No.25-613

In the Supreme Court of the United States

MARQUISE MILLER,

Petitioner

v.

LEGACY BANK,

Respondent

REPLY BRIEF

ON PETITION FOR WRIT OF CERTARORI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT DOCKETED ON NOV 26TH 2025

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REPLY BRIEF

This reply addresses three central points. First, it explains why the trial court's sanctions, filing restrictions, and discovery rulings—imposed against a pro se litigant—rested on protected speech, lacked notice and findings, relied on nonexistent, fabricated, or extrajudicial record material, and collectively undermined neutral adjudication, demonstrating that Petitioner's filings were necessary responses to recurring procedural and constitutional defects rather than abusive litigation. Second, it explains that the Oklahoma State Banking Department's own analysis could not objectively rule out redlining because Legacy never obtained an appraisal, leaving the Department without any neutral valuation metric to assess whether the location-based denial was nondiscriminatory under ECOA. Third, it demonstrates that Respondent's own briefing confirms a live multi-circuit split over whether lenders may evade ECOA liability by structuring discrimination to occur before an application is deemed complete—despite the settled principle that a creditor may not deny credit and then retroactively claim the application was incomplete. Together these issues warrant plain-error review because the resulting structural defects undermine the neutrality of the process and present recurring questions of national importance.

1. The Trial Court Imposed Unconstitutional Sanctions and Filing Restrictions Through Viewpoint Discrimination, Lack of Notice, and Systemic Judicial Interference

The trial court imposed a filing-restriction sanction not for litigation misconduct, but for Petitioner's protected First Amendment speech criticizing the court's performance. The sanctions order expressly relied on Miller's statement that "[i]f the trial judge doesn't want to make decisions between disputing parties, then there are other career paths that would help him reach this goal," and **characterized that criticism as "obstinance" supporting sanctions.** (Order, Doc. 226, at 5–6). Punishing a litigant for the content and viewpoint of criticism directed at the judiciary—absent obstruction, violation of a court order, or a true threat—is constitutionally impermissible. *City of Houston v. Hill*, 482 U.S. 451, 462–63 (1987); *Bridges v. California*, 314 U.S. 252, 270 (1941). The sanction here rested solely on protected speech and therefore violates the First Amendment.

Compounding that error, **the filing restriction was imposed without prior notice or an opportunity to be heard.** Although the court referenced an earlier order to show cause, that order provided notice only of possible dismissal with prejudice—not of any prospective filing restriction affecting future access to the courts. (Doc. 220 at 14; Doc. 226 at 5–6). A filing restriction is a distinct, forward-looking sanction and may be imposed only after notice and an opportunity to respond. *Tripati v. Beaman*, 878 F.2d 351, 353–54

(10th Cir. 1989). **By conflating dismissal with filing restrictions, the court effectively acknowledged that no notice was ever given regarding the restriction itself,** rendering the sanction constitutionally deficient.

The appearance of partiality was further aggravated by the trial judge's failure to recuse despite a disqualifying financial relationship involving an immediate family member whose business model depends on relationships with local banks like Legacy. https://www.roaringforkcap.com/our-team; *Roaring Fork Capital – Real Estate*, https://www.roaringforkcap.com/real-estate-1

Rather than permit scrutiny of that conflict, the court barred discovery into potential ex parte communications with Legacy's counsel, prohibiting questioning on that subject during a properly noticed Rule 30(b)(6) deposition. (Doc. 309 at 7). Preventing inquiry into communications bearing directly on judicial impartiality does not cure an appearance-of-bias problem; it intensifies it. A reasonable observer would conclude that the court both possessed a disqualifying conflict and foreclosed inquiry into that conflict, contrary to 28 U.S.C. § 455(a) and fundamental due process principles.

The court repeatedly interfered with the adversarial process by prohibiting core discovery central to Petitioner's discrimination claims. It barred inquiry into racial slurs and discriminatory conduct under Rule 30(b)(6), foreclosing evidence directly relevant to intent and corporate culture. (Doc. 309 at 9–10). It

also imposed a judicially supervised discovery conference requirement that conflicts with Local Civil Rule 37.1 and exceeds statutory authority under 28 U.S.C. § 636. Taken together—speech-based sanctions, lack of notice, failure to recuse, suppression of bias-related discovery, and obstruction of core discrimination evidence—the proceedings departed from accepted judicial practice and undermined both actual fairness and the appearance of justice, warranting this Court's intervention.

