IN THE SUPREME COURT OF OHIO

THE HUNTINGTON NATIONAL BANK, Plaintiff-Appellant, v. RAYMOND SCHNEIDER, Defendant-Appellee.	: : : : : : : : : :	**Case No. 2024-0208** On Appeal from the Hamilton County Court of Appeals, First Appellate District Court of Appeals Case No. C-230072

BRIEF OF *AMICUS CURIAE* THE OHIO CHAMBER OF COMMERCE IN SUPPORT OF APPELLANT, THE HUNTINGTON NATIONAL BANK

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INTRODUCTION

The First District's counter-textual approach to interpreting commercial loan documents threatens to fundamentally disrupt lending agreements throughout this State. At bottom, this case is a contract dispute where the intent of the parties, as specified in the written instruments to which they agreed, should govern. Disregarding the terms that sophisticated commercial parties chose injects uncertainty into Ohio's lending environment and ultimately will make obtaining credit in Ohio more expensive. It does so in two ways: first, it threatens to transform the terms of billions of dollars in existing loans, retroactively making those loans riskier to lenders; and second, it prevents lenders from relying on the plain language of their agreements governing arms-length transactions and instead subjects them to ill-defined extracontractual obligations. The increased risk to lenders and the costs of this uncertainty ultimately will be passed on to businesses of all stripes that rely on the availability of credit.

Here, the court of appeals effectively amended the guaranty agreement between Huntington National Bank and Schneider twice. First, the court held that common and well-recognized guaranty language instead created a suretyship, a much different legal relationship. The loan documents repeatedly stated the parties' intention that they were creating a guarantor relationship, and the parties in turn structured Schneider's obligations as those of a typical guarantor. Despite the parties' express language, the First District treated Schneider as a surety instead of a guarantor. Second, the court held that the contract imposed an unwritten obligation on the lender to disclose risks to a sophisticated party, even where that party could have (and should have) done its own due diligence. Adopting this amorphous duty, which has no foundation in Ohio law, would enable a guarantor or surety to evade its contractual obligations and shift risk to the lender, contrary to the terms of written agreements.

Amicus the Ohio Chamber of Commerce submits this brief to urge the Court to enforce, not rewrite, commercial agreements and allow parties like the Chamber's members to establish terms by written agreement and not by judicial imposition of nebulous obligations. Amicus and its members have a paramount interest in the sound and consistent interpretation of these agreements. Borrowers and lenders around the State benefit from predictable and stable access to credit. Endorsing the First District's approach would disrupt existing lending relationships, inject uncertainty, and increase borrowing costs throughout the State going forward.

STATEMENT OF AMICUS CURIAE INTEREST

Since 1893, the Ohio Chamber of Commerce has represented Ohio businesses ranging from small sole proprietorships to some of the largest companies in the United States. With over 8,000 member businesses, the Chamber is Ohio's largest and most diverse business advocacy organization. The Chamber promotes and protects its members' interests and advocates to make Ohio's business environment more favorable. By promoting its pro-growth agenda with policymakers and in the courts, the Ohio Chamber seeks a stable and predictable legal system that fosters a business climate where enterprise, and therefore Ohioans, prosper. The Ohio Chamber regularly files amicus briefs in cases important to its members.

STATEMENT OF FACTS

Amicus curiae adopts the statement of facts set forth in Appellant's brief.

ARGUMENT

I. Proposition of Law No. I:

The standard language in the "Guaranty of Payment of Debt" agreement created a guaranty relationship, not a suretyship.

Ohio law has long recognized that a guarantor is different from a surety. In this case, the guaranty agreement clearly establishes Schneider is a guarantor. By conflating the two

relationships, the court of appeals abandoned the principle that sophisticated commercial parties intend what they say in their written contracts. Courts should not second guess the choices that sophisticated parties make in their loan documents. To restore predictability and fairness to the interpretation of loan documents by Ohio courts, this Court should re-establish the age-old principle in Ohio that parties to a contract, not courts, set the terms of a commercial bargain.

A. Ohio Courts Would Inject Uncertainty Into Ohio's Lending Economy If Permitted To Rewrite Plain Terms Of Commercial Loan Documents.

