IN THE SUPREME COURT OF OHIO

Case No. 2024-0208

On Appeal from the First Appellate District
Hamilton County, Ohio

HUNTINGTON NATIONAL BANK

Appellant

vs.

RAYMOND SCHNEIDER

Appellee

BRIEF OF AMICI CURIAE OHIO BANKERS LEAGUE, OHIO CREDIT UNION LEAGUE, AMERICAN BANKERS ASSOCIATION, AND AMERICA'S CREDIT UNIONS IN SUPPORT OF APPELLANT HUNTINGTON NATIONAL BANK

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

I. INTRODUCTION

The First District created a sea change in the lending industry: it rolled back longstanding precedent and industry practice to hold that guarantors who guarantee payments *when due and payable* are sureties instead. In so doing, the court retroactively transformed most existing guaranties to suretyships—effectively abolishing the established distinction between the two concepts under Ohio law and creating enormous uncertainty for the financial services industry. The court then compounded its error by imposing increased duties on lenders toward sureties, thereby creating additional obstacles to commercial lending.

Guarantors are essential to Ohio's economy because guaranty agreements make it possible for financial institutions to lend money to underserved areas, small businesses, startups, expansions, and other higher risk/reward endeavors. By effectively invalidating standard guaranty agreements, the First District eviscerated this important tool of economic development. The court departed from well-established precedent and unilaterally reallocated the responsibilities of contracting parties in a way more properly left to this Court or the General Assembly. If this decision stands, it will impose greater compliance costs for lenders, significantly increase lending costs for borrowers and financial institutions, reduce the availability of credit, and undermine the value of existing loan portfolios. Thus, the First District's judgment not only will hurt Ohio's financial institutions, but also will negatively impact Ohio's economy by restricting the flow of commercial capital, making Ohio a less business-friendly destination for national and global financial institutions who conduct business in the state. This Court should reverse the First District and hold that the agreement in this case is exactly what it says: a guaranty.

II. STATEMENT OF INTEREST OF AMICI CURIAE

Ohio Bankers League ("OBL") is a nonprofit trade association that represents the interests of state and federally chartered FDIC-insured commercial banks, savings banks, and thrifts and savings associations doing business in Ohio. Members include depository institutions that are headquartered in Ohio, as well as institutions that are headquartered elsewhere but conduct banking business in Ohio. OBL has 173 member banks, which represent most of the depository institutions in Ohio. OBL membership is diverse and includes the full spectrum of FDIC-insured depository institutions and their affiliates. Member institutions range from small savings associations that are organized as mutual thrifts owned by their depositors, to community banks that are locally owned and operated, to large regional, multistate, and multinational financial institutions that have multiple bank and non-bank affiliates and conduct business across the country as well as internationally. Depository institutions directly employ more than 60,000 people across the State of Ohio.

American Bankers Association ("ABA") is the united voice of America's $23.4 trillion banking industry and their two million dedicated employees. The ABA represents banks of all sizes, including small, regional, and large national and state banks that safeguard nearly $18.6 trillion in deposits and extend more than $12.3 trillion in loans. The ABA's mission is to help members serve their local communities and the broader U.S. economy through training, advocacy, and industry expertise.

The Ohio Credit Union League ("OCUL") is a not-for-profit trade association whose mission is to support the growth and success of credit unions through advocacy, expertise, collaboration, and advice. OCUL is the only state trade association for Ohio credit unions, and, along with its affiliates, serves nearly all of Ohio's 211 credit unions and their 3.2 million members. OCUL advocates for the rights and interests of all credit unions in Ohio, regardless of affiliation.

America's Credit Unions ("ACU") represents the nation's nearly 5,000 federal- and state-chartered credit unions that collectively serve over 140 million consumers with personal and small business financial service products. ACU's membership includes over 85% of credit unions in Ohio. ACU delivers strong advocacy, resources, and services to protect, empower, and advance credit unions and the people they serve. ACU advocates for responsible legislative policies and regulations so credit unions can efficiently meet the needs of their members and communities.

