)(the congressional-acquiescence argument is inapplicable "where nothing indicates that the legislature had its attention directed to the administrative interpretation upon reenactment").

Moreover, although no evidence exists to suggest that the FRB's re-definition has ever been brought to Congress' attention, significantly, when Congress amended the ECOA as part of the Dodd-Frank Act, it enacted §1691c-2, relating to the collection of data for small business loans. Pub.L. No. 111-203, §1071(a), 124 Stat. 2056 (2010). That statute, which must be read *in pari materia* with the ECOA's other provisions, *see Erlenbaugh v. U.S.*, 409 U.S. 239, 244, 93 S.Ct. 477, 480 (1972), makes clear that the "applicant" is the first-party loan applicant who applies for credit directly for its own benefit, and does not include the applicant's owners or others who are "connected with" it.

For example, in §1691c-2(e)(2), which requires that financial institutions compile and maintain certain information provided by any "loan applicant," including..."the amount of credit...*applied for*, and the amount of credit...approved *for such applicant*," Congress re-confirmed that the "credit" applied for is the credit extended to the first-party applicant, and does not include a third party, such as a guarantor, who merely agrees, as part of the larger loan transaction, to be liable for repayment in the event of a default, but does not apply for or receive any credit. 15 U.S.C. §1691c-2(e)(2)(C). Likewise, in §1691c-2(e)(3), which prohibits the inclusion of certain personally identifiable information "concerning any individual who is, or is connected with, the women-owned, minority-owned, or small business loan applicant" in such a compilation, Congress clearly distinguished between the applicant and third parties who are "connected with" the applicant, whether through ownership or otherwise. *Id.*

Given this clear statement of who the applicant is, and Congress' distinction between the applicant and those "connected with" the applicant, there is no room to suggest that Congress acquiesced in the FRB's re-definition, thereby expanding the scope of the ECOA's protection and what it makes unlawful. On the contrary, in the Dodd-Frank Act, Congress re-confirmed that the "applicant" is the first-party applicant who "applies for credit directly" for its own benefit. Had Congress been aware of the FRB's re-definition (though no evidence suggests that is the

case), and intended to encompass third parties, such as guarantors, within the ECOA's scope, it would have had no need to distinguish between the applicant, its owners and others "connected with" the applicant, as it did in §1691c-2. In so doing, Congress implicitly re-confirmed the plain meaning of the statutory definition, and rejected any attempt to expand the ECOA's protection to third parties, such as guarantors.[19]

In *Hawkins,* the Eighth Circuit, applying the time-tested framework of *Chevron* and well-known rules of statutory construction, correctly concluded that guarantors are not "applicants" under the ECOA. Now that the issue has actually been brought to the forefront through the Sixth and Eighth Circuits' decisions, this Court should deny the petition so that the circuit and lower courts can have an opportunity to fully examine and weigh in on the issue. Petitioners have failed to demonstrate that the narrow conflict between the Sixth and Eighth Circuits would be intolerable were it allowed to continue. And this Court will undoubtedly benefit from a more thorough and thoughtful consideration of the issue by other courts before it steps into the fray.

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[19] Petitioners' hypothetical of a minority-owned, limited liability company loan applicant that is denied credit based on the racial make-up of its owners is irrelevant in construing the plain meaning of the statute. Under that plain meaning, if the LLC could demonstrate discrimination, the LLC-applicant, not its owners, who chose to conduct business in a corporate form, would be the "aggrieved applicant" under §1691e.

III. The Eighth Circuit's decision does not "conflict" with any decisions by a state court of last resort. The Alaska, Iowa, Missouri and Virginia Supreme Courts have never actually decided the issue. Rather, those courts merely *assumed*, without challenge and without conducting the required *Chevron*-analysis, that the regulatory re-definition is valid.

Petitioners suggest that the Eighth Circuit's decision directly conflicts with decisions by the Supreme Courts of Alaska, Iowa, Missouri and Virginia, and that certiorari is warranted to resolve this "split." But Petitioners fail to disclose that none of the litigants in those cases challenged the validity of the FRB's re-definition, and that the courts, *without* conducting the required *Chevron*-analysis, merely *assumed*, without actually deciding, that the regulatory re-definition is valid and that a guarantor is protected. *See Still v. Cunningham,* 94 P.3d 1104 (Alaska 2004);[20] *Bank of the West v. Kline,* 782 N.W.2d 453 (Iowa 2010);[21] *Boone Nat. Sav. & Loan Ass'n v.*

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[20] Significantly, the *Cunningham* court, acknowledging the plain meaning of the statute, noted that the corporate-borrower was the loan applicant under the statute; but citing to §202.2(e), found that the guarantor-husband was also an "applicant" and that it was his creditworthiness, not the borrower's, that had to be examined to determine whether the wife's guaranty was properly required. *Id.* at 1115.