A guarantor and a surety are not the same legal relationship—a point the court of appeals took care to stress. App. Op. ¶ 17; *see Madison Nat'l Bank of London, Ohio v. Weber*, 117 Ohio St. 290, 293 (1927); Huntington Bank Merits Br. at 8. Indeed, "legal dictionaries, treatises, and court decisions have recognized a clear legal distinction between guarantors and sureties for nearly two centuries." *JPMorgan Chase Bank, N.A. v. Earth Foods, Inc.*, 238 Ill.2d 455, 470 (Ill. 2010); *cf. Surety*, Black's Law Dictionary (11th Ed. 2019) ("A surety differs from a guarantor."). Among other differences, a surety assumes primary liability, in the same instrument with the principal debtor—while a guarantor's liability is governed by a separate contract and is "collateral and secondary" to the lender's claim against the principal. *See* 52 Ohio Jur.3d, Guaranty and Suretyship, § 3 (May 2024 update, Westlaw); *Crawford v. Turnbaugh*, 86 Ohio St. 43, 46 (1912) ("The rights and liabilities of a surety and those of a guarantor are different in many respects.").

Sophisticated commercial parties know the difference between a guaranty and a suretyship, and their specific and repeated choice of language (here, always "Guarantor," never "surety") ought to be treated as intentional. In Ohio law, it is well "settled that 'a guarantor . . . is bound only by the express terms of his contract. The language used is to be understood in its plain and ordinary sense, as read in the light of the surrounding circumstances.'" *Merchants' Nat'l Bank v. Cole*, 83 Ohio St. 50, 58 (1910) (citation omitted); *see generally Krewina v. United Specialty Ins.*

Co., 2023-Ohio-2343, ¶ 23. These ordinary contract principles have long prevented "a guarantor . . . [from] demand[ing] an unfair and strained interpretation of those words, in order that he may be released from the obligation which he has assumed." *Morgan v. Boyer*, 39 Ohio St. 324, 326 (1883). The same tried and true principles should continue to guide the Court's analysis here.

In this case, the parties chose a guarantor relationship and its attendant features. Indeed, their agreement uses the word "guarantor" dozens of times without ever once labeling Schneider as a surety. As even the Third Restatement acknowledges, that characterization is important. *See* Restatement of the Law 3d, Suretyship & Guaranty, § 15(a) (1996) ("if the parties to a contract identify one party as a 'guarantor' . . . , the party so identified is a secondary obligor and the secondary obligation is, upon default of the principal obligor on the underlying obligation, to satisfy the obligee's claim"); *see id.* at § 15(c) (defining "surety"). When the parties to this case entered an agreement stating, "*Guarantor* hereby absolutely and unconditionally *guarantees* the prompt payment in full of all of the Debt as and when the respective parts thereof become due and payable," they chose to create a guarantor relationship. Guaranty Agreement § 3 (emphasis added). Consistent with the nature of a guarantor's obligation, the agreement in this case gives the lender the right to proceed directly against the guarantor only "*if the Debt or any part thereof shall not be paid in full when due and payable*." *Id.* (emphasis added). And because this guaranty was "absolute[] and unconditional," the lender was given "the right to proceed directly against the Guarantor" to recover the outstanding debt if not promptly paid by the principal. *Id.*

Other aspects of the agreement confirm Schneider's status as a guarantor and not a surety. Tellingly, the guaranty agreement is *separate from* the underlying credit agreement. And the guaranty agreement, which was between only Schneider and the bank, had its own consideration.

Guaranty Agreement § 1; *see, e.g.*, *JPMorgan Chase*, 238 Ill.2d at 468. These are hallmarks of a guarantor-lender relationship. *See* Huntington Bank Merits Br. at 10.

