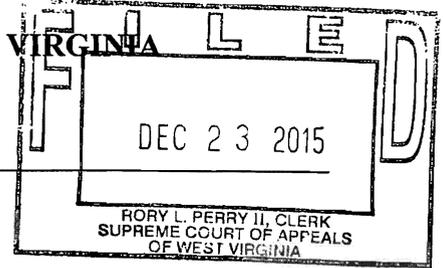


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA  
Docket No. 15-0898



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AT CHARLESTON

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**INTERNATIONAL UNION OF OPERATING  
ENGINEERS, LOCAL UNION NO. 132  
HEALTH AND WELFARE FUND, ET AL.,**

**Petitioners,**

v.

**L.A. PIPELINE CONSTRUCTION  
COMPANY, INC., and UNITED BANK, INC.  
Respondents.**

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**BRIEF OF *AMICI CURIAE*  
WEST VIRGINIA BANKERS ASSOCIATION, INC.  
AND  
COMMUNITY BANKERS OF WEST VIRGINIA  
IN SUPPORT OF RESPONDENTS**

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Upon a Certified Question from the  
United States District Court for the Southern District of West Virginia  
Civil Action No. 3:13-0537

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## I. STATEMENT OF INTEREST

West Virginia Bankers Association, Inc., (the “WVBA”) and Community Bankers of West Virginia (the “CBWV,” and together with WVBA, the “Associations”), each represent the interests of approximately eighty (80) federally-insured financial institutions in the State of West Virginia. The Associations are generally comprised of financial institutions headquartered within the State of West Virginia, and most of the Associations’ members’ business comes from West Virginia residents.

Members of the WVBA and the CBWV engage in the business of issuing letters of credit in a variety of transactions and contexts. Clearly, matters pertaining to the expiration of letters of credit, including interpretation of letters of credit and statutes that may affect letters of credit, are of critical importance to the Associations. In particular, the certified question before this Court deals with matters critical to the letter-of-credit operations of members of the respective Associations. Both the WVBA and the CBWV believe that their perspectives will be of assistance to this Court in the resolution of the certified question.<sup>1</sup>

The WVBA and the CBWV support all of the arguments made by the Respondents to the certified question presented to this Court. The Associations believe that the Uniform Commercial Code -- specifically, in this case, West Virginia Code § 46-5-106(d) -- controls the expiration or termination date of a “perpetual” letter of credit.

The use of a letter of credit is but one of many ways to ensure the performance of a third party in our commercial system. The use of letters of credit has increased dramatically over the last few decades, and both commercial letters of credit and standby letters of credit have

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<sup>1</sup> All costs of filing this brief have been paid by West Virginia Bankers Association, Inc. and Community Bankers of West Virginia, and no other party to this proceeding made a monetary contribution to fund the preparation or submission of this brief of *Amici Curiae*. Neither Respondent nor counsel for Respondents authored this brief.

gained the favor of both lenders and contracting parties, in particular for their ease of use and the certainty of the rules regarding the obligations of the issuing bank. As a result, letters of credit have become an integral part of many facets of modern commerce.

The procedural posture of the underlying case is significant to the extent that it is being used by Petitioners and *amicus curiae* West Virginia Division of Labor (the “DOL”) to attempt to undercut well-established statutory and case law, and equate a letter of credit with a surety bond. If this Court were to accept the positions of Petitioners and the DOL, then it would upend the cornerstone of the letter of credit: its certainty.

Additionally, as a result, the consequences of such a change would reverberate throughout not only the banking industry, including the potential creation of bank regulatory problems, but would extend to the banking industry’s commercial customers as well. Because of these myriad and wide-ranging consequences, the Associations believe firmly that the statutory provisions regarding letters of credit -- set forth clearly and unambiguously in West Virginia Code §§ 46-5-101, *et seq.* -- control the instant case and provide the only clear, consistent, and predictable means of determining when a “perpetual” letter of credit expires.

