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SUPREME COURT OF KENTUCKY  
CASE NO. 2008-SC-877

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MEMBERS CHOICE CREDIT UNION,  
BEACON COMMUNITY CREDIT UNION,  
SERVICE ONE CREDIT UNION,  
C&O CREDIT UNION,  
GREATER KENTUCKY CREDIT UNION, INC.,  
and KENTUCKY EMPLOYEES CREDIT UNION

APPELLANTS

v. Appeal from the Kentucky Court of Appeals  
Case No. 2007-CA-002384  
and  
Franklin Circuit Court  
Civil Action No. 06-CI-00737

HOME FEDERAL SAVINGS AND LOAN  
ASSOCIATION

APPELLEE

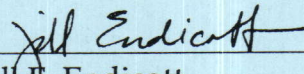
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**BRIEF FOR APPELLEE,  
HOME FEDERAL SAVINGS AND LOAN ASSOCIATION**

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**CERTIFICATE REQUIRED BY RULE 76.12(6)**

The undersigned does hereby certify that copies of this Brief were served upon the following named individuals by mail on the 5<sup>th</sup> day of June, 2009: Hon. Phillip J. Shepherd, Franklin Circuit Court, P.O. Box 678, Frankfort, KY 40602-0678; Sam Givens, Clerk of the Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601; and David T. Wilson, II, Skeeters, Bennett, Wilson & Pike, P.O. Box 610, Radcliff, KY 40160. The undersigned further certifies that the record on appeal was not withdrawn from the Clerk of the Perry Circuit Court.

  
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STATEMENT REGARDING ORAL ARGUMENT

Appellee Home Federal Savings and Loan Association requests oral argument to assist with clarification of the issue, arguments, and authorities presented, and to respond to inquiries of the Court.

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## COUNTERSTATEMENT OF THE CASE

Appellee Home Federal Savings and Loan Association ("Home Federal") provides the following supplemental information concerning the single issue of law presented on appeal, the parties, the statutory background, and the procedural history.

Appellants raise only one question of law for review: whether the Commonwealth of Kentucky's Office of Financial Institutions ("OFI"), now known as the Department of Financial Institutions ("DFI"),<sup>1</sup> is authorized by the plain language of KRS 286.6-107 to approve geographic fields of membership by state-chartered credit unions. Appellants' Motion for Discretionary Review and Appellants' Brief focus exclusively upon the statutory construction of KRS 286.6-107(2), which states: "Credit union memberships shall be limited to persons having a common bond of similar occupation, association or interest." KRS 286.6-107(2).

Appellants, Members Choice Credit Union, Beacon Community Credit Union, Service Once Credit Union, C&O Credit Union, Greater Kentucky Credit

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<sup>1</sup> Effective June 16, 2008, the Commonwealth of Kentucky Office of Financial Institutions ("OFI") was reorganized as the Department of Financial Institutions ("DFI"), as indicated by the Commonwealth of Kentucky ex rel Office of Financial Institution's Motion to Substitute Counsel, filed August 16, 2008, in the Kentucky Court of Appeals proceeding, Case Nos. 2007-CA-02353 - 2007-CA-02384. The Kentucky Court of Appeals Opinion Affirming of October 31, 2008, refers to the "OFI," consistent with the name of the office when the briefs were filed before the Court of Appeals. There is no question that the Court of Appeals Opinion Affirming applies with equal force and effect to the DFI. (See Exh. 1, Kentucky Court of Appeals Opinion Affirming, 10/31/08, at footnote 1, stating, "By Order entered on September 29, 2008, Charles A. Vice, Commissioner of The Office of Financial Institutions (n/k/a Department of Financial Institutions), was substituted for Cordell G. Lawrence, Executive Director of The Office of Financial Institutions.") Hereinafter, the Office of Financial Institutions ("OFI"), now known as the Department of Financial Institutions ("DFI"), will be referred to as "OFI/DFI."

Union, Inc., and Kentucky Employees Credit Union, are state-chartered credit unions that wish to continue to offer credit union membership to new members based upon the new members' place of residence. They argue that the language of KRS 286.6-107 authorizes the OFI/DFI to grant geographic-based charters to state credit unions. Appellee, Home Federal, a federally-chartered savings and loan, takes the position that it does not. The Kentucky Court of Appeals and the Franklin Circuit Court agreed with Appellee Home Federal. (Ky. Ct. App. Opinion Affirming, 10/31/08, at 3, attached hereto and incorporated by reference in full herein as Exh. 1; Franklin Cir. Ct. Opinion & Order, initially entered 10/25/07 and finalized by docket entry on 11/2/07, attached hereto and incorporated by reference in full herein as Exh. 2, R. at 528-558.) Notably, the OFI/DFI has not filed nor joined the appeal before this Court.

A. Statutory and Legislative History

Since 1922, the Kentucky General Assembly has regulated the formation of state-chartered credit unions in Kentucky. Section 883g-5 of Carroll's Kentucky Statutes initially contained no limitations on the categories of persons eligible to join state-chartered credit unions.<sup>2</sup> (Exh. 3, attached.) This changed in

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<sup>2</sup> Credit unions are regulated in the United States under a dual system: they may apply for charter, become chartered, and then be regulated either by the government of a particular state or by the federal government. Federal law permits the federal chartering of credit unions pursuant to the Federal Credit Union Act, 12 USC § 1759, and federal credit unions are regulated by the National Credit Union Administration. Historically, at both the state and federal levels, credit union membership has been limited to specifically defined categories or "fields" of membership. See generally, National Credit Union Admin. v. First Nat. Bank & Trust Co., 118 S.Ct. 927 (1998). Section 109 of the Federal Credit Union Act defines fields of membership for federal credit unions. Three states do not charter or permit state-chartered credit unions at all pursuant to state law. In these states, credit union organizers may apply for federal charter.