The First District, by converting a standard guarantor relationship into one of surety, rewrote not just this contract but potentially many others. The language in this agreement is customary. It appears in similar guaranty agreements used regularly by lenders across the State. Cases in the courts of appeals provide a sampling of similar industry-standard language. In a case also from the First District, a debtor, "as a guarantor, 'absolutely and unconditionally' guaranteed the full and punctual payment due to [the creditor] under the note." *Berger v. Wade*, 2014-Ohio-1262, ¶ 8 (1st Dist.) (per curiam op. joined by DeWine, J.). That "standard guaranty," like this one, included the right to proceed directly against the guarantor. *Id*. at ¶ 9–10; ¶ 14. The Tenth District's decision in *Feller, LLC v. Wagner*, similarly involved substantially the same language—"[Guarantor] unconditionally and absolutely guarantees . . . the full, prompt and complete payment," including all amounts "due and payable"—for a guaranty between a landlord and tenant, 2012-Ohio-5972, ¶ 18–19.

Many other cases have likewise involved agreements in which the guarantor "absolutely and unconditionally" guaranteed prompt payment when due. *See Bayview Loan Serv'g, LLC v. Alex Solomon Family Ltd. P'ship*, 2011-Ohio-6168, ¶ 9 (8th Dist.); *First Merit Bank, N.A. v. NEBS Fin. Servs., Inc.*, 2006-Ohio-5260, ¶ 5 (8th Dist.); *Parkway Bus. Plaza Ltd. P'ship v. Custom Zone, Inc.*, 2006-Ohio-5255, ¶ 20 (8th Dist.); *Hursh Builders Supply Co. v. Clendenin*, 2002-Ohio-4671, ¶ 14 (5th Dist.); *Peoples Nat'l Bank v. Hess*, 1996 WL 527193, at *2 (9th Dist. Sept. 18, 1996); *Stone v. Nat'l City Bank*, 106 Ohio App.3d 212, 218 (8th Dist. 1995); *S-S-C Co. v. Hobby Ctr., Inc.*, 1992 WL 355205, at *3 (6th Dist. Dec. 4, 1992); *Campco Distrs., Inc. v. Fries*, 42 Ohio App.3d 200, 201 (2d Dist. 1987).

Schneider has argued that this language does not create a guaranty—he says the lender cannot collect on a guaranty without first exhausting attempts to collect the judgment from primary obliger. But none of those courts converted a guarantor to a surety on that basis. And that would surely come as a surprise to sophisticated commercial parties—historically, guaranties have been interpreted by their plain terms, and a guaranty of payment may be triggered as soon as the debtor defaults. *See* Huntington Merits Br. at 10.

Consistent with long-standing practice, the "'absolute guarantee' language" that appears in the guaranty agreement "create[s] an unconditional undertaking on the part of the guarantors that they would perform the obligation immediately upon the principal debtor's default." *Campco Distrs.*, 42 Ohio App.3d at 201. Standard forms also use substantially the same language to create "the guarantors' obligation to guaranty payment of the borrower's obligations under a loan agreement." Guaranty, Practical Law Standard Document 2-383-6379 (Westlaw 2024). Such form documents use the same naming conventions as the agreement in this case—"Guarantor," "Lender," "Borrower," and "Agent." *Id.* As here, the guarantor "absolutely, unconditionally, and irrevocably guarantees . . . the due and prompt payment by the Borrower." *Id.*; *see also* Sandra M. Rocks, *Provisions of Standard Commercial Guarantee Agreements* at 12 (Consultative Group to Assist the Poor 2010).

Allowing the erroneous holding of the court of appeals to stand would disrupt thousands of existing contractual relationships formed through the use of this standard and well-recognized language. It would transform the relationships between existing lenders and guarantors in a manner contrary to their mutual intentions and agreed terms.

B. Judicially Rewriting Loan Documents Will Increase The Cost of Credit in Ohio.

These distinct legal arrangements (guaranty and surety) result in different levels of security for lenders and thereby change the risk profile of lending transactions. Shaking the snow globe, as the First District did, overlooks that these relationships come about in different ways, with different consequences. Obscuring these distinctions upsets the expectations of contracting parties—with negative consequences for Ohio's lending economy.