The trial court's errors were structural and cumulative, reflecting a breakdown of neutral adjudication rather than isolated discovery rulings. As part of the filing-restriction sanction, the court conditioned Miller's ability to file discovery motions on appearing before a magistrate judge for a judicially supervised meet-and-confer, a procedure unauthorized by Local Civil Rule 37.1 and unsupported by 28 U.S.C. § 636. **(Order, Doc. 226, at 8).**

That same order also directed the magistrate judge to address matters relating to an already-pending discovery motion that had been filed **before** the filing restriction was imposed, retroactively subjecting existing litigation activity to a newly created procedure not authorized by rule or statute. *Id.* The local rule requires only that parties meet and confer in good faith; it does not permit judicial supervision, and litigants are entitled to rely on those rules. *Woods Constr. Co. v. Atlas Chem. Indus., Inc.*, 337 F.2d 888, 890 (10th Cir. 1964). This unauthorized procedure coincided with a pattern of judicial interference that

barred discovery central to Miller's discrimination claims, including prohibiting Rule 30(b)(6) questioning regarding racial slurs and other evidence bearing on discriminatory intent and corporate culture. **(Order, Doc. 309, at 9–10).**

Courts have long recognized that such evidence is often critical where motive is at issue. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804–05 (1973). Together with rulings barring inquiry into potential ex parte communications and imposing sanctions based on inaccessible evidence, the court repeatedly preempted core lines of inquiry while resolving contested issues in Legacy's favor. Additional examples appear throughout the record but are not set out here due to the reply brief's word limit. Because these errors implicate the neutrality of the process itself and arose in proceedings involving a pro se litigant, plain-error review is necessary to preserve fundamental rights. Plain-error review exists to safeguard the fairness, integrity, and public reputation of judicial proceedings where structural defects may not have been correctable in real time. *United States v. Olano*, 507 U.S. 725, 736 (1993). Refusing such review risks insulating constitutional defects from any meaningful scrutiny—reflecting a departure from accepted judicial practice and supporting this Court's review under Rule 10.

2. The Trial Court Imposed $12,825 in Monetary Sanctions Against A Pro Se Litigant Under Threat of Dismissal Based on Deleted Evidence and an Invented Quotation

The district court imposed two monetary discovery sanctions totaling $12,825 under threat of dismissal with prejudice if Petitioner failed to pay within thirty days. In Doc. 270, the court ordered payment of $8,055 and warned that failure "may" result in sanctions "including dismissal with prejudice." (Doc. 270 at 8). In Doc. 290, the court ordered payment of $4,770 with the same threat. (Doc. 290 at 7). Yet the court conceded it lacked the "meticulous detail required" to assess billing entries and instead applied an unexplained 50% reduction to reach $8,055. (Doc. 270 at 7). For the $4,770 award, the court stated only that it reviewed exhibits and found the request "reasonable," without identifying hours, rates, or calculations. (Doc. 290 at 6). Fee awards imposed must be supported by specific findings permitting review. ***State ex rel. Burk v. City of Oklahoma City*, 1979 OK 115, ¶¶ 6–8, 598 P.2d 659, 661–63**. These orders contain none.

The due-process defect deepens because the sanctions rested on discovery the court could not have reviewed. Although the court later stated that Legacy had "provided Plaintiff with timely and responsive documents," (Doc. 183 at 4), Legacy had already admitted that the discovery link was deleted and inaccessible: "If you attempt to use the deleted/disabled link, it will say: "This item was **deleted.**"" (Doc. 146-1). Legacy then refused to provide any replacement. (Doc. 170-1). A court cannot rule on evidence that does not exist or is inaccessible to the parties. Judicial decision-making is "confined by a record comprising the evidence the parties present." *WildEarth Guardians v. U.S. Bureau of*

Land Mgmt., 870 F.3d 1222, 1230 (10th Cir. 2017). The court's later assertion that reliance on sealed materials is permissible (Order, Doc. 23 at 12–13, *Miller v. Judge Timothy DeGiusti*) does not cure the problem: the defect here was not confidentiality, but nonexistence. Reliance on deleted materials deprived Petitioner of notice, the ability to rebut evidence, and meaningful appellate review. See *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 171 (1951) (Frankfurter, J., concurring); *United States v. McVeigh*, 119 F.3d 806, 814 (10th Cir. 1997).

Finally, the court imposed attorney-fee sanctions based on a statement Petitioner never made. Petitioner asked Legacy: **"How old were the allegedly dated item(s)?"** (Doc. 130-2 at 5–6). The court nevertheless stated—using quotation marks—that Miller asked: "**How old was the [property located at 2110 N. Lottie]?"** (Doc. 183 at 4). That quotation does not appear anywhere in Petitioner's discovery. Quotation marks represent a claim of verbatim accuracy, not interpretation. *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 511 (1991). By inventing language, attributing it to Petitioner, and then sanctioning him based on that fabrication, the court imposed monetary punishment on a false premise of its own creation. Sanctions resting on words a litigant never spoke are incompatible with due process and cannot stand.