1940, when the Kentucky General Assembly began to define the permissible "fields of membership," the categories of people or groups eligible for membership in state-chartered credit unions. In 1940, the General Assembly amended Section 883g-5 to authorize four fields of membership, including a geographic field, also known in the industry as a "community" field of membership. The membership limitations of the statute in 1940 stated:

[M]embership in each corporation, organized under the terms of this Act, shall be limited, within the several corporations so organized, to those persons, societies, associations, co-partnerships, and corporations, who or which, independent of their membership in the credit union, shall have a mutual affiliation, one with another, by either (1) duly enrolled membership in a religious or social, or education group or association, or (2) by identity of profession, occupation, trade or business, so long as members of such profession, occupation, trade or business are bona fide members of a common bona fide profession, occupation, trade or business group, or (3) by the identity of their employer, or (4) by their location for common residential or occupational purposes, within an area, to be defined in the bylaws, containing, at the time the credit union is so organized, not more than two thousand persons, societies, associations, co-partnerships, or corporations, who or which, by the purchase of shares and election to membership, might become members of such credit union.

(Exh. 3, attached hereto and incorporated by reference in full herein.)

In 1942, the General Assembly renumbered and recodified Section 883g-5 as KRS 290.080; no substantive changes were made at the time.<sup>3</sup> (Exh. 4, attached.) Section 290.080 continued to define the fields of membership for state-chartered credit unions in Kentucky until 1984, when the statute was repealed and replaced with a significantly different provision for membership.

In 1984, the Kentucky General Assembly repealed KRS 290.080 and enacted KRS 290.170(2), pursuant to Senate Bill 255. The legislative history of Senate Bill 255 is instructive. The General Assembly patterned the first draft of Senate Bill 255 after the Model Credit Union Act of 1979. The Model Credit Union Act of 1979 provided for specific, limited fields of membership as follows:

*Credit Union membership may include, but is not necessarily limited to groups having a common bond of similar occupation, association or interest, or to groups who reside within an identifiable neighborhood, community, or rural district, or to employees of a common employer, or to persons employed within a defined business district, industrial park or shopping center, and members of the immediate family of such persons. (Emphasis added.)*

Model Uniform Credit Union Act of 1979, Art. 4, Sec. 4.10. (Emphasis added; Exh. 5, attached and incorporated by reference in full herein.)

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<sup>3</sup> KRS 290-080(2) (now repealed) stated: Membership in each corporation shall be limited to those persons, societies, associations, partnerships, and corporations, which independent of their membership in the credit union, have mutual affiliation by either: a) Duly enrolled membership in a religious, social or educational group or association; b) Identity of profession, occupation, trade or business so long as members of such professions, occupation, trade or business are bona fide members of a common bona fide profession, occupation, trade or business group; c) Identity of their employer; or d) Location for common residential or occupational purposes, within an area to be defined in the bylaws, containing, at the time the credit union is organized, not more than two thousand persons, societies, associations, partnerships, or corporations eligible to become members of such credit union.

As originally drafted and introduced, Section 11(2) of Senate Bill 255

stated:

Credit union membership *shall be limited to persons* having a common bond of similar occupation, association or interest, or to *persons* who reside within an identifiable neighborhood, community, or rural district, or to employees of a common employer, or to persons employed within a defined business district, industrial park or shopping center, and members of the immediate family of such persons.

(Exh. 6A, Journal of the Senate of the General Assembly of the Commonwealth of Kentucky Regular Session of 1984, Vol. 1 at 477, attached and incorporated by reference in full herein; Exh. 6B, printing of Senate Bill No. 255, 2/14/84, attached and incorporated by reference in full herein.)

The similarities between the credit union membership criteria stated in the Model Credit Union Act and this draft of Senate Bill 255 are obvious. The difference between them is the General Assembly's replacement of the Model Act's permissive, broad statement that "membership may include, but is not necessarily limited to groups . . ." with the requirement that, "membership shall be limited to persons . . ." (Emphasis added; see italicized terms in provisions cited above, noting differences for comparison.) Thus, even in the earliest draft of Senate Bill 255 based upon the Model Act, the General Assembly replaced select terms from the Model Act with language that is more narrow and restrictive.

The draft of Senate Bill 255 that ultimately passed into legislation and was enacted into law by the Kentucky General Assembly limited the criteria for

membership even further. Specifically, Senate Bill 255 as adopted was revised from the earlier draft, quoted above, to delete the express authorization for geographic fields of membership. (Exh. 6A, containing original provision for membership criteria in Section 11(2) at page 477 and revised Section 11(2) at page 487-488.) Senate Bill 255 as amended, adopted, and codified as KRS 290.170(2) stated in its entirety: "Credit union membership shall be limited to persons having a common bond of similar occupation, association or interest." (Id. at 487-88; Exh. 7, Baldwin's KRS-1984 Acts Issue at 1148, attached and incorporated by reference in full herein.) There was no provision for "geographic" or "community" fields of membership. (Exhs. 6A & 7.)