An important practical difference between a surety and a guarantor is that, "[t]he contract of a surety is made at the same time and usually with that of the principal, while that of a guarantor is a contract separate and distinct from that of the principal." *Weber*, 117 Ohio St. at 293; *Altercare of Canal Winchester Post-Acute Rehab. Ctr., Inc. v. Turner*, 2019-Ohio-1011, ¶ 17 (10th Dist.) (same); 28 C.J. § 5 (1922) (similar). "A surety is usually bound with his principal by the same instrument, executed at the same time and on the same consideration." *Surety*, Black's Law Dictionary, quoting 1 George W. Brandt, *The Law of Suretyship and Guaranty* § 2, at 9 (3d ed. 1905). "On the other hand, the contract of the guarantor is his own separate undertaking, in which the principal does not join. It . . . is often founded on a separate consideration from that supporting the contract of the principal." *Id.*; *see also JPMorgan*, 238 Ill.2d at 468.

These different arrangements lead to different defenses to a lender's collection efforts. Essentially stepping into the shoes of the primary obligor, sureties traditionally maintain the right to assert the primary debtor's non-personal defenses against the lender's attempts to collect: "Whatever amounts to a good defense to the original liability of the principal, is a good defense for the sureties when sued." *Mut. Fin. Co. v. Politzer*, 21 Ohio St.2d 177, 183–84 (1970), quoting *State v. Blake*, 2 Ohio St. 147, 151 (1853).

Governed by a separate agreement, in contrast, guaranties allow sophisticated commercial parties to "contract around the default rules of suretyship." Avery W. Katz, *An Economic Analysis of the Guaranty Contract*, 66 U. Chi. L. Rev. 47, 62 (1999). (describing waivers of suretyship defenses as "the norm in many lending markets"). For example, guarantors may waive "the legal defenses of the principal" (in addition to their own defenses), which creates more security for lenders. *O'Brien v. Ravenswood Apartments, Ltd.*, 2006-Ohio-5264, ¶ 21–22 (1st Dist.); *cf. Buckeye Fed. Sav. & Loan Ass'n v. Guirlinger*, 62 Ohio St.3d 312, 316 (1991) (guarantor "waived his right to any defense"). Guarantees come in two main varieties. More common historically was the guarantee of collection, which requires the creditor to proceed first against the primary obligor before reaching the guarantor. *See Guarantor*, Black's Law Dictionary (11th Ed. 2019). But because private parties may contract around baseline rules, guarantees of payment—which allow the creditor to demand payment directly from the guarantor upon default—have become preferred. *Id.* Thus, the express language in Schneider's agreement allowing the Bank to "proceed directly against Guarantor" upon default reinforces that this is in fact a guarantee. *Id.*; *Crawford*, 86 Ohio St. at 47 ("he took on the obligation of guarantor by the words, 'Payment guaranteed'").

These features in turn lead to different levels of risk. If lenders cannot rely on the terms of existing guaranty agreements, their ability to collect on outstanding loans is jeopardized. "Guaranties . . . help protect creditors against some of the risks of debtor misbehavior or insolvency by shifting those risks to guarantors." Katz, 66 U. Chi. L. Rev. at 59. The harder it is to collect on a debt, the more expensive the cost of credit going forward. Uncertainty equates to increased cost of credit, because the lender must underwrite its risk, which in turn impedes borrowers' access to credit. *See* David Charny, *Nonlegal Sanctions in Commercial Relationships*,

104 Harv. L. Rev. 373, 457–58 (1990) (describing how "the prospect of more intrusive, ad hoc modes of interpretation increases the costs of the banking relationship to sophisticated parties").

Of course, Ohio businesses rely on access to credit to operate and grow. Increases in the cost of doing business caused by uncertainty in the lending industry are "felt by borrowers … through greater difficulty in obtaining loans, higher interest rates, and less flexible credit arrangements." Mark Snyderman, *What's So Good About Good Faith? The Good Faith Performance Obligation in Commercial Lending*, 55 U. Chi. L. Rev. 1335, 1361 (1988). "Judicial activism in contract interpretation creates uncertainty in the market, with resultant costs to all concerned." *Id.* The health of the finance industry in Ohio, furthermore, has a direct impact on Ohio's GDP. *See, e.g.*, Federal Reserve Bank of Cleveland, How Has Ohio Fared in the Current Business Cycle? (March 26, 2024) (noting impact of finance, insurance, and real estate industry on overall economic growth in Ohio).[1] It is little wonder, then, why it is important for Ohio courts to enforce the agreed language in loan documents.