## II. SUMMARY OF ARGUMENT

Letters of credit are unique instruments that serve the function of guaranteeing performance by a third party. While standby letters of credit may serve the same performance guarantee functions as surety bonds and other types of performance guaranties, the mechanical operation of letters of credit is significantly different. Generally, standby letters of credit obligate the issuing bank to pay funds to a beneficiary simply by virtue of the beneficiary’s statement that it is drawing upon the letter, accompanied, if the letter of credit requires, by certain other statements or documents. This stands in stark contrast to a surety bond, in which

case a surety may be required to pay and/or perform once a default or other condition is proven up.

Because of the unique nature of letters of credit, requiring an issuing bank to make payment upon a summary and conclusory statement and draw, there is specific statutory and case law governing letters of credit. This law is designed to provide certainty for all parties involved -- but in particular the issuing bank -- regarding when the obligation of the issuing bank ceases. In West Virginia, this law is embodied in the Uniform Commercial Code--Letters of Credit, W. Va. Code §§ 46-5-101, *et seq.* In particular, as it applies to this case, the Uniform Commercial Code in West Virginia provides that a letter of credit that purports to be perpetual nevertheless expires five years from its issuance. W. Va. Code § 46-5-106(d) (1996).

Holding that a “perpetual” letter of credit expires after five years pursuant to the Uniform Commercial Code is the simplest and most reasonable way of reading the Uniform Commercial Code together with the Wage Payment and Collection Act. It also leaves the Commissioner of the Division of Labor with significant remedies should an employer still be required to maintain a bond after the letter of credit expires.

Moreover, if the Court accepts the arguments of Petitioners and the DOL -- namely, that one section of West Virginia’s Wage Payment and Collection Act that addresses *bond termination* and that makes a passing reference to letters of credit somehow trumps the Uniform Commercial Code’s entire article that specifically addresses letters of credit -- then uniformity and certainty with respect to letters of credit will be lost. Such an interpretation also would raise significant bank regulatory concerns.

The Associations respectfully urge this Court to adopt their interpretation of the Uniform Commercial Code’s interaction with the Wage Payment and Collection Act, as this interpretation would both provide the certainty, uniformity, and regulatory protections that the

Uniform Commercial Code was designed to provide, as well as continue to provide the Commissioner and employees with remedies and protections should an employer's bonding obligations under the Wage Payment and Collection Act continue after a "perpetual" letter of credit's expiration under the Uniform Commercial Code.

### III. ARGUMENT

#### A. Standby letters of credit are unique instruments that should not be confused with or analogized to surety or performance bonds.

This case involves the use of a standby letter of credit.<sup>2</sup> A standby letter of credit involves three parties: the applicant (the bank customer and underlying obligor), the issuing bank, and the beneficiary (the payee upon a default). *See Airline Reporting Corp. v. First Nat'l Bank of Holly Hill*, 832 F.2d 823, 826 (4th Cir. 1987). A standby letter of credit is a standalone obligation of the issuing bank to pay the beneficiary; it represents an obligation independent of the applicant's separate, underlying agreement with or obligation to the beneficiary. With most standby letters of credit, the issuing bank promises to pay the beneficiary upon the beneficiary's written certification of the applicant's default.

As a result of this structure, although a standby letter of credit may serve the same purpose as a surety bond, it is of an entirely different nature, and operates differently. Among other distinctions, letters of credit and performance bonds "differ in the scope of their benefits. Traditionally, performance bonds benefit third parties [with respect to the subject of] the bond. Letters of credit specify the beneficiary . . . . In short, the third-party beneficiary principles of bonds do not find application in standby [letter of credit] cases . . . ." John F. Dolan, *The Law of*

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<sup>2</sup> For a lengthy discussion about the differences between a traditional commercial letter of credit and a standby letter of credit, see John F. Dolan, *The Law of Letters of Credit, Commercial and Standby Credits* ¶ 1.04 (Rev. Ed. 1996). Of particular import in this case is that, in contrast to a commercial letter of credit in a sales context, where an issuing bank expects to pay, the issuing bank does *not* have an expectation to pay when issuing a standby letter of credit to support a third party's obligations. *Id.* This becomes relevant in the analysis below.