[21] The *Kline* court similarly acknowledged that under the statutory definition without more, the LLC-borrower was the only "applicant." But based on the FRB's re-definition, the court

(Continued on following page)

Crouch, 47 S.W.3d 371 (Mo. banc 2004);[22] *Eure v. Jefferson National Bank,* 448 S.E.2d 417 (Virginia 1994).[23] Thus, these cases do not actually "conflict" with the Eighth Circuit's decision in *Hawkins,* because the courts never actually addressed or decided the issue.

While state courts that are granted concurrent jurisdiction are not bound to agree with or apply the decisions of federal courts of appeals when interpreting federal law, *see Arizonans for Official English v. Arizona,* 520 U.S. 43, 58 n. 11, 117 S.Ct. 1055, 1064 n. 11 (1997), now that the issue has been squarely raised, it can hardly be questioned that given the opportunity to actually decide the issue, presumably with arguments from the litigants (something that

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found that the guarantor-spouses were also "applicants." *Id.* at 457-458.

[22] Contrary to Petitioners' assertion, in *Crouch*, the Missouri Supreme Court did not "find," let alone examine, whether the FRB's re-definition was a valid exercise of its regulatory authority. *Id.*

[23] In *Kline, Couch* and *Eure,* the courts held that a guarantor-spouse could assert an alleged ECOA-violation as an affirmative defense for recoupment or equitable estoppel based on illegality to avoid liability under her guaranty. *Kline,* 782 N.W.2d at 458-463; *Crouch,* 47 S.W.3d at 375-376; *Eure,* 448 S.E.2d 418-421 Although Petitioners do not make any argument regarding an illegality-defense directly in their petition, they attempted to do so in their briefing in the Eighth Circuit. Petitioners, however, waived that argument by failing to argue it in the District Court, and the Eighth Circuit did not address that waived argument on appeal. *See Cole*, 533 F.3d at 936; *Wilkens*, 742 F.3d at 360.

was missing in each of the foregoing cases), these courts may very well reconsider their earlier decisions. Because they should be permitted to do so, and because the Court will benefit from an earnest and intelligent discourse on the issue by these and other courts, Petitioners' request for certiorari should be denied.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

VALERIE J. HAWKINS and JANICE A. PATTERSON,	)	
Plaintiffs,	)	No. 12-CV-00670-DW
v.	)	(Filed Nov. 30, 2012)
COMMUNITY BANK OF RAYMORE,	)	
Defendant.	)	

ORDER

Pending before the Court is the Defendant Community Bank of Raymore's (the "Defendant") Motion to Strike Plaintiffs' Demand for a Jury Trial (the "Motion"). *See* Doc. 18. The Defendant filed suggestions in support of the Motion (Doc. 19), the Plaintiffs Valerie J. Hawkins ("Valerie") and Janice A. Patterson ("Janice") (collectively, the "Plaintiffs") filed suggestions in opposition (Doc. 20), and the Defendant filed a reply brief (Doc. 24). As explained below, the Plaintiffs contractually waived their right to a jury trial. Consequently, the Motion is GRANTED.

I.

A.

The following facts are primarily taken from the parties' briefs. Only those facts and issues necessary to decide the pending Motion are discussed below, and

they are simplified to the extent possible. The Defendant loaned PHC Development, LLC ("PHC") the principal sum of $2,077,900.00 so that PHC could acquire and develop a residential facility known as the Fox's Den Subdivision in Peculiar, Missouri. The principal amount is based on four separate loans, which were issued, modified, extended, and/or renewed a total of sixteen times. Both Plaintiffs guaranteed repayment of the four loans, as did their husbands, Gary A. Hawkins ("Gary") and Chris L. Patterson ("Chris"). Both Plaintiffs also executed new Commercial Guaranties in conjunction with the modifications, extensions, and/or renewals of the loans.

The Plaintiffs filed this suit on May 31, 2012. They allege in part that the Defendant wrongly required them to guaranty the loans simply because they were married to Gary and Chris, and that the Defendant "was required to evaluate the need for the claimed Guaranties signed by [Plaintiffs] . . . without discriminating on the basis of marital status." Doc. 1, at ¶ 52. According to the Plaintiffs, this requirement violated the Equal Credit Opportunity Act ("ECOA"). The Defendant has declared a default on the loans, and filed a counterclaim for breach of the guaranties.

B.