In sum, faithful enforcement of the plain term of guaranty agreements is vital to Ohio's lending economy. This Court should confirm that Ohio's loan documents mean what they say.

II. Proposition of Law No. II:

Even for a surety agreement, a lender does not have a duty to disclose information under the "doctrine of increased risk"—and regardless does not have such a duty when the lender lacks actual knowledge of the surety's ignorance or when the surety has the same or greater access to the information at issue.

The doctrine of increased risk—that is, the duty of lenders to disclose risks unknown to sureties—is foreign to Ohio law. While there is no duty to disclose of that kind implicit in every lending agreement, Ohio law does provide other protections that prevent the same hardships.

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[1] *Available at*, https://www.clevelandfed.org/publications/cleveland-fed-district-data-brief/2024/cfddb-20240326-how-has-ohio-fared-in-current-business-cycle.

Adding a new implied obligation is not only unnecessary but costly and unworkable. And in all events, this case is a poor vehicle to add such a duty.

A. Ohio Law Recognizes No Implied Doctrine of Increased Risk.

The court of appeals held: "A creditor owes a duty of disclosure to a surety" when four conditions are met—"(1) the creditor knows facts which materially increase the risk beyond that which the creditor has reason to believe the surety intends to assume, (2) the facts are unknown to the surety, (3) the creditor has reason to believe the facts are unknown to the surety, and (4) the creditor has a reasonable opportunity to communicate the facts to the surety." App. Op. ¶ 22. That is a misstatement of Ohio law, and it is an extraordinary departure from Ohio's prohibition against adding implied terms to agreements between sophisticated parties.

The court of appeals treated this doctrine of increased risk as a term implicit in *every surety agreement*. Implied terms "are disfavored in the law," *see Clagg v. Baycliffs Corp.*, 82 Ohio St.3d 277, 279 (1998), because they contradict "the rule that written instruments shall speak for themselves," *Tiller v. Hinton*, 19 Ohio St.3d 66, 69 (1985), quoting *Ciski v. Wentworth*, 122 Ohio St. 487, syllabus (1930). In a contract dispute, a court should discern the parties' intent based on the mutually assented to language. There is no indication that either party contemplated the doctrine of increased risk when entering the guaranty agreement. On the contrary, "[b]orrowers and lenders construct their contracts largely from a menu of standard terms provided by background common and statutory law… and by the banks themselves, which have privately tested and adapted standard terms over the course of numerous credit relationships." Charny, *Nonlegal Sanctions*, 104 Harv. L. Rev. at 457–58.

This Court has never adopted a heightened duty of disclosure based on surety status. That imposition would defy the ordinary rule in "business transactions" that "where parties deal at arm's length, . . . neither party has a duty to disclose material information to the other." *Blon v. Bank*

One, Akron, N.A., 35 Ohio St.3d 98, 101 (1988). Under this Court's cases, a disclosure obligation may arise when the contracting parties cultivate "special trust," such as "a fiduciary relationship." *Id*. But that circumstance is absent here. The ordinary creditor-debtor relationship without more does not create a fiduciary duty. *Umbaugh Pole Bldg. Co. v. Scott*, 58 Ohio St.2d 282, 287 (1979). These parties designated "Ohio law" to govern their "rights and duties" and disclaimed any fiduciary relationship against that doctrinal backdrop: "[the Bank] shall have no fiduciary obligation toward Guarantor with respect to this Agreement or the transactions contemplated hereby." Guaranty Agreement § 13.