*Letters of Credit, Commercial and Standby Credits* ¶ 1.05[1] (Rev. Ed. 1996). See also, e.g., *Western Sec. Bank, N.A. v. Superior Court*, 933 P.2d 507, 517 (Cal. 1997) (“[t]he rules applicable to surety relationships do not govern the relationships between the parties to a letter of credit transaction.”).<sup>3</sup>

Additionally, under a standby letter of credit, a beneficiary need not establish in litigation nonperformance of the underlying obligation before resorting to the issuing bank; rather, the beneficiary often must do no more than certify nonperformance and demand payment from the issuing bank. This triggers an immediate obligation of the issuing bank to pay the beneficiary, and leaves to the applicant the burden of litigating whether the beneficiary properly drew upon the letter of credit.

Of critical importance in the letter of credit versus bond distinction is that letters of credit are a matter of

function and nature, not of nomenclature. If the banking industry were to begin marketing a primary obligation tomorrow that was (1) payable against the presentation of documents and (2) independent of the underlying transaction, [then] it would not matter to letter of credit law if the banks were to call that product a “guaranty.” *Letter of credit law would be applicable to it.*

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<sup>3</sup> The Supreme Court of California went on:

The Court of Appeal mistook standby letters of credit . . . by seeing them only as a form of guaranty. The court analogized the standby letter of credit to a guaranty because of the perceived functional similarities. One consequence of that analogy was that the court applied to standby letters of credit a rule whose legal justifications originated in the subrogation rights owed to sureties. However, . . . *letters of credit -- standby or otherwise -- are not a form of suretyship, and the rights of the parties to these transactions are not governed by suretyship principles. . . .*

While analogies can improve our understanding of how and why letters of credit are useful, *analogies cannot substitute for recognizing the letters' unique qualities. . . .* “*In short, a letter of credit is a letter of credit.* As Bishop Butler once said, ‘Everything is what it is and not another thing.’”

*Id.* (emphasis added) (citations omitted).

*Id.* ¶ 1.05[2] (emphasis added).

The law has recognized the unique nature of letters of credit by affording them their own governing statutory law under the Uniform Commercial Code: in West Virginia, Article 5 of Chapter 46 governs letters of credit.<sup>4</sup> Like the rest of the Uniform Commercial Code, Article 5 is a robust statutory scheme that is designed to provide a *uniform* governance of a widely-used commercial document.

The provisions of Article 5 are addressed specifically to letters of credit and no other subject. There is no similar statutory provision in West Virginia governing bonds generally, or other performance guarantees. For all of these reasons, letters of credit are unique instruments that should not be confused with or analogized to surety or performance bonds.

**B. “Perpetual” letters of credit expire five years after issuance under West Virginia Code § 46-5-106(d) (1996).**

**1. West Virginia’s Uniform Commercial Code specifically addresses the expiration of a letter of credit that purports to be perpetual.**

West Virginia’s Uniform Commercial Code specifically addresses the expiration of letters of credit. W. Va. Code § 46-5-106 (1996). With respect to a letter of credit that purports to be perpetual, that provision provides that “[a] letter of credit that states that it is perpetual expires five years after its stated date of issuance, or if none is stated, after the date on which it is issued.” *Id.* § 5-106(d). Although the Uniform Commercial Code provides that the parties to a letter of credit can, by agreement, alter certain terms of the letter of credit from those provided by default in the statutory scheme, the expiration of a letter of credit is *not* one of these