In 2005, KRS 290.107(2) was renumbered as KRS 286.6-107(2). Otherwise unchanged, the renumbered statute continues to limit the fields of membership to "persons having a common bond of similar occupation, association or interest." KRS 286.6-107(2). Thus, the Kentucky statute defining the fields of memberships for state-chartered credit unions has omitted specific reference to geographic fields of membership continuously since 1984, when the General Assembly enacted KRS 290.107(2) pursuant to revised Senate Bill 255. (Exhs. 6A & 7.)

Despite the statutory history and the express terms of KRS 290.107(2), in 2006, the OFI/DFI proposed an administrative regulation captioned "required filing for application to amend or establish bylaws to serve community field of membership." See 808 KAR 3:070, 32 Ky.R. 1497 (Exh. 8, attached). The OFI/DFI

withdrew the administrative regulation less than one month later in the face of formal protests. 32 Ky.R. L-12 (Exh. 9, attached). Appellee Home Federal thereafter discovered that the OFI/DFI had adopted an informal policy by which it continued to authorize credit union membership based upon a geographic field of membership after KRS 290.080 had been repealed, despite the fact that express authorization for geographic fields had been deleted from the statute.<sup>4</sup>

B. Procedural History and Rulings before the Franklin Circuit Court

Home Federal brought suit on May 31, 2006, in Franklin Circuit Court against the Commonwealth of Kentucky, ex rel. the Office of Financial Institutions and Cordell G. Lawrence, Executive Director, challenging this policy. (R. at 1-37; see n. 1, supra.) Home Federal requested that the court enter declaratory judgment finding that (1) the General Assembly no longer authorizes credit union membership based on geographic fields and (2) the OFI/DFI exceeded its delegated powers by approving charters and bylaws of credit unions that permit such fields of membership. (R. at 1-37.)

On February 8, 2007, Home Federal filed a Motion for Summary Judgment seeking a declaration that the OFI/DFI acted outside the scope of its administrative authority by approving credit union charters or by-laws which permit geographic fields of membership. It maintained that the General Assembly limited the fields of membership in KRS 286.6-107 to "persons having a common bond of similar occupation, association or

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<sup>4</sup> As noted previously, the OFI/DFI is not appealing the lower courts' decisions before this Court.

interest." (R. at 148-150).

The OFI/DFI sought to postpone consideration of the Summary Judgment Motion until after discovery had been completed. Its Motion to Stay Response to the Motion for Summary Judgment (R. at 164-68) was heard on February 26, 2007. During the hearing, counsel for OFI/DFI admitted that he could not tell the court what facts were in dispute. (VR No.1; 2/26/07; 9:22:16). The court noted that it read the pending motion to present a pure issue of law, but advised that it would permit discovery if the OFI/DFI in responding to the Motion for Summary Judgment could identify a genuine issue of fact. (VR No.1; 2/26/07; 9:26:30). More directly, the court instructed the OFI/DFI to file an affidavit identifying any disputed issues of fact so that the question of whether discovery was necessary could be revisited. (VR No.1; 2/26/07; 9:24:09, 9:26:42).

Members Choice Credit Union, Beacon Credit Union, Service One Credit Union, C&O Credit Union, Greater Kentucky Credit Union, Inc. and Kentucky Employees Credit Union (hereinafter collectively, "the Intervening Credit Unions" or "Appellants") moved to intervene on March 6, 2007. (R. at 173-74). By order dated March 19, 2007, they were permitted to intervene and respond to Home Federal's pending Motion for Summary Judgment. (R. at 185-86.) The Motion for Summary Judgment was fully briefed by the OFI/DFI (R. at 433-511) and the Intervening Credit Unions. (R. at 200-15).

The OFI/DFI filed a countering Motion for Summary Judgment, agreeing that the controversy could be resolved as a matter of law. (R. at 349-432.) The court heard oral argument on the Motions for Summary Judgment on July 12, 2007. It entered an Opinion and Order on October 25, 2007 which was re-entered on November 2, 2007 due to a failure to properly serve all counsel of record. (R. at 528-558; Exh. 2.) The court dismissed the standing challenge asserted by the OFI/DFI, and it rejected the contention that the action should be dismissed on the grounds that Home Federal had not exhausted its administrative remedies. (Exh. 2.)

On the merits, in an exceedingly well-written and well-supported Opinion, Franklin Circuit Court Judge Phillip J. Shepherd explained precisely why KRS 286.6-107 does not authorize the state chartering of geographic-based credit unions. (Exh. 2.) As if reliance upon the plain language of the statute were not enough, Judge Shepherd swiftly dismantled every argument of Defendant OFI/DFI (no longer a party) and Intervening Defendants (the Appellants here) by carefully and thoroughly tracking the state legislative history, the history of the evolution of the statute under the Model Act of 1979, and even the statutory history and construction of corresponding provisions of the federal act for chartering federal credit unions as interpreted and applied by the United States Supreme Court. (Id.) (Later, a unanimous panel of the Kentucky Court of Appeals, including Judges Keller, Wine, and Lambert (Senior Judge, sitting as

Special Judge by assignment of the Chief Justice), adopted verbatim these portions of Judge Shepherd's Opinion.) (See Exh. 1.)

More specifically, the court acknowledged that statutes must be construed by examining their "plain language." (Exh. 2.) The plain language of KRS 286.6-107 does not authorize the OFI/DFI to approve geographic fields of membership. (Id.) "The statute makes no mention of geographic fields of membership. OFI has interpreted this silence as authorizing geographic fields of membership, notwithstanding the clear legislative history that demonstrates that geographic fields of membership were proposed and rejected by the General Assembly." (Id.) The legislative history establishes that the General Assembly chose to delete from the statute that portion of the Model provision which authorized geographic fields of membership. (Id.)