This case is of keen interest to all OBL, OCUL, ACU, and ABA ("Amici") members, their customers, and the public. Nearly all Amici member financial institutions provide commercial loans. And this core financial service plays a vital role in Ohio's economy. Without ready access to capital, most businesses cannot start, operate, or expand. But the First District's judgment dramatically undercuts the ability of financial institutions to assist with economic growth through commercial lending because it practically eliminates a vital tool for facilitating loans—the personal guaranty. The ability to work with personal guarantors allows lenders to provide capital in situations where loans would otherwise be impossible due to enhanced risk or other loan-specific factors. The First District's judgment will thus severely impact the ability of banks, credits unions, and financial institutions to meet their mission of serving their customers and enabling economic growth and development. Accordingly, Amici have a vital interest in the issues presented by this case.

III. STATEMENT OF THE CASE AND FACTS

Amici adopt and incorporate the Statement of Facts within the Brief of Appellant Huntington National Bank.

IV. ARGUMENT

<u>Huntington Bank's first proposition of law</u>: The standard language in the "Guaranty of Payment of Debt" agreement created a guaranty relationship, not a suretyship.

Guaranties are critical to economic development, particularly for facilitating commercial loans in underserved areas, small businesses, startups, expansions, and other higher risk/reward endeavors. But the First District largely eliminated this important tool of economic development by effectively abolishing the distinction between guarantors and sureties—upending the financial services industry in the process and harming small businesses and underserved communities by effectively reducing access to credit. Ohio financial institutions and courts have relied on standard guaranty language for at least the last century, but the First District disregarded this well-settled precedent and retroactively transformed hundreds of thousands of standard guaranty agreements into suretyships. Not only is the First District's decision contrary to law, but its detrimental effect on existing loan portfolios and future economic development can hardly be overstated—and should be reversed.

A. The distinction between suretyships and guaranties is critical to lending and economic development.

In lending, the distinction between guarantors and sureties remains a crucial one. "'A surety is primarily and jointly liable with the principal debtor. His obligation is created concurrently with that of the principal debtor.'" S*t. Paul Fire & Marine Ins. Co. v. Indus. Com'n of Ohio*, 30 Ohio St.3d 17, 20 (1987), quoting *Madison Nat. Bank of London, Ohio v. Weber*, 117 Ohio St. 290, 293 (1927). A common example of a suretyship is when a party cosigns a line of credit or credit card. *See* 1 Restatement of the Law 3d, Suretyship & Guaranty, § 15, Comment e

(1996) (noting that "[t]he term 'cosigner'" "communicates essentially the same meaning" as "surety").

In contrast, "[t]he obligation of a guarantor is collateral and secondary to that of the principal debtor and is fixed only by the inability of the principal debtor to discharge the obligation for which he is primarily liable." *Weber* at 293. "A guaranty is, perhaps, always understood, in its strict legal and commercial sense, as a collateral warranty, and often as a conditional one, against some default or event in [the] *future*." (Emphasis in original.) *Solomon Sturges & Co. v. Bank of Circleville*, 11 Ohio St. 153, 169 (1860). "'The difference [between suretyship and guaranty] is that a surety insures the debt, is bound with his principal as an original promisor, is a debtor from the beginning; a guarantor answers for the debtor's solvency, must make good the consequences of his principal's failure to pay or perform, is bound only in case his principal is unable to pay or perform.'" (Bracketed text in original.) *Liquidating Midland Bank v. Stecker*, 40 Ohio App. 510, 517 (8th Dist. 1930), quoting *J.R. Watkins Med. Co. v. Lovelady*, 186 Ala. 414, 419 (1914).

But the distinction between guaranties and suretyships is not merely academic. In exchange for their increased liability, sureties have increased legal protections. For example, "a surety can assert the defenses of its principal." *Holben v. Interstate Motor Freight Sys.*, 31 Ohio St.3d 152, 156 (1987). A surety may also "assert his rights . . . after judgment has been entered against him." *See Gholson v. Savin*, 137 Ohio St. 551, 557–58 (1941). Moreover, unlike guarantors, the law provides more limits to which rights a surety may waive. *Compare* R.C. 1341.03 ("In contracts for the payment of money to banks or bankers, sureties . . . shall be considered in all courts, to be sureties, and have all the privileges of sureties, anything in the contract expressed to the contrary notwithstanding.") *with U.S. Bank Natl. Assn. v. Green Meadow*

SWS L.L.C., 2014-Ohio-738, ¶ 31 (5th Dist.) ("A party can waive its potential legal defenses against enforcement of a guaranty as a term within the guaranty.").