Nor did the parties have a principal-agent relationship of any other kind that might give rise to "a duty to disclose all material information which the agent learns." *Miles v. Perpetual Sav. & Loan Co.*, 58 Ohio St.2d 93, 95 (1979). The "failure of a party to a transaction to fully disclose facts of a material nature" arises only "where there exists a duty to speak." *Miles v. Perpetual Sav. & Loan Co.*, 58 Ohio St.2d 97, 99 (1979). But that is the "exception to the general rule of no duty to disclose." *Williams v. Aetna Fin. Co.*, 83 Ohio St.3d 464, 474 (1998). The parties recognized their relationship as solely between "debtor and creditor," Guaranty Agreement § 13, consistent with the norm that "a bank and its customers stand at arm's length in negotiating terms and conditions of a loan," *Blon*, 35 Ohio St.3d at 101. Thus, the Bank had no "duty to speak," *id*., and every entitlement "to advance its own interests," *Ed Schory & Sons, Inc. v. Soc. Nat'l Bank*, 75 Ohio St.3d 433, 444 (1996).

The court of appeals resorted to the implied "duty of disclosure" a creditor owes a surety based on scant authority, namely, an unpublished decision of the Third District from 1985, *Kawasaki Motors Corp., USA v. Navratil*, 1985 WL 7222, at *3. In dictum and with little reasoning, that decision purported to "adopt" the duty of disclosure provided in Section 124(1) of

the Restatement of Security.[2] *Id.* Notably, that decision nonetheless found "no [such] duty on the part of [the creditor in that case,] Kawasaki Motors." *Id.*

More to the point, though, one unpublished, cherry-picked decision does not establish a statewide rule. *Cf. PNC Bank v. Schram*, 1999 WL 252729, at *2 fn. 10 (1st Dist. April 30, 1999) (rejecting the *Kawasaki* decision as nonbinding and "inapposite" to a case that "involve[d] a guarantor rather than a surety"). This Court has never endorsed the Restatement of Security provision or its successor in the Restatement (Third) of Suretyship and Guaranty, Section 12(3).[3] On the contrary, this Court's usual practice is to *reject* Restatement rules that lack support in history or precedent, such as this one. *See, e.g.*, *DeVries Dairy, LLC v. White Eagle Coop. Ass'n,*

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[2] The Restatement of Security provides:

> Where before the surety has undertaken his obligation the creditor knows facts unknown to the surety that materially increase the risk beyond that which the creditor has reason to believe the surety intends to assume, and the creditor also has reason to believe that these facts are unknown to the surety and has a reasonable opportunity to communicate them to the surety, failure of the creditor to notify the surety of such facts is a defense to the surety.

§124(1).

[3] Restatement (Third) of Suretyship & Guaranty provides:

> Subject to [exceptions], if, before the secondary obligation becomes binding, the obligee:
>
> (a) knows facts unknown to the secondary obligor that materially increase the risk beyond that which the obligee has reason to believe the secondary obligor intends to assume; and
>
> (b) has reason to believe that these facts are unknown to the secondary obligor; and
>
> (c) has a reasonable opportunity to communicate them to the secondary obligor;
>
> the obligee's nondisclosure of these facts to a secondary obligor constitutes a material misrepresentation.

§12(3). Even under the summary judgment standard, an exception almost certainly removed the Bank's disclosure obligation under this rule, because Schneider was "ab[le] to obtain knowledge of [unknown] facts independently in the exercise of ordinary care." *Id*. §12(4)(c).

Inc., 2012-Ohio-3828, ¶ 2 (noting that the "court has never recognized a claim under" that Restatement rule); *Snay v. Burr*, 2021-Ohio-4113, ¶ 32 (same); *Marchetti v. Kalish*, 53 Ohio St.3d 95, 99 (1990). The 1941 Restatement provision was well-established when this Court decided *Blon* in 1988. And the 1996 Restatement (Third) provision contradicts *Blon*'s rule that the duty to disclose arises only when the parties enjoy a "special relationship of trust and confidence." 35 Ohio St.3d at 101. Accordingly, the Restatement's rule, which the lower court imported, "lacks support in the law" and threatens a "novel extension . . . that will alter the doctrinal landscape of contract law." *Kansas v. Nebraska*, 574 U.S. 445, 483 (2015) (Thomas, J., dissenting) (citation and internal quotation marks omitted).