The court rejected the contention that the statutory phrase "common bond of similar interest" was sufficient to authorize a geographic membership field. Judge Shepherd explained:

The structure of the Model Act itself is instructive on the question of whether the concept of "common interest" includes a common geographic location. Under the Model Act membership may be limited to (1) groups with "similar occupation, association, or interest"; or (2) groups who reside within an identifiable geographic area. The act clearly lists these as two different types of groups. [OFI and the Intervening Credit Unions] interpret the second alternative (geographic area) as duplicative but more restrictive. However, the structure of the paragraph does not suggest that the subsequent clauses are examples of implementing the first, "common bond"



clause. If the common geographic area qualifies as a common bond of similar interest, then the use of the second clause in the Model Act would be entirely redundant. Statutes are to be interpreted so that no part is meaningless or ineffectual. Potter v. Bruce Walters Ford Sales, Inc. 37 S.W.3d 210 (Ky. App.2000).

Moreover, a review of the Kentucky legislation supports the conclusion that residence in an identifiable geographic location is *not* adequate as a common bond to support membership in a credit union. The 1984 Kentucky legislation that defines credit union membership provides that "credit union membership shall be limited to persons having a common bond of similar occupation, association or interest." 1984 Ky. Acts, c. 408, Sec. 11. It is noteworthy that the legislation, as originally introduced in Senate Bill 255, explicitly provided for residence in related geographic areas to qualify as a basis to support credit union membership. The geographic area provisions were deleted from the bill before final passage. . . . Thus, it is clear that the legislature considered and rejected the proposal to allow for geographic fields of membership in credit unions.

(Emphasis added; Exh. 1 at 5-6, referencing drafts of Senate Bill 255, Exh. 6A at 477 & 487-488.)

The Franklin Circuit Court specifically rejected the argument that a "common bond of similar interest" could encompass geographic fields of membership:

Defendant OFI interprets "interest" to "necessarily entail" community fields of memberships. Numerous definitions of interest are offered, none of which clearly entail a geographic field. . . . The examples offered for a common interest in a geographic field actually illustrate how poorly the concepts converge.

Nor can the common bond of geographic interest be that everyone in that community wants affordable financial services. Again, such a common bond would be limitless: everyone wants affordable financial services. . . . The defendants'

interpretation of the statute would vitiate the statutory requirement that makes a common bond a prerequisite for membership. . . . If the term "common bond of interest" includes geographic charters, then removal of the limitation of the Model Act would allow Kentucky to charter credit unions geographically within the Commonwealth without any meaningful limit. The common bond of interest could be as broad as residence in the Commonwealth or even an interest in residence in the Commonwealth. Under this interpretation, the concept of "common bond of interest" would be limitless.

(Emphasis added; Exh. 2 at 7-8.)

Concerning the standard of review, the court refused to give deference to the OFI's interpretation of KRS 286.6-107, since it is required to "discharge its constitutional duty to enforce the boundaries of the separation of powers when an agency seeks to act beyond the scope of its authority by expanding its legislative mandate without authorization." (Exh. 2 at 3-4.) See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984). "OFI cannot implement, by internal policy or regulation, an expansion of its legislative mandate." (Exh. 2 at 4, citing KRS 13B.130). Unless OFI's interpretation of the statute is supported by the language enacted by the legislature, OFI cannot expand its power to approve geographic fields of membership without violating the separation of powers restrictions of Sections 27 and 28 of the Kentucky Constitution. (Exh. 2 at 4.)

Accordingly, the Franklin Circuit Court held: "KRS 286.6-107 does not authorize or permit OFI to approve articles of incorporation or by-laws for state chartered credit unions that provide for a geographic field of

membership." (Exh. 2 at 13). Moreover, "[T]he approval by OFI of credit union by-laws that provide for a geographic field of membership exceeds the scope of OFI's legislatively delegated authority in violation of KRS 13A.130, and Ky. Const., Sec. 27 and 28." (Id.). The court, therefore, prospectively enjoined the OFI/DFI from approving articles of incorporation or by-laws that provide for geographic fields of membership for new credit union members.<sup>5</sup> (Id.).

C. Opinion Affirming by the Kentucky Court of Appeals

The OFI/DFI and Intervening Credit Unions appealed to the Kentucky Court of Appeals, which affirmed the decision of the Franklin Circuit Court in its entirety. The Kentucky Court of Appeals issued its Opinion Affirming summary judgment in favor of Home Federal on October 31, 2008. (Exh. 1, attached and incorporated by reference in full herein.) Incorporating, adopting, and reiterating much of the Franklin Circuit Court's written opinion, the Kentucky Court of Appeals' followed conservative and conventional precepts of statutory construction to explain in-depth precisely why KRS 286.6-107 cannot and should not be interpreted to authorize geographic-based charters to state credit unions.

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<sup>5</sup> The status of credit union members who leave the field of membership after being admitted to a particular credit union is not at issue in this case and it never has been. Pursuant to KRS 286.6-125, Retention of membership, "Members who leave the field of membership may be permitted to retain their membership in the credit union, under reasonable standards established by the board of directors." Accordingly, the rulings of the Franklin Circuit Court would have no effect upon current credit union members who joined their credit unions based upon a geographic field of membership.

