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

PETITION FOR REHEARING

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REASONS FOR GRANTING THE PETITION

The Questions Presented in this case are too significant and far-reaching to leave undecided. Indeed, they likely will recur without a definitive ruling from this Court. Petitioners thus respectfully request that the Court rehear this case after obtaining a full complement of Justices capable of reaching resolution by a five-Justice majority.

Rehearing, although rare when the Court has *decided* an issue, is warranted where the Court is equally divided, particularly when there is a vacancy. "[R]ehearing petitions have been granted in the past where the prior decision was by an equally divided Court and it appeared likely that upon reargument a majority one way or the other might be mustered." STEVEN M. SHAPIRO ET AL., SUPREME COURT PRACTICE § 15.I.6(a) at 838 (10th ed. 2013). When confronted by such unique circumstances, the Court has often reheard a case rather than leave it undecided.[1] "This was particularly true when a new Justice became available to break the tie" – as will eventually be the case here. *Id.* (citing *Gray v. Powell*, 313 U.S. 596

[1] *See MacGregor v. Westinghouse Elec. & Mfg. Co*., 327 U.S. 812 (1946); *Bruce's Juices, Inc. v. Am. Can Co*., 327 U.S. 812 (1946); *Balt. & Ohio R.R. Co. v. Kepner*, 313 U.S. 597 (1941); *N.Y., Chi. & St. Louis R.R. Co. v. Frank*, 313 U.S. 596 (1941); *Commercial Molasses Corp. v. N.Y. Tank Barge Corp*., 313 U.S. 596 (1941); *Toucey v. N.Y. Life Ins. Co*., 313 U.S. 596 (1941); *United States v. One 1936 Model Ford V-8*, 305 U.S. 666 (1938).

(1941), and *Halliburton Oil Well Cementing Co. v. Walker*, 327 U.S. 812 (1946)). A vacancy remaining until the Court's next term does not change this truism. This Court has routinely held cases over the summer recess before ultimately rehearing them during the subsequent Term.[2]

Although this Court has from time to time operated with fewer than nine Justices upon the recusal, leave of absence, retirement, or untimely death of a Justice, this Court hasn't affirmed a lower court decision by a divided Court due to a Justice's retirement or death since 1988. *See Trans World Airlines, Inc. v. Indep. Fed'n of Flight Attendants*, 485 U.S. 175 (1988); *Hartigan v. Zbaraz*, 484 U.S. 171 (1987). In all subsequent cases where a Justice's retirement or

[2] *See Halliburton*, 327 U.S. 812 (granting rehearing on February 25, 1946), *and* 329 U.S. 1 (1946) (issuing a decision on case reargued on October 23 and 24, 1946); *MacGregor*, 327 U.S. 812 (granting rehearing on March 11, 1946), *and* 329 U.S. 402 (1947) (issuing decision in case reargued on November 14 and 15, 1946); *Bruce's Juices*, 327 U.S. 812 (granting rehearing on March 11, 1946) *and* 330 U.S. 743 (1947) (issuing decision on case reargued on November 14, 1946); *Kepner*, 313 U.S. 597 (granting rehearing on April 28, 1941), *and* 314 U.S. 44 (1941) (issuing decision in case reargued on October 20, 1941); *Frank*, 313 U.S. 596 (granting rehearing on April 28, 1941), *and* 314 U.S. 360 (1941) (issuing decision in case reargued on October 16 and 17, 1941); *Commercial Molasses*, 313 U.S. 596 (granting rehearing on April 28, 1941), *and* 314 U.S. 104 (1941) (issuing decision in case reargued on October 16, 1941); *Toucey*, 313 U.S. 596 (granting rehearing on April 28, 1941), *and* 314 U.S. 402 (1941) (issuing decision in case reargued on October 17, 1941).