Three of the original guaranties provided that arbitration was the preferred method of resolution, and did not include a provision waiving the right to a jury trial. Importantly, however, the modifications,

extensions, and/or renewals of the guaranties all contained an explicit jury trial waiver provision. *See* Doc. 4-1, p. 39 (Loan No. 9035923, dated 11/1/10); 4-1, p. 42 (same); Doc. 4-2, p. 96 (Loan 9037410, dated 11/1/10); 4-2, p. 99 (same); Doc. 4-1, p. 102 (Loan. No. 9036698, dated 6/15/09); 4-1, p. 105 (same); Doc. 4-2, p. 50 (Loan No. 9036970, dated 6/15/09); 4-2, p. 53 (same). These agreements state: "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."

The jury waiver provision provides that:

> 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.

Immediately below this waiver, the Commercial Guaranties state that: "EACH UNDERSIGNED GUARANTOR ACKNOWLEDGES HAVING READ ALL THE PROVISIONS OF THIS GUARANTY AND AGREES TO ITS TERMS." The Commercial Guaranties also expressly provided that the Plaintiffs had an opportunity to be advised by their attorney.

C.

Despite these contractual provisions, the Plaintiffs' Complaint includes a demand for a jury trial. Doc. 1, p. 13. In the parties' Joint Proposed Scheduling Order/Discovery Plan, the Defendant stated that it intended on filing a motion to strike that demand.

Because the bench/jury trial issue would affect scheduling issues and deadlines, the Court directed the Defendant to file its motion. The motion was filed, has been fully briefed, and is ready for resolution.

II.

A party may waive by contract its right to a jury trial, and federal law governs the waiver analysis. *Westgate GV at the Woods, LLC v. Dickson,* 2010 WL 4721245, at * 2 (W.D. Mo. Nov. 15, 2010). "Jury trial waivers are common in loan agreements and loan guaranties and are regularly enforced." *Hillcrest Bank, N.A. v. Cordsen,* 2011 WL 2633273, at * 1 (W.D. Mo. July 5, 2011). The waiver must be "knowing and voluntary," and four primary factors should be considered: "(1) the relative bargaining power of the parties; (2) the sophistication of the parties; (3) the negotiability of the contract terms; and (4) the conspicuousness of the waiver provision." *Hardee's Food Sys., Inc. v. Hallbeck,* 2010 WL 4363420, at * 3 (E.D. Mo. Oct. 27, 2010). Each factor is addressed in turn.

A.

First, the Court must determine whether there was a "gross disparity in bargaining power." *Popular Leasing USA, Inc. v. Turner Constr. Co.,* 2005 WL 2874741, at * 1 (E.D. Mo. Oct. 31, 2005); *Boyd v. U.S. Bank Nat'l Ass'n.,* 2007 WL 2822518, at * 19 (D. Kan. Sept. 26, 2007) (recognizing that "the relevant inquiry is whether this disparity was 'gross' "). For example,

in *Westgate,* one of the non-moving parties claimed he could not "read above a second-grade level and lacked the sophistication to understand the jury waiver provision." *Westgate,* 2010 WL 4721245, at * 3. In enforcing the waiver, Judge Kays ruled that "a gross disparity in bargaining power did not exist between the parties because the Dicksons had the opportunity to consult with an attorney and negotiate the terms of each contract." *Id.* at * 4.

Here, the Plaintiffs expressly acknowledged in the Commercial Guaranties that "Guarantor has had the opportunity to be advised by Guarantor's attorney with respect to this Guaranty; [and] the Guaranty fully reflects Guarantor's intentions. . . ." This acknowledgment undermines any notion of a gross disparity in bargaining power. *Westgate,* 2010 WL 4721245, at * 4. Any alleged disparity is also undermined because the loans were not for a necessity of life; they were issued to promote a commercial real estate development project. *See Westside-Marrero Jeep Eagle, Inc. v. Chrysler Corp., Inc.,* 56 F. Supp. 2d 694, 709 (E.D. La. 1999) ("The ability to take out a loan to start up a profit making cable company is not a necessity of life such that Defendant was compelled to accept Plaintiff's loan on whatever terms it was offered.") (citations and quotations omitted). For these reasons, the first factor weighs in favor of a knowing and voluntary waiver.

B.

Second, the Court must examine the sophistication of the non-moving party. This is because "[l]arge disparities in education and familiarity with the commercial processes can permit an overreaching party to turn the other party's lack of knowledge into an unfair advantage." *Boyd,* 2007 WL 2822518, at * 19. Here, Plaintiff Valerie Hawkins is an educated individual. She is a 1986 graduate of Northwest Missouri State University, and also received a Master of Science degree from the University of Central Missouri in 2011. Doc. 19-2, p. 52.