3. Judge DeGiusti's Leadership Role in JHealth and Repeated Service by Designation Heighten the Appearance-of-Impartiality Concerns

Legacy's narrative of abusive or frivolous filings is contradicted by the Tenth Circuit's own conduct and the record, which instead heightens appearance-of-impartiality concerns. In No. 24-6105, the court—at the judges' direction—ordered Legacy to respond to Miller's rehearing petition, granted leave for further reply, and considered the issues adversarially before denying rehearing—treatment inconsistent with insubstantial filings. The appearance problem is compounded by timing: Miller filed a civil complaint against Judge DeGiusti on March 7, 2025, and a Tenth Circuit panel denied rehearing six days later in *Miller v. Legacy*. Although timing alone does not establish actual bias, due process protects against the appearance of partiality. *v. Pennsylvania*, 579 U.S. 1, 8–9 (2016); *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 860 (1988).

Those concerns are materially heightened by undisputed record facts showing that Judge DeGiusti was deeply embedded in the Tenth Circuit's institutional life: he repeatedly sat by designation on the court, authored binding circuit precedent,--------- ***(United States v. Morris, 562 F.3d 1131 (10th Cir. 2009)*** and served as Chairperson of the Tenth Circuit's Judicial Health and Assistance Committee (JHealth)---------- (See **https://judicature.duke.edu/articles/jhealth-how-the-tenth-circuit-is-improving-the-health-and-performance-of-federal-judges/**)---- a confidential, circuit-wide governance program created by the Judicial Council. A reasonable observer would understand that judges who have deliberated confidentially with a colleague, relied on

his authored opinions as binding law, and worked with him in a leadership capacity within the Circuit's internal governance face a constitutionally intolerable appearance-of-impartiality problem when later adjudicating matters involving that judge. Because due process turns on appearance and probability—not proof—these institutional entanglements underscore the structural nature of the errors and warrant this Court's review.

4. Legacy's Waiver Argument Is Refuted by Its Own Filings

Legacy's claim that Miller waived any *Townstone* prospective-applicant argument is flatly contradicted by Legacy's own filings. In responding to Miller's FRAP 28(j) letter, Legacy expressly acknowledged that Miller had already discussed *Townstone* in his appellate briefing, stating that Miller "**had already discussed Townstone in his reply brief.**" (Doc. 33 at 1). That admission alone defeats waiver, which turns on whether an argument was raised—not whether it ultimately prevailed. *Wood v. Milyard*, 566 U.S. 463, 472 (2012). The point is reinforced by the procedural record: after *Townstone* was decided, Miller squarely raised the prospective-applicant issue in his petition for rehearing and rehearing en banc (Doc. 44, pgs 1-3, Case No. 24-6105), and Legacy responded on the merits upon order of the court (Doc. 48). A party cannot respond to an argument and later claim it was never presented. *Id.* at 470–72.

5. The Oklahoma Banking Department's Findings—and *Townstone*—Confirm That Location-Based Lending Decisions Without Appraisals Are Classic Indicators of Redlining Prohibited by ECOA

The Oklahoma State Banking Department's own analysis confirms why Legacy's conduct, viewed at the moment of denial and in the absence of any appraisal, raised precisely the kind of redlining concern ECOA was enacted to prevent. The Department acknowledged that Legacy's loan-denial email expressly relied, in part, on the location of the Lottie Property, explaining that the loan "was refused, in part, based on the location of the Lottie Property," and that "[t]aken alone," such a denial "would appear to fall within the impermissible practice" associated with redlining. Although the Department later considered explanations offered by Legacy after the denial, its analysis confirms that the contemporaneous basis for the decision was location. When a lender denies credit by considering where a property is located—rather than by applying a neutral, objective valuation metric—that decision reflects textbook redlining.

Critically, the Department could not identify any appraisal establishing the property's fair market value—because none existed. See Legacy MSJ, Exh. 8, Oklahoma State Banking Dep't Letter to Miller, p. 3 (OSBD #000148) (W.D. Okla. ECF No. 320). Legacy never obtained an appraisal, leaving no neutral underwriting metric against which to assess collateral sufficiency. Under Tenth Circuit law, an

appraisal is "necessarily an estimate of the fair market value of property." *Rhodes v. Amoco Oil Co.*, 143 F.3d 1369, 1374 (10th Cir. 1998). **A county tax assessment is not an appraisal** and cannot establish market value for underwriting purposes. Without an appraisal, Legacy could not legitimately evaluate collateral value, rendering location—not objective valuation—the operative basis for denial. That concern is heightened by the undisputed fact that the **Lottie location was 80.4% Black at the time of denial**, a fact Miller placed before the district court. (Doc. 117 at 11; Doc. 51-1).