death caused the Court to equally divide, the Court restored the cases for rehearing after the new Justice's confirmation. For example, the Court restored three cases for reargument following Justice Marshall's 1991 retirement and Justice Thomas's confirmation. *See Doggett v. United States*, 502 U.S. 976 (1991); *Bray v. Alexandria Women's Health Clinic*, 504 U.S. 970 (1992); *Cippollone v. Liggett Group, Inc.*, 502 U.S. 923 (1991). This Court restored three presumably deadlocked cases to its calendar for reargument following Chief Justice Rehnquist's passing and Justice O'Connor's retirement in 2005, and Chief Justice Roberts's and Justice Alito's confirmations. *See Garcetti v. Ceballos*, 546 U.S. 1162 (2006); *Hudson v. Michigan*, 547 U.S. 1096 (2006); *Kansas v. Marsh*, 547 U.S. 1037 (2006). This Court should similarly grant rehearing so that a full complement of Justices can decide the Questions Presented here.

Moreover, this Court has granted Petitions for Rehearing filed after affirming a lower court decision by an equally divided court. For instance, the Court affirmed the Fifth Circuit in *Indian Towing Co. v. United States* by an equally divided Court following Justice Jackson's October 9, 1954, death. *See* 349 U.S. 902 (1955). The Court granted a Petition for Rehearing (349 U.S. 926 (1955)), and Justice Jackson's newly confirmed replacement, Justice Harlan, joined a 5-4 majority in reversing the Fifth Circuit. *See Indian Towing Co.*, 350 U.S. 61 (1955). The Court similarly granted a Petition for Rehearing to resolve an equally

divided Court in *Ryan Stevedoring Co. v. Pan-Atl. S.S. Corp. See* 349 U.S. 926 (1955).

When Justice Jackson took a leave of absence in 1945 to prosecute at Nuremburg, this Court granted Petitions for Rehearing to resolve deadlocks in *MacGregor*, 327 U.S. 812 (1946), *Bruce's Juices*, 327 U.S. 812 (1946), and *Halliburton*, 327 U.S. 812 (1946). Justice Jackson sided with the 5-4 *MacGregor* majority in reversing the Pennsylvania Supreme Court (329 U.S. 402 (1947)), with the 5-4 *Bruce's Juices* majority in affirming the Florida Supreme Court (330 U.S. 743 (1947)), and with the 8-1 *Halliburton* majority in reversing the Ninth Circuit (329 U.S. 1 (1946)).

Justice McReynolds's January 31, 1941, resignation caused the Court to equally divide on eight cases. *See Reitz v. Mealey*, 313 U.S. 542 (1941); *Kepner*, 313 U.S. 542 (1941); *Commercial Molasses*, 313 U.S. 541 (1941); *Lisenba v. California*, 313 U.S. 537 (1941); *Toucey*, 313 U.S. 538 (1941); *Frank*, 313 U.S. 538 (1941); *Bernards v. Johnson*, 313 U.S. 537 (1941); *Gray*, 312 U.S. 666 (1941). The Court granted rehearing on all eight so that Justice McReynolds's replacement, Justice Jackson, could hear the cases. *See Reitz*, 313 U.S. 597 (1941); *Kepner*, 313 U.S. 597 (1941); *Commercial Molasses*, 313 U.S. 596 (1941); *Lisenba*, 313 U.S. 597 (1941); *Toucey*, 313 U.S. 596 (1941); *Frank*, 313 U.S. 596 (1941); *Bernards*, 313 U.S. 597 (1941); *Gray*, 313 U.S. 596 (1941).

Here, the circumstances present this Court good reason to follow its traditional practice of rehearing cases so that they may be decided by a full complement of nine Justices. Rehearing ensures that cases meriting this Court's certiorari grant don't remain unresolved simply because an unexpected vacancy prevents a majority decision. The current vacancy will be filled, and the tie will be broken – it's only a matter of time. It makes sense to hold the case for resolution until the Court is capable of so resolving it.