The Franklin Circuit Court, the Kentucky Court of Appeals, and the parties agree that the material facts are undisputed. (See Exhs. 1 and 2).<sup>6</sup> Appellants do not allege any dispute of fact; they simply repeat the facts as stated in the Kentucky Court of Appeals' Opinion Affirming. (Appellants' Brief, served 4/10/09 at 1-2.)

Apart from their argument that KRS 286.6-107 permits geographic fields of memberships, Appellants do not challenge any other rulings of the Kentucky Court of Appeals or Franklin Circuit Court, including rulings on standing, exhaustion of administrative remedies, and laches. Appellants seek review solely to revisit and revise the Kentucky Court of Appeals' holding that KRS 286.6-107 does not authorize the state chartering of geographic-based credit unions.

Notably, the rulings of the Kentucky Courts of Appeals are applied prospectively only. The Franklin Circuit Court and Kentucky Court of Appeals took great care to ensure the protection of the five state-chartered credit unions operating with OFI/DFI charters for geographic-based members by applying their decision prospectively only.<sup>7</sup> Appellants have not challenged this approach as unfair, unjust, or in need of modification. The OFI/DFI—charged with chartering and regulating state financial institutions—does not even seek

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<sup>6</sup> The Kentucky Court of Appeals succinctly recites the operative facts in its Opinion Affirming. (Exh. 1 at 3-5.)

<sup>7</sup> The Court's decision would only affect new credit union members pursuant to KRS 286.6-125. See Footnote 5, supra.

discretionary review or reversal by this Court, and its posture is telling. The Kentucky Court of Appeals decision is solid and should stand.

### ARGUMENT

Pursuant to the long-standing doctrines of statutory construction, the statute's plain meaning, and statutory and legislative history, KRS 286.6-107(2) does not authorize OFI/DFI to permit geographic fields of membership in state-chartered credit unions.

#### I. The Standard of Review Is De Novo

The parties agree that there are no facts in dispute, and this case presents only one question of law: whether KRS 286.6-107 permits geographic fields of membership. (See generally, Brief of Appellees.) Accordingly, this Court's review and statutory construction of KRS 286.6-107 is de novo. See Martin Co. Home Health Care v. Cabinet for Health & Family Serv., 214 S.W.3d. 324, 326 (Ky. App. 2007).

The OFI/DFI's erroneous interpretation of KRS 286.6-107(2) is not entitled to any deference whatsoever. See National Credit Union Admin. v. First Nat. Bank & Trust Co., 118 S. Ct. 927, 938-939 (1998) (explaining application of Chevron analysis in similar context, pursuant to Chevron USA, Inc. v. Natural Resources Defense Council, Inc., 104 S. Ct. 2778 (1984)); (Exh. 2 at 3-4.). This Court is "not bound by an erroneous administrative interpretation no matter how long standing such an interpretation." Camera Center, Inc. v. Revenue Cabinet, 34 S.W3d 39, 41 (Ky. 2001). Appellants do not argue that the OFI/DFI's

interpretation of KRS 286.6-107 is entitled to deference. To the contrary, they concede that this Court should construe KRS 286.6-107(2) pursuant to a de novo standard of review, without deference to the OFI/DFI's prior interpretation or application of this statute. (See Brief of Appellants at 6.)

II. KRS 286.6-107(2) Does Not Permit Geographic Fields of Membership.

The plain meaning of KRS 286.6-107(2) does not authorize fields of membership for state-chartered credit unions based upon geography, or location of business or residence. Language supporting a geographical field of membership is simply absent altogether from the express terms of the statute.

KRS 286.6-107, Membership defined, states:

(1) The membership of a credit union shall be limited to and consist of the subscribers to the articles of incorporation and such other persons within the common bond set forth in the bylaws as have been duly admitted members, have paid any required entrance fee or membership fee, or both, have subscribed to one (1) or more shares, and have paid the initial installment thereon, and have complied with such other requirements as the articles of incorporation or bylaws specify.

(2) Credit union membership shall be limited to persons having a common bond of similar occupation, association or interest.

KRS 286.6-107.

The seminal duty of the court in construing a statute is to effectuate the intent of the legislature by analyzing the plain meaning of the statutory language. Stephenson v. Woodward, 182 S.W.3d 162, 169-70 (Ky. 2006). Words of the statute must be given their normal, ordinary, everyday meaning, and a statute must be interpreted literally unless ambiguous. Id. The court is not at

liberty to abandon the plain language of a statute. AIK Selective Self-Insurance Fund v. Minton, 192 S.W.3d 415, 418 (Ky. 2006). “Where a statute is intelligible on its face, the courts are not at liberty to supply words or insert something or make additions however just or desirable it might be to supply an omitted provision.” Id.

The language of KRS 286.6-107 is unambiguous and its meaning is plain: fields of membership in state-chartered credit unions “shall be limited to persons having a common bond of similar occupation, association or interest. ” KRS 286.6-107(2). There are only three permissible fields of membership: (1) common bond of similar occupation; (2) common bond of similar association; or (3) common bond of similar interest. Common bond of place of residence—geographical membership—is *not listed* as a sanctioned category under the statute. (Id.) Because it is omitted from the membership provision in the statute, a geographic field of membership simply does not qualify as one of the three enumerated criteria or categories for credit union membership.