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<sup>4</sup> Indeed, the introductory official comment indicates that “[t]he objectives of the original and revised Article 5 are best achieved [] by defining the peculiar characteristics of a letter of credit that distinguish it and the legal consequences of its use from other forms of assurance such as secondary guarantees, *performance bonds*, and insurance policies, and from ordinary contracts, fiduciary engagements, and escrow arrangements . . . .” W. Va. Code § 46-5-101 (1996), Official Comment (emphasis added).

terms. W. Va. Code § 46-5-103(c) (1996). A letter of credit expires pursuant to the Uniform Commercial Code and not pursuant to any other agreement or provision. *Id.* There can be no clearer specific application of statutory law to the expiration of a “perpetual” letter of credit than that adopted in Article 5 of the Uniform Commercial Code in West Virginia.

In this case, the letter of credit at issue was a letter of credit on a form drafted by the DOL and approved by the Office of the Attorney General of West Virginia,<sup>5</sup> on which form was the statement in the heading that the letter of credit was perpetual.<sup>6</sup> This brings the letter of credit squarely within the provisions of § 46-5-106(d), such that the “perpetual” letter of credit expired by operation of law five (5) years after its stated date of issuance or, if no stated date, after the date on which it was issued. Moreover, by application of W. Va. Code § 46-5-103(c), any other provision in the form letter of credit drafted by the DOL that purports to extend or alter such an expiration is void as a matter of law.

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<sup>5</sup> For a variety of reasons, letters of credit are often drafted by the issuing bank, and often construed strictly against the issuing bank as a result. To the extent that the DOL -- the *beneficiary* -- drafted the letter of credit in this case, the letter of credit should be construed strictly against the DOL and more liberally in favor of the issuing bank. See John F. Dolan, *The Law of Letters of Credit, Commercial and Standby Credits* ¶ 4.08[3] (Rev. Ed. 1996) (noting that some courts construe letters against drafter, and suggesting that it is appropriate to put the burden on the beneficiary “to review the [letter of] credit”).

<sup>6</sup> The Associations note that, as of September 26, 2014 -- after the underlying civil action was commenced, and since this case has been pending -- the DOL has revised its form of letter of credit to, among other things, add a provision that the issuing bank will automatically renew the perpetual letter of credit until the letter of credit is released by the Commissioner of the DOL. See West Virginia Division of Labor Wage & Hour, Wage Bond, Letter of Credit Form, *available at* <http://www.wvlabor.com/newwebsite/Documents/wageforms/Final%20LC%20WB-102114.pdf> (last visited Dec. 17, 2015).

While the Associations leave it to the Respondents to argue the more specific issues applicable to this particular case, the Associations note that this revision by the state is a telling change, given the current underlying litigation and certified question before this Court, and shows that the state realized -- too late for this case -- its predicament with respect to the expiration of a letter of credit under its previous form.

**2. The Wage Payment and Collection Act's provisions regarding the termination of a bond do not apply to standby letters of credit governed by the West Virginia Uniform Commercial Code.**

The wage payment and collection statute's provisions regarding the termination of a wage payment bond do not apply to standby letters of credit governed by the Uniform Commercial Code.

Despite the Uniform Commercial Code's clear application to the letter of credit in this case, the Petitioners and the DOL take the position that West Virginia's wage payment bond statute's termination provision somehow supersedes the Uniform Commercial Code's expiration provision. The gist of the Petitioners' and the DOL's argument is that a single subsection of the Wage Payment and Collection Act<sup>7</sup> somehow supersedes an entire body of law devoted exclusively to letters of credit.

The Petitioners' and the DOL's positions fail for several reasons. First, the wage payment bond statute governs wage payment generally, and the wage payment bond termination provision on its face covers only wage payment *bonds*.<sup>8</sup> The entire Wage Payment and Collection Act mentions letters of credit only twice (and only tangentially), and the wage payment bond termination provision does not mention letters of credit at all,<sup>9</sup> and addresses termination, not expiration.

