

No. 15-1538

IN THE
Supreme Court of the United States

MERSCORP HOLDINGS, INC., ET AL.,
Petitioners,

v.

DANNEL P. MALLOY, ET AL.,
Respondents.

On Petition for a Writ of Certiorari
to the Supreme Court of the State of Connecticut

**BRIEF OF CONSUMER MORTGAGE COALITION,
MORTGAGE BANKERS ASSOCIATION, CON-
NECTICUT MORTGAGE BANKERS ASSOCIA-
TION, CONNECTICUT BANKERS ASSOCIATION,
REAL ESTATE SERVICES PROVIDERS COUNCIL,
INC., AMERICAN LAND TITLE ASSOCIATION,
AND HOUSING POLICY COUNCIL OF THE
FINANCIAL SERVICES ROUNDTABLE AS
AMICI CURIAE IN SUPPORT OF PETITIONERS**

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INTEREST OF AMICI CURIAE¹

The Consumer Mortgage Coalition (“CMC”) is a trade association comprised of national residential mortgage lenders, servicers, and service providers. CMC was formed in 1995, and its members participate in every stage of the home financing process.

The Mortgage Bankers Association (“MBA”) is the national association representing the real estate finance industry, an industry that employs more than 280,000 people in virtually every community nationwide. The MBA works to ensure the continued strength of the Nation's residential and commercial real estate markets, and to expand homeownership and extend access to affordable housing to all Americans. Its membership of over 2,200 companies includes all elements of real estate finance: mortgage companies, mortgage brokers, commercial banks, thrifts, REITs, Wall Street conduits, life insurance companies, and others in the mortgage lending field.

The Connecticut Bankers Association is an industry association representing over eighty banks that conduct banking operations in the State of Connecticut.

¹ All parties have consented to the filing of this *amicus* brief. Petitioners’ written consent is on file with the Clerk, and respondents’ written consent is submitted with this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici*, their members, or their counsel made such a contribution.

The Connecticut Mortgage Bankers Association is a non-profit industry association created in 1984 to promote the welfare of the mortgage lending and servicing industry in the State of Connecticut. Its membership includes 700 individuals and 150 organizations.

The Real Estate Services Providers Council, Inc. is a national trade association representing various service providers in the home buying and financing industry.

The American Land Title Association, founded in 1907, is the national trade association representing 6,000 title insurance companies, title and settlement agents, independent abstracters, title searchers, and real estate attorneys. With offices throughout the United States, ALTA members conduct title searches, examinations, closings, and issue title insurance that protects real property owners and mortgage lenders against losses from defects in titles.

The Housing Policy Council of The Financial Services Roundtable is a trade association representing thirty-three of the leading national mortgage finance companies. Housing Policy Council member companies originate, service, and insure mortgages for consumers across the nation. The Housing Policy Council's mission is to represent the mortgage and housing marketplace policy views of its member companies in legislative, regulatory, and judicial forums.

The petition implicates operations of Mortgage Electronic Registration Systems, Inc. ("MERS"), a company that serves as mortgagee of record as

nominee for mortgage loan lenders and MERSCORP Holdings, Inc. (“MERSCORP”), a company that owns and operates a national electronic mortgage loan registry system (the “MERS® System”). *Amici* have a direct interest in its resolution as many of their members are also members of the MERS® System and make and service loans in Connecticut. *Amici*’s members are also leading members of the mortgage lending industry and can provide insight into the adverse impacts which the Connecticut Supreme Court’s decision, if not overturned, could have on that industry and the customers it serves. *Amici* submit this brief to assist the Court by providing that industry perspective, as they have done on other occasions.²

SUMMARY OF ARGUMENT

The Founders enacted the Commerce Clause to spur economic activity across state lines, not inhibit it. Connecticut has, however, passed a statute that facially discriminates against the MERS® System’s national loan registry system in favor of local entities and which, especially if adopted in other states, threatens significant negative impacts on the national and regional lending activities of *amici*’s members. The petition should be granted to stop such provincial legislation and to reaffirm that our Nation’s economy was intended to and must function across state lines, rather than within them. The

² *E.g.*, *Bank of America Corp. v. City of Miami*, No. 15-1111; *Texas Dep’t of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, No. 13-1371; *Cuomo v. Clearing House Association*, No. 08-453; *Chevy Chase Bank, F.S.B. v. Wells*, No. 03-918.

secondary mortgage market, on which all mortgage lenders rely for liquidity is a national market. It cannot function except interstate, and it functions much more efficiently with a nationwide loan registry.