These differences between suretyships and guaranties are important to economic growth because they facilitate commercial lending in higher risk/reward scenarios, such as business startups and development in underserved areas. First, the distinctions allow lenders, borrowers, and sureties or guarantors the flexibility to structure commercial loans in a way that works best for all parties involved—thereby providing more avenues for businesses and investors to obtain funding. Second, the distinctions specific to guaranty agreements make it possible for financial institutions to lend money in situations where a traditional loan may not otherwise be possible. A significant percentage of commercial lending would not be feasible if those loans were backed only by suretyships because of the increased risk (and cost) associated with obtaining and enforcing those agreements. For example, a surety can often delay enforcement for years, simply by litigating all the possible surety defenses, meaning that obtaining them is more time-intensive, complicated, and costly for lenders and borrowers alike. This case illustrates that very point: the trial court granted summary judgment to Huntington National Bank based on the plain language of the Guaranty, but the First District remanded for findings of fact based on a lender's implied duty to sureties.

Eliminating the distinctions between sureties and guarantors—as the First District has effectively done—will profoundly affect the lending industry in Ohio. First, it will single-handedly abrogate hundreds of thousands of standard guaranty agreements currently in place, upending the very risk calculus the parties already negotiated. This includes many commercial and industrial loans over $1 million, about half of which in the U.S. are fully or partially guaranteed. Beyhaghi, *Third-Party Credit Guarantees and the Cost of Debt: Evidence from*

Corporate Loans, 26 Rev. Fin. 287, 288 (2022). Second, it will create commercial lending deserts in underserved areas. As noted above, lending to new developments or underserved areas frequently depends upon guaranties and the exclusion of surety defenses (with the increased risk they carry). Financial institutions often cannot consider these types of loans without the certainty of a guaranty. Without the security of guaranty agreements, lending will necessarily become more expensive and less available for higher risk/reward scenarios. This will invariably mean fewer startup businesses, less development in historically overlooked neighborhoods, fewer opportunities for entrepreneurs with minimal credit history, and fewer small business expansions—resulting in less economic investment and slower economic growth.

B. The First District reversed well-settled interpretations of standard guaranty agreements and retroactively transformed guaranties to suretyships.

The First District ignored the express, industry-standard language of both the Guaranty (t.d. 6) and Credit Agreement (t.d. 3) in concluding that Mr. Schneider was a surety instead of a guarantor. In so doing, the court made three critical errors with enormous implications for the financial services industry in Ohio.

First, the First District disregarded time-honored factors showing that the standard agreement here was a guaranty:

1. **Whether the contract uses the word "guarantee" or "guarantor," instead of "surety."** *See Liquidating Midland Bank*, 40 Ohio App. at 516 ("The use of the word 'guarantee' in an agreement of guaranty, although not conclusive, imports not an absolute but a conditional promise to pay."); *LaSalle Bank Natl. Assn. v. Belle Meadows Suites L.P.*, 2010-Ohio-3773, ¶ 22 (2d Dist.) ("'"A guarantor, like a surety, is bound only by the precise words of his contract. Other words cannot be

added by construction or implication.”’”), quoting *G.F. Business Equip., Inc. v. Liston*, 7 Ohio App.3d 223, 224 (10th Dist. 1982), quoting *Morgan v. Boyer*, 39 Ohio St. 324, 326 (1883); 1 Restatement of the Law 3d, Suretyship & Guaranty, Interpretation of the Secondary Obligation—Use of Particular Terms, § 15(a) (1996) (“[I]f 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 also PNC Bank v. Schram*, 1999 WL 252729, *2 (1st Dist. Apr. 30, 1999) (“The law requires an express agreement to create a suretyship; it will not be implied.”).

2. **Whether the guaranty is made in a separate and distinct agreement.** *See Weber*, 117 Ohio St. at 293 (“The 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.”); *Liquidating Midland Bank*, 40 Ohio App. at 517–18 (“The petition shows that the guaranty is . . . contained in a separate instrument. This, in our opinion, is strong evidence that it was intended to be a conditional obligation.”).