But if this Court does entertain the Restatement, it should at least also recognize that even the Restatement preserves the distinction between guarantors and sureties. Section 15 provides that the term "guarantor" communicates liability "upon default of the principal obligor on the underlying obligation" whereas reference to "a 'surety,' or the contract as a 'suretyship' contract," means the party "is jointly and severally liable with the principal obligor to perform the obligation set forth in that contract." Restatement, Suretyship & Guaranty, § 15. Thus, even the Restatement counsels reversal on the first proposition (which counters any reason to affirm on the second proposition).

B. Ohio Law Already Protects Sureties.

The doctrine of increased risk would not operate in a vacuum. Rather, a web of established protections benefitting sureties already serves the purpose that the court of appeals sought to advance through this implied disclosure duty. Existing legal protections further the purpose that the doctrine of increased risk serves, so this Court should not adopt a new implied covenant. *See, e.g.*, *Alford v. Collins McGregor Operating Company*, 2018-Ohio-8, ¶ 2, 22–23 (declining to

import into oil and gas leases "an implied covenant to explore further" because existing an covenant already served a similar purpose).

As far as implied contract terms go, most prominently, "every contract imposes an implied duty of good faith and fair dealing." *Lucarell v. Nationwide Mut. Ins. Co.*, 2018-Ohio-15, ¶ 42. The requirement of good faith and fair dealing provides "an implied undertaking not to take opportunistic advantage in a way that could not have been contemplated at the time of drafting, and which therefore was not resolved explicitly by the parties." *Ed Schory & Sons*, 75 Ohio St.3d at 443–44 (citation omitted). This implied obligation already protects contracting parties against opportunistic advantage, which counsels against adopting a new implied obligation serving the same purpose. *See Alford* at ¶ 23.

Additionally, proving fraud can be a complete defense to liability. "If a surety or guarantor is duped into assuming secondary liability, then his obligation is typically voidable." *Bartenwerfer v. Buckley*, 598 U.S. 69, 82 (2023). "In Ohio, a party to a contract is entitled to rescission if the party relies on the other party's intentional misrepresentation of a material fact." *Fifth Third Mortg. Co. v. Chicago Title Ins. Co.*, 692 F.3d 507, 513 (6th Cir. 2012); 48 Am.Jur.3d 329, Proof of Facts, *Proof of Fraudulent Inducement of a Contract and Entitlement to Remedies* § 3 (June 2024 update, Westlaw). The "mere failure to disclose a fact," however, "is not fraud" unless the party makes statements "so incomplete as to a material fact that the incompleteness" amounts to a false statement. *Id.* at § 9; *Blon*, 35 Ohio St.3d at 101 ("disclosure is necessary to dispel misleading impressions . . . created by partial revelation of the facts") (citation omitted). Protections against fraudulent inducements and concealments have long provided adequate protection to sophisticated contracting parties, without the need to adopt a new free-ranging duty of disclosure that upsets settled expectations.

Schneider's opposition to jurisdiction introduced a Supreme Court case to support the assertion that sureties are generally due heightened protection. Opp. Jur. at 13. But *Magee v. Manhattan Life Insurance Company*, even though it says a "surety is a favored debtor," does not help Schneider. 92 U.S. 93, 98 (1875) (citation omitted). *Magee* discussed the relationship between fraud, non-disclosure of risk, and sureties under the federal common-law. A surety sought to avoid contract liability based on the lender's nondisclosure of a borrower's debt. *Id.* "The mere relation of principal and surety," the Court explained, "does not require the voluntary disclosure of all the material facts in all cases." *Id.* at 99. The Court went on, "[i]f the surety desires information, he must ask for it. The creditor is not bound to volunteer it. An undisclosed prior debt will not affect the validity of the contract." *Id*. Short of fraudulent concealment, the Court held, "[t]he creditor is not bound to inform the intended surety of matters affecting the credit of the debtor, or of any circumstances unconnected with the transaction in which he is about to engage." *Id*. at 100.

Little has changed in 150 years: No duty of disclosure arises because "there was nothing fraudulent in the agreement"; the surety "made no[inquiries], and there was no obligation on the part of the company to volunteer the disclosure." *Id*. at 100–01. As much as any case, *Magee* undermines a surety's plea for special protection.