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<sup>7</sup> The meaning of the statutory text in W. Va. Code § 21-5-14(g) is not nearly as clear as the DOL suggests. For example, the statute could be interpreted to mean that the commissioner may terminate a bonding *requirement, not a specific bond*. Even if it is read to mean a specific bond, it could be construed to apply only to *bonds* and not to other types of performance guarantees, like letters of credit. Finally, even if it is read to mean a specific letter of credit issued to satisfy the requirements of the Wage Payment and Collection Act, it could be interpreted to apply to termination before the letter of credit *otherwise expires, by its own terms or by operation of law*.

<sup>8</sup> As discussed above, with respect to favoring the Petitioners and the DOL, this provision's scope and meaning are ambiguous at best.

<sup>9</sup> Nor do any of the regulations under the Wage Payment and Collection Act address wage bonds at all. See W. Va. Code R. §§ 42-5-1, *et seq.* (1990); *id.* (2014); *id.* (proposed Dec. 9, 2015).

In contrast, the Uniform Commercial Code specifically addresses letters of credit -- indeed, it devotes an entire article just to letters of credit. Likewise, the Uniform Commercial Code provision on the expiration of a letter of credit is directed specifically at the expiration of a letter of credit. Thus, it is the *Uniform Commercial Code* that is the more specific provision as to the expiration of a letter of credit, and, accordingly, it is the *Uniform Commercial Code's* provisions that should control.<sup>10</sup>

Second, the Uniform Commercial Code article on letters of credit was amended in 1996, *after* the wage payment bond provision was last amended in 1991. *See* W. Va. Code §§ 46-5-101, *et seq.*; 21-5-14. If the legislature had intended to except “perpetual” letters of credit “serving as wage bonds” from the five-year expiration of “perpetual” letters of credit under the Uniform Commercial Code, it would have done so in 1996 when it amended the Uniform Commercial Code.<sup>11</sup> *See, e.g., Motto v. CSX Transp., Inc.*, 220 W. Va. 412, 420, 647 S.E.2d 848, 856 (2007) (declining to read an exception into a statute where legislature could have added exception if it had intended to do so).<sup>12</sup>

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<sup>10</sup> The DOL incorporates into its argument a familiar canon of statutory construction: the specific controls the general. DOL Am. Br. at 12. The DOL argues that the wage payment bond provision should control because it is specific as to this type of bond, while arguing that the Uniform Commercial Code provisions only govern letters of credit generally. *Id.* But that argument turns the statutory construction analysis on its head. As discussed above, it is the Uniform Commercial Code that is the more specific as to the expiration of a letter of credit.

<sup>11</sup> Or, for that matter, after this Court decided *Leary v. McDowell County National Bank*, 210 W. Va. 44, 552 S.E.2d 420 (2001), discussed below.

<sup>12</sup> In *Motto*, this Court was confronted with a question whether a plaintiff may re-file an action against the state that had previously been dismissed for failure to follow the statutory pre-suit notification requirements, once the plaintiff complies with those pre-suit notification requirements. In addressing that question, this Court observed:

While we acknowledge and tend to agree with DEP’s argument that application of the Savings Statute to permit re-filing thwarts the legislative intent behind the pre-suit notice requirement, the language chosen by the Legislature in enacting the Savings Statute compels this result. The Legislature expressly provided in the Savings Statute that any action timely filed and not dismissed on the merits may [be] refiled. *The*

Third, and perhaps most compelling, the simplest and most reasonable reading of the Uniform Commercial Code together with the Wage Payment and Collection Act in this context is that, if an employer satisfies the Wage Payment and Collection Act requirements by obtaining a “perpetual” letter of credit that expires after five years under the Uniform Commercial Code, then, prior to such expiration, the Commissioner need only elect not to release the bonding requirement under the Wage Payment and Collection Act and instead either (a) require that employer to post a substitute bond or letter of credit in place of the expiring letter of credit if the Commissioner does not believe the employer should be released entirely from the bonding requirement, or (b) call or draw upon the letter of credit before its expiration, if the terms of the letter of credit so provide.