3. **Whether the guaranty is conditional upon nonpayment by the principal.** *See LaSalle Bank*, 2010-Ohio-3773, at ¶ 21 (2d Dist.) (“Unlike a surety, who is primarily liable along with his principal on the principal’s obligation, a guarantor’s liability is contingent on a default by his principal, in which event the guarantor becomes absolutely liable on the principal’s obligation when the guarantor is notified of the default.”); *Weber*, 117 Ohio St. at 293 (“The obligation of a guarantor . . . is fixed only by the inability of the principal debtor to discharge the

obligation . . . ."); *Liquidating Midland Bank*, 40 Ohio App. at 517 ("'[A] guarantor answers for the debtor's solvency . . . [and] is bound only in case his principal is unable to pay or perform.'"), quoting *Lovelady*, 186 Ala. at 419 (1914).

<u>These longstanding factors easily demonstrate that the agreement here is a guaranty:</u>

1. The words ***guarantee***, ***guarantor***, or ***guaranty*** appear in Schneider's agreement over 90 times. *See generally* t.d. 6, Guaranty.) In contrast, the word ***surety*** appears only once, and it was used to affirm that Mr. Schneider was waiving notice rights with respect to "any surety" and other non-parties. (*See id.* ¶ 5.2.)

2. The Guaranty was separate from—and Mr. Schneider was not a party to—the Credit Agreement between the lenders and borrowers. (*See generally* t.d. 3, Credit Agreement; t.d. 6, Guaranty.)

3. The Guaranty was expressly conditional on nonpayment by the principal: it was enforceable against Mr. Schneider only "[i]f the Debt or any part thereof shall not be paid in full when due and payable . . . .") (Emphasis added.) (*See* t.d. 6, Guaranty ¶ 3.)

<u>**Second**</u>, the court misinterpreted the meaning of guaranteeing payments ***when due and payable***. The court quoted Paragraph 3 of the Guaranty, which uses industry standard language and provides:

> 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***. If the Debt or any part thereof shall not be paid in full when due and payable, Agents and the Lenders, in each case, shall have the right to proceed directly against Guarantor under this Agreement to collect the payment in full of the Debt, regardless of whether or not Agent or Lenders shall have theretofore proceeded or shall then be proceeding against any

> Borrower or any other Person obligated on the Debt or Collateral . . . .

(Emphasis added by court of appeals.) *See Huntington Natl. Bank v. Schneider*, 2023-Ohio-4813, ¶ 18 (1st Dist.), quoting Guaranty ¶ 3. The First District focused on this "due and payable" language to erroneously conclude that guaranteeing payments ***when due and payable*** amounts to being primarily liable on the debt. *See id.* ¶ 20 ("[B]ecause Schneider is primarily liable under the agreements for the debt as and when the payment became due and payable, we hold that Schneider is a surety under the agreements."). This interpretation was wholly erroneous.

Ohio courts have long interpreted agreements that guarantee payments when ***due and payable*** as guaranty agreements—not suretyships. *See Galloway v. Barnesville Loan*, 74 Ohio App. 23, paragraph two of the syllabus (7th Dist. 1943) (holding that agreement was not a suretyship where the endorser "guarantee[d] the payment of th[e] note when due or any time thereafter"); *Liquidating Midland Bank*, 40 Ohio App. at 515 (holding that guarantee agreement was a "secondary obligation" where the signer "guarantee[d] . . . the full and prompt and punctual payment of the principal . . . according to [the principal agreement's] terms and tenor"); *see also Fifth Third Bank v. Jarrell*, 2005-Ohio-1260, ¶ 14–16 (10th Dist.) (interpreting as a guaranty an agreement that "guarantees the prompt payment when due of all indebtedness and liabilities"); *LB-RPR REO Holdings, L.L.C. v. Ranieri*, 2012-Ohio-2865, ¶ 21 (10th Dist.) (interpreting as a guaranty an agreement that "guarantees to Lender . . . the payment and performance of the Guaranteed Obligations as and when due and payable"); *Cincinnati v. PE Alms Hill Realty LLC*, 2023-Ohio-2784, ¶ 7 (1st Dist.) (interpreting as a guaranty an agreement that "guarantees to Lender . . . the payment and performance of the Guaranteed Obligations . . . as and when the same shall be due and payable"); *SMS Financial 30, L.L.C. v. Frederick D. Harris, M.D., Inc.*, 2018-Ohio-