– When a statute defines the scope of permissible activities, criteria, or categories, “the enumeration of particular things excludes ideas of something else not mentioned.” See Lewis v. Jackson Energy Coop. Corp., 189 S.W.3d 87, 91 (Ky. 2006). “It is a general rule of statutory construction that the enumeration of particular items or categories excludes others not specifically mentioned.” Schwindel v. Meade Co., 113 S.W.3d 159, 168 (Ky. 2003); Commonwealth v. Harris, 59 S.W.3d 896, 900 (Ky. 2001).

Express reference in KRS 286.6-107 to membership based upon "geography," "community," "location for residency," or "location for occupational purposes" is conspicuously absent. The General Assembly certainly knows how to draft statutory language to create a geographic field of membership when it intends and chooses to do so. See KRS 290.080 (repealed). The General Assembly obviously chose to exclude geographic fields of membership from KRS 286.6-107. (See Sections III and IV, infra, expounding upon legislative intent behind KRS 290.080 as demonstrated by statutory and legislative history.)

Because any reference to a geographical field of membership is wholly absent from the literal, express provisions of the current governing statute, this Court is not at liberty to supply it. See Commonwealth v. Holloway, 225 S.W.3d 404, 406 (Ky. 2007). Well-established rules of statutory construction under Kentucky law prohibit courts from reading unstated, unpronounced, and unlisted terms into a statute. See Commonwealth v. Harris, 59 S.W. at 900 ("[A] court may not insert language to arrive at a meaning different from that created by the stated language in a statute."). The Kentucky Supreme Court has stated repeatedly that courts are "not at liberty to add or subtract from the legislative enactment nor discover meaning not reasonably ascertainable from the language used." Hale v. Combs, 30 S.W. 3d 146, 151 (Ky. 2000). "To determine legislative intent, a court must refer to the words used in enacting the statute rather than surmising what may have been intended but was not expressed." Id. Moreover,



under general rules of statutory construction, courts are strictly prohibited from interpreting statutes at variance with their stated language. See General Motors Corp. v. Book Chevrolet, Inc., 979 S.W. 2d 918, 919 (Ky. 1998).

The Franklin Circuit Court and Kentucky Court of Appeals faithfully adhered to the statutory language, consistent with these long-standing rules of statutory construction. They correctly found that the legislature did not intend to authorize geographic fields of membership in state-chartered credit unions under KRS 286.6-107. (Exhs. 1 & 2.)

Appellants insist that KRS 286.6-107(2) is ambiguous and that the legislature expanded, rather than reduced, the permissible fields of membership with its enactment. The argument rings hollow. The words of the statute are simple, clear, and comprehensible; they are not equally susceptible to multiple reasonable interpretations. Although the General Assembly did not specifically define the words "occupation, association, or interest" within KRS 286.6-107 itself, the lack of written statutory definitions for words that, on their face, are easily understood by their plain and ordinary meaning is wholly unnecessary, and it certainly does not justify expansion of the statutory criteria to add language (for geographical fields of membership) that is not there. See Schwindel v. Meade Co., 113 S.W.3d 159 at 168; Commonwealth v. Harris, 59 S.W. at 900.

Appellants cite no caselaw to support their contention that the language of KRS 286.6-107(2) is ambiguous. To the contrary, courts in other jurisdictions addressing credit union membership statutes have NOT found similar language

to be ambiguous, ineffective, or otherwise problematic. See, e.g., National Credit Union Admin. v. First National Bank & Trust Co., 118 S.Ct. 927 (1998) (finding language of federal statute limiting credit union membership to “groups having a common bond of occupation or association” to be unambiguous); North Carolina Saving & Loan League v. North Carolina Bankers Assoc., 276 S.E.2d 404 (N.C. 1981) (implicitly finding language of statute permitting credit union membership by “groups having a common bond of similar occupation, association, or interest, or groups who reside within an identifiable neighborhood . . . ” to be unambiguous).

The Franklin Circuit Court swiftly and persuasively dismantled Appellants’ contention that the legislature intended to expand membership criteria when it repealed KRS 290.080 in 1984 and enacted KRS 286.6-107(2) in its place, specifically reducing the list of persons who could qualify for credit union membership. (Exh. 2, quoted supra at 10-12.) Besides noting the obvious illogic of the premise, the Franklin Circuit Court and the Kentucky Court of Appeals explain precisely why “common bond of similar occupation, association or interest” in KRS 286.107(2) should not be read—and cannot be read under tenants of plain meaning statutory construction—to include geographic fields of membership. (Id.) In essence, besides being inconsistent with the plain meaning, to read KRS 286.6-107(2) in this manner is to read it so broadly that the statute is rendered meaningless. (Exhs. 1 & 2.) The trial court and Court of Appeals

properly rejected such an approach. See Potter v. Bruce Walters Ford Sales, Inc., 37 S.W.3d 210 (Ky. App. 2000); (Exhs.1 & 2).

**III. The Statutory History of KRS 286.6-107(2) Establishes Legislative Intent to Exclude Geographic Fields of Membership.**

Consistent with and in support of a plain meaning construction of KRS 286.6-107(2), the statutory history of Kentucky's credit union membership statute definitively establishes legislative intent to exclude geographic fields of membership today. Tracing the evolution of Kentucky's credit union membership statute from its inception in 1922, it is imminently clear that the Kentucky General Assembly expressly, deliberately, and unmistakably eliminated from Kentucky law the OFI/DFI's authority to charter credit unions based upon geographic fields of membership.

The statutory history of today's credit union membership statute, KRS 286.6-107(2), is summarized as follows:

1922: Carroll's Kentucky Statutes, Section 883g-5, was enacted and contained no limits upon credit union membership.