This construct serves the purposes of both the Uniform Commercial Code in providing clarity and certainty to issuers of letters of credit, and the Wage Payment and Collection Act in guaranteeing payment of wages to employees.<sup>13</sup> Moreover, the important point here is that, if this Court holds, as the Associations urge, that a “perpetual” letter of credit expires

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*Legislature had the power to specifically exclude actions dismissed for failure to comply with the provisions of W. Va. Code §§ 55–17–1, et seq., from [the] scope of the Savings Statute. It did not do so. Where the Legislature itself has not acted, it is improper for this Court, under the guise of statutory interpretation, to amend legislative enactments in order to judicially impose upon the Legislature a result it did not intend. Therefore, we can not [sic] read into W. Va. Code § 55–2–18 an exception for actions dismissed for failure to comply with the provisions of W. Va. Code §§ 55–17–1, et seq.*

*Id.* (emphasis added).

<sup>13</sup> The DOL argues that West Virginia’s legislature “placed specific responsibilities on the Commissioner to determine whether a covered employer meets specific criteria, including the payment of all wages owed to employees, before approving the termination of a wage bond.” DOL Am. Br. at 7. This is a true statement, but it misses the point. As discussed above, the Commissioner has several remedies available if a “perpetual” standby letter of credit is approaching its statutory expiration under the Uniform Commercial Code, any of which will adequately protect employees and serve the Commissioner’s functions.

after five years pursuant to the Uniform Commercial Code, then neither the Commissioner nor employees are left without a remedy.

Finally, it is worth pointing out again that a standby letter of credit is not a form of a traditional wage bond. Rather, a standby letter of credit is a unique instrument that does not operate the same way as a performance bond. For all of these reasons, the Wage Payment and Collection Act's provisions regarding the termination of a wage bond are not applicable to a standby letter of credit governed by the Uniform Commercial Code.

**3. This Court's prior decision in *Leary v. McDowell County National Bank*, 210 W. Va. 44, 552 S.E.2d 420 (2001) is distinguishable and should not be extended to post-1996 letters of credit.**

This Court's decision in *Leary v. McDowell County National Bank*, 210 W. Va. 44, 552 S.E.2d 420 (2001) is distinguishable on its face from the instant case, and it should not be extended to post-1996 letters of credit.

Contrary to the Petitioners' and the DOL's arguments, *Leary* is inapplicable in this case because this case turns on the 1996 version of the Uniform Commercial Code, not the 1963 version examined and applied by the *Leary* court. *See Leary*, 210 W. Va. at 51, 552 S.E.2d at 427. Indeed, this Court expressly limited its decision to the 1963 version of the Uniform Commercial Code, saying then that "our decision today *is limited* in that it was *not necessary* for us to address W. Va. Code § 46-5-106 (1996)." *Id.* n.9 (emphasis added). Thus, this Court left open the issue whether a letter issued under the revised Uniform Commercial Code would expire pursuant to the provisions of the Uniform Commercial Code.

This is important because, in *Leary*, the issue was whether a stated expiration date meant that the parties agreed that a letter of credit could be revocable at that date, and, if so, whether that meant that the Commissioner had agreed that the letter of credit would be revoked on that date. *See id.*, 210 W. Va. at 51, 552 S.E.2d at 427. There was, at that time, no statutory

provision that expressly provided for a letter of credit's expiration. *See id.* This is an important distinction, as revocability is not the same as expiration.

The DOL suggests two reasons why this Court should extend *Leary* to post-1996 perpetual letters of credit. The first reason is that both versions of the Uniform Commercial Code refer to other potential governing law with respect to letters of credit. *See* DOL Am. Br. at 8-9 (citing W. Va. Code §§ 46-5-103(b), 46-5-103, Official Comment No. 2, 46-5-101, Official Comment). The DOL's reliance on these statements is misplaced because the DOL reads the statements out of context. These statements refer to other law respecting letters of credit, such as the Uniform Customs and Practice, the Convention on Independent Guarantees and Standby Letters of Credit, or other international letter of credit law. *See, e.g.,* W. Va. Code §§ 46-5-101, Official Comment, 46-5-103, Official Comment 2. What these references do *not* contemplate is that a wage payment statute would trump a uniform commercial provision.