2064, ¶ 39 (8th Dist.) (interpreting as a guaranty an agreement that "guarantees prompt pay of the indebtedness evidenced by and arising under the above Agreement when each payment becomes due"); *Bayview Loan Servicing, L.L.C. v. Alex Solomon Family Ltd. Partnership*, 2011-Ohio-6168, ¶ 9 (8th Dist.) (same); *Hursh Builders Supply Co. v. Clendenin*, 2002-Ohio-4671, ¶ 14 (5th Dist.) (same); Sandra M. Rocks, *Provisions of Standard Commercial Guarantee Agreements*, at 12 (2010)[1] (same).

Similarly, Mr. Schneider's attempt to transform his guaranty into a suretyship by relying on Section 5.2(b) of the Guaranty—which waives any right to require the lender to first seek recourse against the principal—is contrary to Ohio law. "A creditor need not proceed against a principal debtor before pursuing a guarantor who has given an absolute guaranty. . . ." (Cleaned up.) *Citizens Bank Natl. Assn. v. Ranch Rd. Superior Properties, L.L.C.*, 2016-Ohio-7590, ¶ 26 (9th Dist.); s*ee also Campco Distributors, Inc. v. Fries*, 42 Ohio App.3d 200, 201 (2d Dist. 1987) ("The 'absolute guarantee' language created an unconditional undertaking on the part of the guarantors that they would perform the obligation immediately upon the principal debtor's default. The creditor need not pursue and exhaust the principal before proceeding against the guarantor."); *Reiner v. Kelley*, 8 Ohio App.3d 390, 394 (10th Dist. 1983) ("If only a conditional guaranty be involved, the creditor must first exhaust means to compel payment by the principal debtor before proceeding against the guarantor."); *Eden Realty Co. v. Weather-Seal, Inc.*, 102 Ohio App. 219, 222, (9th Dist. 1957) (an "absolute guarantee" means "it is unnecessary to first pursue and exhaust the principal before proceeding against the guarantor"); *Harshman Dynasty, L.L.C. v. Mason*, 2014-Ohio-1108, ¶ 13–14 (2d Dist.) (rejecting attempt to invoke surety defenses and holding that

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[1] https://www.cgap.org/sites/default/files/CGAP-Technical-Guide-Provisions-of-Standard-Commercial-Guarantee-Agreements-Oct-2010.pdf

guaranty was enforceable without lender first proceeding against principal); U.S. Department of Justice, *Civil Resource Manual*, 84 Guaranty Agreements[2] ("The SBA['s] . . . standard guaranty agreement is totally unconditional. Thus, liquidation of collateral or proceeding against the primary obligor is not required prior to suit on the SBA guaranty agreement."); Sandra M. Rocks, *Provisions of Standard Commercial Guarantee Agreements*, at 13 (2010)[3] ("The term 'absolute and unconditional' means that no condition need be satisfied, and no remedy need be pursued against the primary obligor, before any rights against the guarantor under the guarantee become enforceable.");

Mr. Schneider "absolutely and unconditionally guarantee[d] the prompt payment in full of all of the Debt." (T.d. 6, Guaranty ¶ 3.) And he "waive[d] any right to require . . . Lender . . . to resort for payment or to proceed directly or at once against any person, including any Borrower . . . ." (*Id.* ¶ 5.2(b).) As this Court long ago stated: "'"The rule that a guarantor is held only by the express words of his promise does not entitle him to demand an unfair and strained interpretation of those words, in order that he may be released from the obligation which he has assumed."'" *LaSalle Bank*, 2010-Ohio-3773, at ¶ 22 (2d Dist.), quoting *G.F. Business*, 7 Ohio App.3d at 224, quoting *Morgan*, 39 Ohio St. at 326. Having contractually agreed to these terms, Mr. Schneider cannot now use these provisions to argue that he is no longer a guarantor.