C. Implying a New Amorphous Duty Of Disclosure Would Be Disruptive to Ohio's Lending Economy.

Although the doctrine of increased risk offers little by way of added benefit, its arrival will come at great cost. As conceived by the court of appeals, this new duty affixes to every surety agreement with invisible ink. And when triggered, the court explained, the implied covenant "is a [complete] defense to the surety." App Op. ¶ 22.

First, the doctrine of increased risk shifts to the lender the surety's own imperative to contract responsibly and creates perverse incentives for the surety to remain ignorant, just as Schneider chose here. Under the disclosure obligation, rather than the surety assessing his own risk, as is the norm in every arm's length negotiation, the lender must shoulder that burden. Parties negotiating a contract "have the opportunity to ascertain relevant facts." *Blon*, 35 Ohio St.3d at 101. In this case, Schneider acknowledged that he asked the principal for financial information and did not get it, but he proceeded anyway. App. Opp. ¶ 25–26. If the surety needed more information to make an informed choice, then the surety should have insisted on getting that information before taking on a $77 million obligation. *See* Charny, *Nonlegal Sanctions*, 104 Harv. L. Rev. at 459 ("[f]or rational borrowers, the array of readily available contract provisions covers most contingencies, and a strict approach to interpretation helps preserve the integrity of this system …").

Second, shifting the cost of the surety's due diligence to lenders will increase the cost of credit in Ohio, particularly because the doctrine of increased risk is amorphous and unmanageable. As formulated by the court of appeals, the duty is doubly subjective: It asks not only what the creditor knows or what the surety knows, but what the creditor thinks the surety knows about the risks—and further what risks the creditor thinks the surety intends to assume. App. Op. ¶ 22. In practice, the duty imposes on creditors a blanket rule of disclosure vis-à-vis sureties, because creditors generally are not in a position to read the minds of a third party. This flies in the face of *Blon*, which forecloses an implied "duty to disclose material information" absent a special relationship that does not exist here. 35 Ohio St.3d at 101.

The costs of added diligence and disclosure would be borne by lenders, debtors, and sureties alike, thereby making credit more expensive and either crowding out some participants or

redirecting them to a freer market. Consider the compliance efforts in practice. Before entering a surety agreement, and so before extending credit, lenders will need to ascertain the following:

- Does the lender know facts that materially increase the risk of default?
- Does the surety actually know the pertinent facts?
- What risks does the lender think the surety intended to assume?
- What risks does the surety actually intend to assume?
- Can the lender reasonably communicate these facts to the surety?

Those questions only raise second order questions.

- How does a lender measure another's risk tolerance?
- How does a lender assess what the surety likely knows?
- How do banks reconcile this disclosure obligation with the financial privacy protections of federal law, which place strict limits on what banks can share about customer financial information with third parties? *See* 15 U.S.C. 6801 ("each financial institution has an affirmative and continuing obligation to respect the privacy of its customers and to protect the security and confidentiality of those customers' nonpublic personal information").
- What is the cost of answering these questions, and how will lenders recover it?

Riddled with subjectivity, these questions are not easily answered. Future lenders might contract around this uncertainty by expressly disclaiming the duty of disclosure. But that would leave behind an entire generation of existing surety agreements susceptible to invalidation. That jolt would threaten to suddenly alleviate existing sureties from their agreed obligations. And surely lenders did not factor in an increased-risk analysis when underwriting existing surety agreements, as Ohio has never before required it.

If the General Assembly sprung such an implied covenant on existing agreements, challenges under Ex Post Facto, Contracts, and Retroactivity clauses would pour in. *See* U.S. Const. art. I § 10, cl. 1 ("No State shall . . . pass any . . . ex post facto Law, or Law impairing the

Obligation of Contracts"); Ohio Const. art. II § 28 ("The general assembly shall have no power to pass . . . laws impairing the obligation of contracts"). A legislature could impose this obligation only prospectively; this Court should not divine a duty of disclosure hiding in every surety agreement armed with retroactive effect.

For good reasons—legal, practical, and economic—this Court has not previously adopted the doctrine of increased risk. It should not take the extraordinary and counterproductive step of implying a disclosure duty now.

CONCLUSION

This Court should reverse the decision of the court of appeals.

Respectfully submitted,

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