Among other business endeavors, Plaintiff Janice Patterson and her family members operate CLP Fox Trotters ("CLP"). CLP is a business that owns, breeds, and sells "one of the world's most popular gaited horses – the Fox Trotter." Doc. 19-2, p. 33-43. Under the circumstances, there are no large disparities in education or a lack of familiarity with commercial processes. And, even if there was such a disparity, the waiver in this case is "unambiguous and specialized knowledge or sophistication is not required to understand the jury waiver provision." *Westgate,* 2010 WL 4721245, at * 3 (citations and quotations omitted). For these reasons, the second factor also weighs in favor of a knowing and voluntary waiver.

C.

Third, the Court must consider whether the Plaintiffs had an opportunity to negotiate the terms

of the Guaranties. Here, the Plaintiffs do not argue that they even attempted to negotiate or otherwise alter any terms of the Guaranties. The Plaintiffs summarily claim they had "little opportunity" to consult an attorney or "otherwise analyze the contents of the personal guaranty prior to their execution." Doc. 20, p. 7. The Plaintiffs also claim they were unaware of the jury waiver provision. *See* Doc. 20-7, p. 2; Doc. 20-8, p. 2.

These conclusory statements made in litigation are directly contrary to what the Plaintiffs expressly agreed to in the guaranties. As discussed above, the Plaintiffs expressly agreed that they had read all of the terms (which would necessarily include the jury waiver), had agreed to all of the terms (which would necessarily include the jury waiver), and had an opportunity to consult an attorney. Finally, the Defendant argues (and the Plaintiffs have not shown otherwise) that the Plaintiffs' husbands (and co-guarantors) were able to negotiate some terms of the Guaranties. For these reasons, the third factor also weighs in favor of finding a knowing and voluntary waiver.

D.

Fourth, the Court must consider whether the waiver provision is conspicuous. A conspicuous waiver provision will more likely be enforced than a provision that is "buried in a lengthy document." *See Morris v. McFarland Clinic P.C.,* 2004 WL 306110, at

* 3 (S.D. Iowa Jan. 29, 2004). Here, the waiver provision is conspicuous. The Commercial Guaranties are only three pages in length, and the waiver provision is conspicuously titled "WAIVE JURY." The waiver provision states, clearly and unambiguously:

> 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.

Immediately below that provision is an acknowledgment that the guarantor has "read all the provisions of this guaranty and agrees to its terms." Under these circumstances, the fourth factor weighs in favor of finding a knowing and voluntary waiver. *Westgate,* 2010 WL 4721245, at * 4 (enforcing waiver in part because "the waiver was distinctly set apart in its own subparagraph, and the paragraph heading plainly read 'Waiver of Jury Trial.'").

III.

The Plaintiffs argue that a ruling on the Motion is premature because discovery could shed light on whether the waiver was made knowingly and voluntarily. They also suggest that the Defendant "unilaterally slip[ped] a jury trial waiver into later guaranties without discussing such an alteration with Plaintiffs." Doc. 20, p. 5. These arguments are not persuasive.

In fact, this is not a close call. By signing the Commercial Guaranties, the Plaintiffs expressly

acknowledged that they read and understood all of the provisions, that they had an opportunity to discuss those provisions with their attorney, and expressly agreed to the jury waiver. *See, e.g., Popular Leasing USA, Inc.,* 2005 WL 2874741, at * 2 (recognizing that "a party who signs a contract is presumed to have knowledge of its contents"). This Court will not allow the Plaintiffs to evade the agreed-upon waiver simply because they no longer wish to be bound by it.

Nor have the Plaintiffs shown how any discovery could alter the foregoing analysis. They have not alleged that they were fraudulently induced into the jury waiver, or explained how discovery could show that the waiver was not knowing or voluntary. As a result, the Motion is not premature and further discovery is not necessary to resolve it. *See Hillcrest Bank,* 2011 WL 2633273, at * 1 (enforcing jury waiver even though non-moving party argued that issues of fact were unresolved).[1]

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[1] The Plaintiffs argue that a jury trial is required in cases brought under the ECOA. *See* 15 U.S.C. § 1691(a). The Plaintiffs then claim that "[l]ittle to no case law discusses the intersection between a right to a jury trial under ECOA and whether it can be waived." Doc. 20, p. 3. But the case the Plaintiffs cite for this alleged lack of case law expressly held that "the ECOA claim falls within the scope of the jury waiver provision and the court finds that the jury waiver applies to the instant case." *Boyd,* 2007 WL 2822518, at * 20.

IV.

For the reasons set forth above, it is hereby ORDERED that the Defendant's Motion to Strike Plaintiffs' Demand for a Jury Trial (Doc. 18) is GRANTED, and the Court STRIKES the Plaintiffs' demand for a jury trial. The Plaintiffs' request for an oral argument is denied as unnecessary.

IT IS SO ORDERED.

Date: November 29, 2012

/s/ Dean Whipple
Dean Whipple
United States District Judge