1940: Carroll's Kentucky Statutes, Section 833g-5 was amended to limit credit union membership to mutually affiliated groups in four categories: (1) religious, social, or educational groups or associations; (2) profession, occupation, trade, or business groups; (3) groups sharing identity of employer; or (4) groups within a defined area of location for common residential or occupational purposes, not to exceed 2,000 people. (Exh. 3).

1942: Section 833g-5 was renumbered as KRS 290.080, without any revisions to the statutory terms or language. (Exh. 4). KRS 290.080 continued to limit credit union membership to mutually affiliated groups in four categories: (1) religious, social, or educational groups or associations; (2) profession, occupation, trade, or business groups; (3)

groups sharing identity of employer; or (4) groups within a defined area of location for common residential or occupational purposes, not to exceed 2,000 people. (Exh. 4.)

1984: KRS 290.080 was repealed, and KRS 290.170(2) was enacted in its place. KRS 290.170(2) limited credit union membership to "persons having a common bond of similar occupation, association or interest." (Exh. 7.)

2005: KRS 290.170(2) was renumbered as KRS 286.6-107(2) and no other changes were made. KRS 286.6-107(2) continued to limit credit union membership to "persons having a common bond of similar occupation, association or interest."

Thus, the statute evolved over time to limit and reduce dramatically the types of fields of membership eligible for state-charter under Kentucky law. Beginning with a limitless membership statute, the Kentucky General Assembly restricted and contracted membership to four membership fields in 1940. Notably, occupational groups and geographical groups were permitted under the 1940 statute. In 1984, the General Assembly reduced the number of membership fields further, eliminating geographical fields of membership altogether, but retaining the field of membership for occupational groups.

The General Assembly knew exactly what it was doing and it unquestionably intended to effectuate these changes as reflected by the plain terms of each revision it made to the credit union membership statute. "It is beyond dispute that whenever a statute is amended, courts must presume that the Legislature intended to effect a change in the law." Godby v. Commonwealth, 187 S.W.3d 857, 859 (Ky. App. 2006) (quoting Brown v. Sammons, 743 S.W.2d 23, 24 (Ky. 1988)); see Haven Point Enterprises, Inc. v.

United Kentucky Bank, Inc., 690 S.W.2d 393 (Ky. 1985) (stating that it must be assumed that the General Assembly knew of the earlier statutes).

Accordingly, pursuant to long-standing principles of statutory construction, the court must assume that the legislature intentionally changed the language of Kentucky's credit union membership statute for the explicit purpose of effecting a change in the law itself. See Inland Steel Co. v. Hall, 245 S.W.2d 437, 438 (Ky. 1952). Specifically, when the Kentucky General Assembly amended the membership criteria of the statute to omit geographic groups, the legislature intended that geographic fields of membership would no longer be permitted by state-chartered credit unions under Kentucky law. Id. at 438.

With such an unequivocal expression of legislative intent based upon the entire statutory history of credit union membership restrictions under Kentucky law since 1922, there should be no question that the Franklin Circuit Court and Kentucky Court of Appeals correctly ruled that geographic fields of membership are not permitted by KRS 286.6-107(2). "The seminal duty of a court in construing a statute is to effectuate the intent of the legislature." Commonwealth v. Plowman, 86 S.W.3d 47, 49 (Ky. 2002). Sometimes statutory history is nonlinear, undecipherable, or nonexistent altogether. That is not the case here. Here, the statutory history is linear, clear-cut, and undeniable – geographic fields of membership are no longer authorized by Kentucky law.

Appellants' contention that the Kentucky General Assembly intended to continue to include geographic fields of membership when it repealed KRS

290.080 and enacted KRS 290.170(2), now numbered KRS 286.6-107(2), is implausible. The notion that the legislature understood and meant to continue to permit geographical fields of membership *after specifically deleting those terms from the statute* controverts long-standing, unwavering precepts of statutory construction under Kentucky law. See Godby v. Commonwealth, 187 S.W.3d at 859 ("It is beyond dispute that whenever a statute is amended, courts must presume that the Legislature intended to effect a change in the law.")

IV. The Legislative History of KRS 286.6-107(2) Establishes Legislative Intent to Exclude Geographic Fields of Membership.

The legislative history behind the statutory evolution of KRS 286.6-107 confirms legislative intent to drop geographic fields of membership from the permitted groups for charter under Kentucky law. The current statute, KRS 286.6-107(2), previously numbered KRS 290.170(2), was enacted in 1984. The history of the 1984 legislation is telling.

In 1984, the legislature contemplated significant changes to the credit union membership statute. The initial draft of Senate Bill 255, Section 11(2), was patterned after the Model Uniform Credit Union Act of 1977, Art. 4, Section 4.10. (Exhs. 5, 6A, 6B; infra. at 4-6.) The original draft of Senate Bill 255 at Section 11(2) authorized fields of membership based upon: (1) similar occupation, association or interest; (2) residence within an identifiable neighborhood, community, or rural district; (3) employment with a common employer; (4) employment within a defined business district, industrial park, or shopping center; or (5)

membership within the immediate family of someone who otherwise qualified. (Exh. 6A at 477; compare Exh. 5, Model Act.) This version of the bill did not pass.

Instead, the General Assembly passed into law a revised version of Senate Bill 255, Section 11(2), to authorize fields of membership based only upon similar occupation, association or interest. (Exhs. 6A at 487-88; 6A, & 7.) This provision remains in effect today. KRS 286.6-107(2).