The second reason put forth by the DOL why this Court should extend *Leary* to post-1996 letters of credit is because a contrary result would run against the Wage Payment and Collection Act. *See* DOL Am. Br. at 9. But, as discussed above, there are several mechanisms by which the Commissioner could implement the protections of the Wage Payment and Collection Act even if a particular "perpetual" letter of credit used in satisfaction of the requirements under the Wage Payment and Collection Act expires after five years pursuant to the Uniform Commercial Code. Accordingly, this reason, too, is insufficient to warrant upsetting established law regarding the expiration of letters of credit.

Simply put, there is no reason to extend *Leary* to address the expiration of a letter of credit under the 1996 version of the Uniform Commercial Code.

**C. Bank regulatory considerations, as well as uniformity and parity considerations, also militate in favor of finding that “perpetual” letters of credit expire five years after issuance under the Uniform Commercial Code.**

In addition to the legal arguments above, there are significant bank regulatory and uniformity and parity reasons to find that perpetual letters of credit expire after five years.

**1. Bank regulatory considerations militate in favor of finding that “perpetual” letters of credit expire five years after issuance under the Uniform Commercial Code.**

Significant bank regulatory considerations militate in favor of finding that letters of credit expire as provided in the Uniform Commercial Code. Primarily, if a bank, as an issuer in this context, were obligated essentially indefinitely to the Commissioner, and the letter of credit could only terminate with the Commissioner’s consent, notwithstanding the Uniform Commercial Code’s expiry provisions, then an issuer would have to hold funds in the amount of the letter of credit for possible payment to the beneficiary. In other words, the issuer’s capital available for lending, investing, and operations would be indefinitely restricted until its obligations under the letter of credit were terminated. This is important because of the strict lending limits applied to banks.<sup>14</sup> *See, e.g.,* James E. Byrne, 6B Hawklund UCC Series § 5-106:19 [Rev] (“The letter of credit is a specialized undertaking that embodies considerable risk to the issuer. Apart from general commercial law interests in the limitation of rights, there is an added safety and soundness concern with respect to the expiration of a letter of credit.”); *id.* § 5-106:23 [Rev] (“For public policy and safety and soundness reasons, there are serious concerns about unlimited obligations.”).

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<sup>14</sup> Interestingly, because of, and in reliance upon, the Uniform Commercial Code’s provision that a perpetual letter of credit expires after five years, the Office of the Comptroller of the Currency removed its requirement that banks insert expiration dates into letters of credit. *See* James E. Byrne, 6B Hawklund UCC Series § 5-106:24 [Rev] (Westlaw 2015).

The Petitioners somewhat cavalierly state that banks need not worry that a ruling favorable to the Petitioners would mean the banks' obligations under these types of letters of credit would continue forever. In that regard, the Petitioners state that "[a]ll that is required of the issuer (bank) or employer is to submit an affidavit from the employer stating that the employer has ceased doing business and all wages and fringe benefits have been paid or that the employer has been doing business in the state of West Virginia for at least five consecutive years and all wages and fringe benefits have been paid." Pet. Br. at 9. That is hardly comforting, as, in that case, it would shackle an issuing bank to both the applicant and the Commissioner, leaving the issuer at their mercy until either the applicant satisfies certain conditions or the Commissioner voluntarily terminates the letter of credit.

If this Court were to abrogate the effect of the Uniform Commercial Code's expiry provisions in this context, then it may inadvertently create a void in established practice and policy regarding bank regulatory matters such as lending limits and safety and soundness considerations.