A broad array of industry and federal government participants who participate in this national market created a national electronic loan registry system, the MERS® System, in the mid-1990s to address significant persistent problems and backlogs in local land recording offices across the country. Since that time, the MERS® System has grown to reach a large majority of all residential loans made in the country, and lenders, federal and state governments, and law enforcement agencies all have become members. Loans registered on the MERS® System's national registry have resulted in fewer errors by recording offices, fewer delays, an effective fraud-prevention tool for law enforcement, and reduced costs of residential lending for lenders and borrowers alike. Today, MERS® System members, including national or regional lenders and online lenders, rely on interstate commerce of which the MERS® System is an essential part. The MERS® System's innovation significantly helps lenders make and fund loans to homeowners throughout the country, and to do so in a reliable and efficient way.

The Connecticut Supreme Court has, however, upheld a state law that imposes recording fees for loans registered on a national registry such as the MERS® System, which are three times higher than loans that are instead made using parochial, costlier recordation procedures. As Petitioners correctly argue, Connecticut's two-tiered system facially

discriminates against interstate commerce in direct violation of the dormant Commerce Clause.

Connecticut's law, if allowed to stand and be followed by other states, will likely bring back the serious problems the MERS® System was created to prevent: lost documents, long delays, higher costs, and uncertainty as to the state of title, among others. And if states are free to arbitrarily impose substantially greater recording fees simply because the loans are registered on a national registry, as Connecticut has done, lenders are certain to face similarly discriminatory increases in charges imposed on other aspects of their business, and national businesses in other industries could face similar problems.

All of these impacts would come at a time when the country is still seeking to increase homeownership and rebound from the last recession amidst a still-fragile economy. To help forestall these negative consequences, which the dormant Commerce Clause doctrine seeks to prevent, the Court should grant certiorari and on review reverse the Connecticut Supreme Court's decision.

ARGUMENT

I. The MERS® System Solved A Serious National Problem.

Industry and government agencies formed the MERS® System in the 1990s to address serious problems occurring with recording documents in land records system, which adversely impacted the speed and costs of mortgage lending to consumers. The MERS® System quickly succeeded in helping to eliminate those problems.

A. Significant Recording Problems Before The MERS® System.

Before the MERS® System became operational in the late 1990s, many of our country's land record offices struggled to serve the public effectively. The refinancing boom of the early to mid-1990s, combined with a growing secondary market for mortgage loans, created a significant increase in recorded documents that the local recording infrastructure prevalent throughout the Nation could not adequately handle.³

Before the MERS® System, lenders would record mortgage assignments in local land records when the entity servicing a loan changed, and sometimes if ownership of the loan changed. This provided notice that the new entity (the assignee) was the appropriate entity to receive service of process or notice by others that may affect the interest in the property that had the recorded mortgage lien. The recording of those mortgage assignments created onerous paperwork burdens, such as drafting, executing, shipping, tracking, and recording the various papers.⁴

Those burdens grew as the rise of securitization in mortgage loans caused a significant increase in the number of changes needing to be recorded. The first securitizations took place in the 1970s, and by 1998,

³ Apu Sikri, *Mortgage Banks to Move to Electronic Registration of Loans*, Capital Markets Report (Oct. 24, 1995); Steve Cocheo, *Moving from paper to blips*, ABA Banking J., Jan. 1, 1996, at 1; Property Records Industry Association, *PRIA Land Summit* at 10 (Feb. 29, 2012).

⁴ Cocheo, *supra* note 3, at 1.

the majority of conventional prime residential mortgage loans had been securitized.⁵ The result, before the advent of the MERS® System, was a “massive paperwork challenge” for lenders and recording offices.⁶ This cumbersome recording system has become obsolete in today’s nationwide secondary mortgage market.

The increase in recording of mortgage assignments ran headlong into a recording system that had been in place since the seventeenth century.⁷ Some land recording departments used 3-by-5 index cards to record information about which parties held interests in land and when they acquired their interests.⁸

Significant problems arose. First, serious delays arose throughout the 1990s. One author noted in 1995 that “[w]ith the refinancing boom of the last two years, many counties are almost a year behind in

⁵ Liz Laderman, Federal Reserve Bank of San Francisco, *Subprime Mortgage Lending and the Capital Markets* (Dec. 28, 2001), <http://www.frbsf.org/economicresearch/publications/economic-letter/2001/december/subprime-mortgage-lending-and-the-capital-markets/>; Wayne Passmore et al., Federal Reserve Board, *GSEs, Mortgage Rates, and the Long-Run Effects of Mortgage Securitization* at 1 n.2 (Dec. 2001).