This case undoubtedly illustrates the reasons for following that longstanding, traditional practice. The Questions Presented here profoundly impact credit transactions nationwide. Future lenders, credit applicants, and lender-required spousal guarantors alike have no direction to navigate the uneven, inconsistent application of ECOA's "applicant" definition. Indeed, a lender-required spousal guarantor's ECOA protections now rest on jurisdictional happenstance, not the law. Remarkably, a lender-required spousal guarantor discriminated against in Memphis, Tennessee (Sixth Circuit) can seek ECOA relief in federal court. But, a lender-required spousal guarantor living across the Mississippi River in West Memphis, Arkansas (Eighth Circuit) cannot. This Court should not permit ECOA protections to hinge on such jurisdictional happenstance. Rather than allow this circuit split to deepen and fester, the Court should rehear this matter.

Indeed, this Court granted certiorari to resolve a clear circuit split between the Sixth and Eighth

Circuits as to whether ECOA's "applicant" definition unambiguously excludes spousal guarantors. The Sixth Circuit deemed ECOA's "applicant" definition "easily broad enough to capture a guarantor." *RL BB Acquisition, LLC v. Bridgemill Commons Dev. Grp., LLC*, 754 F.3d 380, 385-86 (6th Cir. 2014). The Eighth Circuit concluded that a guarantor does not request or otherwise apply for credit and therefore cannot be an "applicant." *Hawkins v. Cmty. Bank of Raymore*, 761 F.3d 937, 940-43 (8th Cir. 2014). The judicial split concerning this issue is not limited to the Sixth and Eighth Circuits. One Seventh Circuit Court of Appeals panel in *dicta* agreed that a guarantor cannot apply for credit. *See Moran Foods, Inc. v. Mid-Atl. Mkt. Dev. Co.*, 476 F.3d 436, 441 (7th Cir. 2007). The Third Circuit Court of Appeals in *Silverman v. Eastrich* accepted Regulation B's inclusion of guarantors as "applicants," stating that "the ECOA has from its inception prohibited requiring spousal guaranties." 51 F.3d 28, 31 (3d Cir. 1995); *see also Bank of the West v. Kline*, 782 N.W.2d 453, 458 (Iowa 2010) (holding that guarantors are "applicants" under the ECOA); *W. Star Fin., Inc. v. White*, 7 P.3d 502, 505-06 (Okla. Civ. App. 2000) (allowing a spousal guarantor's ECOA claim to proceed to trial); *Eure v. Jefferson Nat'l Bank*, 448 S.E.2d 417, 417-18, 421 (Va. 1994) (requiring a spousal guaranty in violation of Regulation B is a violation of the ECOA); *see also Mayes v. Chrysler Credit Corp.*, 167 F.3d 675, 677 (1st Cir. 1999) ("The paradigm case is the spouse who is wrongly made to . . . guarantee a debt but may be unconscious of the violation. . . .").

This Court's affirmance of the Eighth Circuit "by an equally divided Court" on March 22, 2016, does nothing to solve the disarray among the federal circuits or state supreme courts. *See Hawkins*, 136 S. Ct. 1072 (2016). That is, the Court's ruling is not entitled precedential weight. *See Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 73 n.8 (1977) (citing *Neil v. Biggers*, 409 U.S. 188, 192 (1972)). The circuit split and general disarray under ECOA's applicant definition that this Court only one year ago deemed important to resolve persists and continues to fester. Federal and state courts will continue to apply inconsistently ECOA and Regulation B to spousal guarantors.

Without definitive guidance from this Court, the circuit split will persist and courts wrestling with this issue will be left with three equally unappealing alternatives: (1) side with the Sixth or Eighth Circuit and further deepen the circuit split, (2) choose a different path which only creates more confusion, or (3) altogether avoid the standing issue. Indeed, the Tenth Circuit recently heard argument on the spousal-guarantor standing issue in *Garrett v. Branson Commerce Park Cmty. Improvement Dist.*, but waited to issue a ruling pending this Court's *Hawkins* decision. Brief of Appellee BOKF, N.A., as Successor by Merger to Southwest Trust Co., N.A. at 53-61, No. 14-3240 (10th Cir. May 4, 2015), 2015 WL 2148076, at *53-61; Reply Brief of Appellants Gloria Garrett & Jane Vandewalle at 26-29, No. 14-3240 (10th Cir. July 22, 2015), 2015 WL 4503357, at *26-29. However, having