The Seventh Circuit's decision in *CFPB v. Townstone Financial, Inc.* confirms why ECOA cannot be read narrowly or deferred to after-the-fact regulatory rationalizations. *Townstone* recognized that **Congress amended ECOA because regulators historically failed to take meaningful action even after discrimination was identified, noting legislative findings that agencies showed "great reluctance to take strong action" and were "not taking appropriate action to resolve issues of credit discrimination.**" S. Rep. No. 102-167, at 92–93 (1991), quoted in *Townstone*, No. 23-1654, slip op. at 10–11. This case illustrates that reality: the Oklahoma State Banking Department's own analysis shows that, at the time of denial, Legacy relied on location without appraisal support, leaving an overwhelmingly Black neighborhood as the operative basis for denial. That is precisely the conduct ECOA was enacted to prevent and why private enforcement and judicial scrutiny remain indispensable.

6. The Trial Court Admitted There Was "Nothing in the Record" Regarding Appraisal While Making Appraisal-Based Findings

The trial court's ruling rests on a contradiction. It stated that the "undisputed facts" establish that the loan was denied because "**the combined appraised values**" did not meet a 75% loan-to-value ratio. (Doc. 348, footnote at 12). But the same order acknowledged:

"**Plaintiff does not rely on any documentary evidence or independent analysis—such as an appraisal—regarding the value ... and...there is nothing in the record for the Court to consider on that front.**" (Doc. 348 at 12) (emphasis added).

Those statements cannot both be true. Legacy never obtained an appraisal; that is why the record contains none. Without an appraisal, the court could not lawfully determine whether the properties "combined appraised values" satisfied any loan-to-value threshold. The only plausible explanation is that the court relied on extra-record assumptions in Legacy's favor. At summary judgment, disputed value determinations are factual matters for a jury, not findings the court may supply from outside the record.

7. Respondent's Own Reliance on Fifth Circuit Authority Confirms a Multi-Circuit Split

Respondent's Opposition expressly relies on Fifth Circuit precedent holding that only a "completed application" can support a private ECOA claim, even

where a lender's conduct prevents completion. See *Alexander v. AmeriPro Funding, Inc.*, 848 F.3d 698, 708 (5th Cir. 2017) (discouragement of a "prospective applicant" cannot support a private ECOA action). That rule aligns with the approach adopted below and stands in direct tension with the Seventh Circuit's decision in *Consumer Financial Protection Bureau v. Townstone Financial, Inc.*, 107 F.4th 768 (7th Cir. 2024), which rejected attempts to evade ECOA by structuring discrimination to occur before an application is formally completed. Respondent's own briefing thus confirms that the conflict concerns not merely who may sue, but whether ECOA permits creditors to avoid liability by front-loading discrimination at the pre-application stage. That acknowledged divide presents a recurring, nationally important question warranting this Court's review under Rule 10.

8. Doc. 66-6 Reflects That Legacy Bank Evaluated Miller's Loan Request, Decided Not to Approve It, and Communicated That Decision—Thereby Treating the Request as an "Application" Under ECOA

Regulation B draws a bright line:

a creditor has treated a request as an application—and is subject to ECOA's adverse-action requirements—when it evaluates information, **decides not to approve the request, and communicates that decision to the consumer**. 12 C.F.R. pt. 1002, Supp. I, § 1002.2(f), cmt. 2.

Courts of appeals apply this rule by focusing on creditor conduct rather than post-hoc labels. Thus, after identifying the defendant's participation in the credit decision, the Sixth Circuit held that the dealership had "essentially denied the plaintiff's credit application," reversed the district court, and adjudicated the claim on the premise that **ECOA's remedial provisions apply to private applicants as well as government enforcement actions.** ***Tyson v. Sterling Rental, Inc.*****, 836 F.3d 571, 578 (6th Cir. 2016).**

Together, Regulation B and appellate precedent foreclose any attempt to evade ECOA by recharacterizing a communicated denial as something other than an application. Accepting Legacy's position would permit creditors to deny credit on substantive grounds, notify the consumer, and then escape ECOA obligations through relabeling. Regulation B forecloses that loophole, and *Townstone* confirms that ECOA's scope cannot be narrowed to invite circumvention. *CFPB v. Townstone Fin., Inc.*, 107 F.4th 777 (7th Cir. 2024).

CONCLUSION

Plain- error review is necessary, and Petition should be granted.

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