<u>Third</u>, not only did the First District misinterpret the Guaranty, but the court erroneously relied on the Credit Agreement to further conclude that Mr. Schneider was a surety. As relevant here, the Credit Agreement provides that "each Borrower, each Guarantor and each Subsidiary of

[2] https://www.justice.gov/jm/civil-resource-manual-84-guaranty-agreements
[3] https://www.cgap.org/sites/default/files/CGAP-Technical-Guide-Provisions-of-Standard-Commercial-Guarantee-Agreements-Oct-2010.pdf

the Borrowers party hereto . . . hereby unconditionally and irrevocably guarantees jointly and severally . . . the due and punctual payment . . . ." *See Huntington Natl. Bank*, 2023-Ohio-4813, at ¶ 19 (1st Dist.), quoting t.d. 3, Credit Agreement § 11.1, pg. 138. As explained above, this guarantee of "due and punctual payment" in the credit agreement could not transform Mr. Schneider's Guaranty to a suretyship. But what's more, Mr. Schneider was not even a party to the Credit Agreement. (*See* t.d. 3, Credit Agreement, pg. 143–49, signature pages.) Moreover, by its own terms, the Credit Agreement did not apply to him: "For purposes of clarification, the term 'Guarantor' ***expressly excludes the Individual Guarantors***.'" (Emphasis added.) (*See id.* § 1, pg. 16.) Thus, besides not being a party to the Credit Agreement, Mr. Schneider was an *Individual Guarantor* and "expressly exclude[d]" from the very provision on which the court of appeals relied. (*See id.* at pg. 19 ("'Individual Guarantors' mean Harold Sosna, Raymond Schneider and Faye Sosna.").)

The First District took a standard guaranty agreement in which the words ***guarantee***, ***guarantor,*** or ***guaranty*** appear over 90 times and transformed it to a suretyship because it guaranteed payments ***when due and payable***. Not only do Ohio courts consistently hold that "due and payable" language is consistent with a guaranty (as explained above), but it also is nearly unimaginable that any guaranty in the last two centuries has lacked that same (or similar) language. *See, e.g.*, *Parker v. Riddle*, 11 Ohio 102, 106–08, 1841 WL 55 (Dec. 1, 1841) (holding that defendant "would be a guaranty" where he "agreed to guaranty the payment thereof to the plaintiff, ***when the note should become due and payable***") (Emphasis added.) The court of appeals single-handedly transformed the historical and established meaning of the innumerable guaranties currently in effect in Ohio. The First District's judgment thus constitutes a sea change in the lending services industry and in the precedent on which financial institutions have relied. It creates widespread uncertainty and is almost certain to curtail the flow of credit. This Court should reverse the First District and affirm Ohio's longstanding position on the meaning and enforceability of guaranties.

> **<u>Huntington Bank's alternative proposition of law</u>: Even for a surety agreement, a lender does not have an extracontractual 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.**

C. The First District adopted increased duties on the financial services industry that are untenable and will further restrict commercial lending.

The First District compounded its error that Mr. Schneider was a surety by adopting the increased risk doctrine, which provides that financial institutions have a duty to disclose to sureties facts that materially increase the risk of default. This new duty is unworkable and creates unnecessary obstacles to commercial lending. Historically speaking, the person vouching for another bore the burden of ensuring the soundness of their pledge. *See Magee v. Manhattan Life Ins. Co.*, 92 U.S. 93, 99–100 (1875) ("[T]he creditor is under no obligation, legal or moral, to search for the surety, and warn him of the danger of the step he is about to take. No case has gone so far as to require this to be done."). The First District dramatically altered this principle: financial institutions now bear the risk for ill-advised suretyships. But the ramifications are much broader than just the lending industry. Lenders will have no incentive to rely on sureties if suretyships have no teeth when things go poorly—after all, sureties are unnecessary when things go well. As a result, commercial loans will be more expensive and less available. And economic development will suffer accordingly.