received no guidance from this Court, the Tenth Circuit simply assumed, without deciding, that the spousal guarantors had ECOA standing, but ruled their ECOA claim barred by the statute of limitations. *Garrett v. Branson Commerce Park Cmty. Improvement Dist.*, No. 14-3240, at 2-3 (10th Cir. April 14, 2016). Only a rehearing with a full complement of Justices will eliminate the circuit split and the needless uncertainty and confusion it has engendered.

Notably, federal case law interpreting federal law does not bind state courts. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 58 n.11 (1997); *Doe v. Roman Catholic Diocese of St. Louis*, 311 S.W.3d 818, 823 (Mo. Ct. App. 2010); *State v. Mack*, 66 S.W.3d 706, 710 (Mo. 2002). Indeed, only United States Supreme Court decisions concerning federal questions bind state courts. *Chesapeake & Ohio Ry. Co. v. Martin*, 283 U.S. 209, 221 (1931). And, Alaska, Iowa, Missouri, and Virginia state supreme court opinions directly conflict with the Eighth Circuit by affording spousal guarantors ECOA standing. *See Still v. Cunningham*, 94 P.3d 1104, 1113-14 (Alaska 2004); *Kline*, 782 N.W.2d at 457-58 (Iowa 2010); *Boone Nat'l Sav. & Loan Ass'n v. Crouch*, 47 S.W.3d 371, 374-76 (Mo. 2001); *Eure*, 448 S.E.2d at 421 (Va. 1994).

Thus, although Eighth Circuit law binds Iowa and Missouri federal courts, the Iowa and Missouri Supreme Courts bind Iowa and Missouri state courts. Whereas Missouri and Iowa state courts afford spousal guarantors ECOA protection, Missouri and Iowa federal courts do not. Thus, without definitive

guidance from this Court, an Iowa spousal guarantor may bring an ECOA violation against a creditor in Iowa state court under *Kline*, but cannot file the same claim in Iowa federal court pursuant to the Eighth Circuit's *Hawkins* opinion. The creditor-defendant need only remove the spousal guarantor's case to federal court to evade the spousal guarantor's ECOA claim. If rehearing is not granted, the Court encourages such inconsistent application of federal law and forum shopping.

Inconsistent manacling of ECOA's protections gives rise to far-reaching consequences for lenders, future credit applicants, and lender-required spousal guarantors. Parties to credit transactions lack definitive guidance. Without rehearing by this Court, "federal law will be administered in different ways in different parts of the country; citizens in some circuits are subject to liabilities or entitlements that citizens in other circuits are not burdened with or entitled to." *Beaulieu v. United States*, 497 U.S. 1038, 1039 (1990) (White, J., dissenting) (denial of petition for writ of certiorari); *see also Layne & Bowler Corp. v. W. Well Works, Inc.*, 261 U.S. 387, 393 (1923).

This Court in granting certiorari understood that a lender-required spousal guarantor's rights under federal law should not rest on jurisdictional happenstance. But after this Court's four-four decision, a clear circuit split still exists. Granting rehearing so that a full complement of Justices can decide the issue is necessary to resolve this circuit split and also serves judicial economy. Indeed, the spousal-guarantor

standing issue has been fully briefed in this matter. Requiring new briefing in a new case is unnecessary. Granting rehearing will most expeditiously resolve the clear circuit split.

And, this Court should avoid issuing its first affirmance by an equally divided Court due to the death or retirement of a Justice in nearly thirty years. The Court should instead grant rehearing and restore this case to the Court's calendar so that a newly-confirmed Justice may break the Court's deadlock.

CONCLUSION

For these reasons, this Court should grant Petitioners' Petition for Rehearing.

Respectfully submitted,

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April 15, 2016

CERTIFICATE OF COUNSEL

I hereby certify that this petition for rehearing is presented in good faith and not for delay.

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