The General Assembly's process to draft, revise, and enact KRS 286.6-107(2) establishes legislative intent to exclude geographic fields of membership from the statute. The early version of the proposed legislation permitted geographic fields of membership; the later version adopted and enacted into law does not. (KRS 286.6-107(2); Exh. 6A, 6B, 7.) Like the statutory history, the legislative history definitely establishes legislative intent to preclude geographic fields of membership from state-chartered credit unions. See, Fiscal Court v. City of Louisville, 559 S.W.2d 478, 480 (Ky. 1977) (noting that prior drafts of statute demonstrate where the legislature intentionally changed a statute's meaning).

The legislative history of KRS 286.6-107(2), like the statutory history, confirms that the Kentucky General Assembly knows how to designate, articulate, and expressly describe geographic or community fields of membership for state-chartered credit unions when it chooses to do so. If the General Assembly had meant for KRS 286.6-107(2) to include a geographic field of membership, it simply would have said so. (See Exh. 6A at 477 & 478-88.)

Kentucky's legislature deliberately omitted geographic fields of membership from the list of permissible membership categories in KRS 286.6-107(2). (Id.) Appellant Credit Unions ask this Court to supply and imply terms in a statute that simply do not and never were intended to exist. Travelers Indem. Co. v. Reker, 100 S.W.3d 756 (Ky. 2003) (noting that court may not supply words, add language, or insert into a statute items not expressed); Commonwealth v. Allen, 980 S.w.2d 278, 280 (Ky. 1998) ("To determine legislative intent, a court must refer to 'the words used in enacting the statute rather than surmising what may have been intended but was not expressed.'")

V. The Purpose of KRS 286.6-107 Is Not Rendered Meaningless by Exclusion of Geographic Fields of Membership.

Appellants strive to demonstrate that the lower courts' construction of KRS 286.6-107(2) will render it meaningless. Their position is, again, untenable.

Appellants cite no judicial precedents or persuasive authority to establish that the language and terms in the context of KRS 286.6-107(2) is "meaningless," "limitless," or otherwise ineffectual. To the contrary, similar language in substantially similar contexts has been found to be unambiguous and unproblematic. See, e.g., National Credit Union Admin. v. First National Bank & Trust Co., 118 S.Ct. 927 (1998); North Carolina Saving & Loan League v. North Carolina Bankers Assoc., 276 S.E.2d 404 (N.C. 1981). The Franklin Circuit Court's ruling, adopted by the Court of Appeals, swiftly dismantles Appellants'



contention that interpreting KRS 286.6-107(2) to exclude geographic fields of membership renders it meaningless. (Exh. 1 at 15-16.)

VI. The Effect of the Lower Courts' Decisions on the Parties is Fair and Reasonable

Credit unions have traditionally limited membership, so the limits upon membership in KRS 286.6-107(2) are nothing new. See generally National Credit Union Admin. v. First Nat. Bank & Trust Co., 118 S. Ct. 927, 938-939 (1998). As noted above, the decisions of the Franklin Circuit Court and Kentucky Court of Appeals provide for prospective application only, avoiding any prejudice (or even consequence) to existing credit union members. (Exhs. 1 & 2.) Credit union members who gained membership previously are assured continuing membership pursuant to KRS 286.6-125. Moreover, nothing in the Franklin Circuit Court or Kentucky Court of Appeals' rulings prohibit or otherwise effect the ability of credit union organizers to pursue a federal credit union charter under the membership criteria imposed by federal statute. (See Footnote 2, supra.)

The Franklin Circuit Court notes that only five credit unions have been chartered using a geographic field of membership since enactment of Senate Bill 255 in 1984. (Exh. 2, at 12, n. 6 (citing OFI Mem. in Supp. of Mot. to Dismiss at 2, filed 7/25/06), R. at 48-88.) Accordingly, the trial court found that the scope and timing of Appellants' challenge to the credit union membership statute "has had minimal impact." (Id.)

VII. Statutory Interpretation Must Be Confined To The Narrow Issue Presented—Whether Geographic Fields Of Membership Are Permitted by KRS 286.6-107(2).

This appeal addresses whether the OFI/DFI is authorized by KRS 286.6-107(2) to permit geographic fields of membership in state-chartered credit unions. The questions presented are not: (1) whether KRS 286.6-107(2) is good policy; (2) whether KRS 286.6-107(2) is “modern”; or (3) how the words “occupation,” “association,” or “interest” are specifically defined by the statute. See Woods, 142 S.W.3d at 45-46 (noting only the legislature—not the courts—have authority to establish public policy); Bailey v. Commonwealth, 70 S.W.3d 414 (Ky. 2002) (“Assessing the wisdom of legislative action is not within the purview of the judiciary.”).

Statutory construction and appellate review should be confined exclusively to the narrow issue presented. Because the Appellants’ challenge to the precise question presented is weak, Appellants seek to expand their purview to encompass issues where their arguments may garner more favor or more traction. This Court should not be distracted from the narrow issue presented and correctly decided by the Franklin Circuit Court and the Kentucky Court of Appeals - KRS 286.6-107(2) does not permit geographical fields of membership as a matter of law.

CONCLUSION

For the foregoing reasons, Appellee Home Federal respectfully requests that the Kentucky Court of Appeals Opinion Affirming of October

31, 2008 be affirmed.

Respectfully submitted,

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