To be clear, Amici do not contest—and wholeheartedly support—well-settled duties to avoid misrepresentations or fraudulent inducements. *See, e.g.*, *Blon v. Bank One, Akron, N.A.*, 35

Ohio St.3d 98, 101 (1988) ("Full disclosure may . . . be required of a party to a business transaction 'where such disclosure is necessary to dispel misleading impressions that are or might have been created by partial revelation of the facts.'"), quoting *Connelly v. Balkwill*, 174 F.Supp. 49, 53 (N.D. Ohio 1959). And this Court has long held that "a party to a business transaction *in a fiduciary relationship* with another is bound to make a full disclosure of material facts known to him but not to the other." (Emphasis added.) *Id.*

But this Court has made "clear that a fiduciary duty does not arise between a [financial institution] and a prospective borrower unless there are special circumstances." *See Groob v. KeyBank*, 2006-Ohio-1189, ¶ 22. It has also repeatedly affirmed that financial institutions and their customers generally "stand at arm's length." *See id.* ¶ 20–21; *Blon*, 35 Ohio St.3d at 101–02; *Stone v. Davis*, 66 Ohio St.2d 74, 78 (1981). This Court should thus reject the First District's imposition of increased duties for financial institutions to advise sureties on the wisdom of their pledge and join those states rejecting the doctrine of increased risk. *See, e.g., Rachman Bag Co. v. Liberty Mut. Ins. Co.*, 46 F.3d 230, 235–36 (2d Cir. 1995) (explaining that "New York cases have repeatedly stated that, absent a request from the surety, silence on the part of the obligee" seldom creates a defense to enforcement of surety); *Mainstreet Bank v. Gisch*, 2011 WL 1743913, *6 (Minn.App. May 9, 2011) (stating that "the restatement provisions [imposing a duty to disclose] have never been cited, let alone adopted, by Minnesota courts"); *Inst. & Supermarket Equip., Inc. v. C & S Refrig., Inc.*, 609 So.2d 66, 68 (Fla.App. 1992) ("The trial court erred in relying on the Restatement . . . because Florida does not follow that reasoning. Our supreme court has held that with an absolute and unconditional guarantee the 'creditor is not required to notify the guarantor of any dishonor.'"), quoting *Chris Craft Industries, Inc. v. Van Valkenberg*, 267 So.2d 642, 646 (Fla. 1972); *Florida Steel Corp. v. Indiana Lumberman's Mut. Ins. Co.*, 794 S.W.2d 175, 177 (Ky.

App. 1990) ("'Absent either an express agreement in a surety bond or inquiry by the surety, the creditor has no duty to keep the surety informed of the debtor's financial situation. Rather, the surety bears the burden of making inquiries and informing itself of the relevant state of affairs of the party for whose conduct it has assumed responsibility.'"), quoting *State v. Peerless Insurance Company*, 501 N.Y.S.2d 651, 652 (1986). As the U.S. Supreme Court succinctly stated: "If the surety desires information, he must ask for it. The creditor is not bound to volunteer it." *Magee* at 99.

But, even if this Court were inclined to conclude that financial institutions have *some* duty to disclose increased risks to sureties, it should hold that a lender has an affirmative duty to disclose only where it:

> (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

See 1 Restatement of the Law 3d, Suretyship & Guaranty, § 12(3) (1996). This Court should further hold that lenders should have "no burden . . . to investigate for the benefit of the [surety]," or "to take any particular steps to ascertain whether the [surety] is acquainted with facts that the [lender] may reasonably believe are known to both of them." *See id.* at Comment f. Similarly, the Court should clarify that "it is unlikely" that a bank will have a duty to disclose when a surety "has independent access to information about the principal obligor." *See id.* at § 13(5), Comment h. This can all be done if the Court adopts Section 12 of the Restatement in its entirety.

Adopting the Restatement's framework of duties would undoubtedly cause significant disruption in the lending industry. But it would at least be guided by—and limited to—the Restatement's coherent and comprehensive approach—causing less instability and disruption than the amorphous and nebulous principles offered by the First District.

The First District's judgment created widespread unpredictability within the lending industry by rolling back well-settled interpretations of standard guaranty agreements and imposing increased duties on commercial lenders. This Court should reaffirm the distinction between sureties and guarantors and restore uniformity and stability regarding financial institutions' potential duties to sureties.

V. CONCLUSION

For these reasons, Amici ask this Court to reverse the First District's judgment and adopt The Huntington National Bank's propositions of law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of June 2024, a copy of the foregoing *Brief of Amici Curiae Ohio Bankers League, Ohio Credit Union League, American Bankers Association, and America's Credit Unions in Support of Appellant Huntington National Bank* was served by email upon the following:

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