**2. Uniformity and parity considerations also militate in favor of finding that "perpetual" letters of credit expire five years after issuance under the Uniform Commercial Code.**

Additionally, the Uniform Commercial Code--Letters of Credit is a uniform law that should not be changed in West Virginia. Revised Article 5 of the Uniform Commercial Code, addressing letters of credit, has been adopted in all fifty (50) states, the U.S. Virgin Islands, and the District of Columbia. *See* UCC Article 5, Letters of Credit (1995), *available at* [http://www.uniformlaws.org/Act.aspx?title=UCC Article 5, Letters of Credit \(1995\)](http://www.uniformlaws.org/Act.aspx?title=UCC Article 5, Letters of Credit (1995)) (last visited Dec. 21, 2015). As the Uniform Law Commission points out:

It is important that U.S. law regarding letters of credit be in accord with international rules and practices, but since letters of credit are a major instrument in domestic transactions as well, both

international and domestic trade *requires uniformity of law. These rules should be consistent within the United States.*

Why States Should Adopt UCC Article 5, *available at* [http://www.uniformlaws.org/Narrative.aspx?title=Why States Should Adopt UCC Article 5](http://www.uniformlaws.org/Narrative.aspx?title=Why%20States%20Should%20Adopt%20UCC%20Article%205) (last visited Dec. 21, 2015) (emphasis added).

If this Court adopts the position urged by the Petitioners and the DOL, then this Court would be upsetting well-established, uniform law across the country. Indeed, as far as the Associations can tell, this state would be the only state in the entire country that would have changed the law on the expiration of “perpetual” letters of credit.<sup>15</sup> Such a change would impact the operations of every financial institution and other entity issuing letters of credit in West Virginia, requiring, at a minimum, new forms and new procedure specific to West Virginia.

This Court should not so easily upset fundamental, uniform law on letters of credit, especially where, as discussed above, the Commissioner already has available to him sufficient remedies within the confines of the Uniform Commercial Code to satisfy his mandate and protect employees’ wages.

#### IV. CONCLUSION

Letters of credit are unique instruments that should not be confused with surety or performance bonds. Because of their unique nature, the Uniform Commercial Code contains provisions that expressly address expirations of letters of credit -- provisions that are designed to control to the exclusion of other statutory provisions or agreement of the parties. As discussed above, this Court’s holding that the Uniform Commercial Code controls would not deprive the Commissioner of his ability to ensure, under the Wage Payment and Collection Act, that there is

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<sup>15</sup> According to a representative of the Uniform Law Commission, the most recent information available to the Uniform Law Commission is that all jurisdictions that enacted Article 5 did so without changes to the act.

a guarantee of payment to employees. Finally, bank regulatory and uniformity considerations further support holding that “perpetual” letters of credit expire after five years. Accordingly, the Associations respectfully urge this Court to reject the position of the Petitioners and the DOL and to answer the certified question such that a letter of credit that states that it is perpetual expires five years after its stated date of issuance or, if none is stated, after the date on which it is issued, as provided in W. Va. Code § 46-5-106(d) (1996).

**WEST VIRGINIA BANKERS ASSOCIATION,  
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**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA  
Docket No. 15-0898**

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**AT CHARLESTON**

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**INTERNATIONAL UNION OF OPERATING  
ENGINEERS, LOCAL UNION NO. 132  
HEALTH AND WELFARE FUND, ET AL.,**

**Petitioners,**

**v.**

**L.A. PIPELINE CONSTRUCTION  
COMPANY, INC., and UNITED BANK, INC.  
Respondents.**

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**CERTIFICATE OF SERVICE**

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I, Julia A. Chincheck, hereby certify that on December 23, 2015, the foregoing **Brief of *Amici Curiae* West Virginia Bankers Association, Inc., and Community Bankers of West Virginia in Support of Respondents** was served via facsimile and regular U.S. mail, postage prepaid and properly addressed, on the following:

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