⁶ Cocheo, *supra* note 3, at 1.

⁷ M. Anthony Carr, *Mortgage companies unite for automation, System replaces archaic procedure* (June 14, 1996) at 1; see Phyllis K. Slesinger & Daniel McLaughlin, *Mortgage Electronic Registration System*, 31 Idaho L. Rev. 805, 808 (1995).

⁸ Carr, *supra* note 7, at 1.

their record-keeping.”⁹ In Nassau County there was a “25-week delay in recording mortgages” and a “backlog, estimated at 50,000 unrecorded mortgages alone.”¹⁰ Dane County, Wisconsin’s clerk noted that it “had fallen too far behind in recording real estate documents. We’re eight weeks behind and there’s no way we can catch up.”¹¹ Similar stories occurred in Florida, Ohio, Pennsylvania, Georgia, Maryland, and Illinois.¹²

The Pennsylvania Land Title Association was forced to sue the City of Philadelphia based on “a backlog of 30,000 unrecorded” documents, which

⁹ Sikri, *supra* note 3, at 1.

¹⁰ Diana Schemo, *Nassau Clerk Agrees to Timetable for Clearing Backlog*, N.Y. Times, Aug. 26, 1992, 1992 WLNR 3296643.

¹¹ Marv Balousek, *Register Making Money; Reluctant to Help*, Wisconsin State J., June 21, 1993, 1993 WLNR 3517069.

¹² Bob LaMendola, *Checks Pile Up While County Converts to Computers*, South Fla. Sun-Sentinel, Apr. 7, 1993, 1993 WLNR 4263686; Molly Kavanaugh, *Office Works In The Past Lorain Recorder Battles Backlog*, Cleveland Plain Dealer, May 3, 1993, 1993 WLNR 4575026; Jackie Powder, *Shortage of Clerks Hits Court Hearings Delayed, Paperwork Muddled*, Baltimore Sun (MD), April 22, 1992, 1992 WLNR 777475; *No Primary Battles for Several Carbon Posts*, Morning Call (Allentown, PA), May 16, 1991, 1991 WLNR 1712401; *A Chaotic Recorder’s Office*, Cincinnati Post (OH), August 15, 1990, 1990 WLNR 534829; Deborah Royston, *Sales of Existing Homes Down 27% for State in 2nd Quarter, Report Says Realty Observers Skeptical of Figure*, Atlanta Journal and Constitution (GA), August 6, 1992, 1992 WLNR 2324759; Helen Anderson, *Good Deeds for Chief Torrens Examiner, Job Changes with Titles*, Chicago Tribune, June 19, 1992, 1992 WLNR 4091500.

“delay[ed] by up to six months the recording of new documents received.”¹³ Title was compromised because backlogged documents were not recorded in the order received as required by law,” documents were not timely entered into the land records index, documents were being arbitrarily rejected instead of recorded, and documents were not being timely returned to the filer.¹⁴ The court issued an order requiring the City to expend funds to “eliminate the recording backlog and the indexing backlog.”¹⁵

Other errors occurred. Documents were misplaced altogether, or recorded in the wrong order. Indexes of the contents of recorded documents were replete with errors: information was incomplete, wrong, out of order, confusing, or impossible to find. All of this inhibited the ability of title searches to determine title, thereby inhibiting the closing of real estate transactions.¹⁶

¹³ Complaint ¶ 54, *Pennsylvania Land Title Association v. Philadelphia*, No. 3127 (Pa. Ct. Com. Pleas filed Jan. 30, 1997) (reprinted in App., *infra*, 1a-27a); *see id.* ¶¶ 44-53, 55.

¹⁴ *Id.* ¶¶ 63-89.

¹⁵ *Pennsylvania Land Title Association*, Order of Mandamus (Nov. 25, 1997) (reprinted in App., *infra*, 28a-30a). Nassau County, New York lost a similar lawsuit to the New York State Land Title Association. *See Schemo*, *supra* note 10, at 1-2.

¹⁶ *E.g.*, Complaint, *supra* note 13, at ¶¶ 44-89; Patrick C. Sargent & Mark W. Harris, *The Myths and Merits of MERS* at 1, 10 (September 25, 2012), <https://www.mersinc.org/media-room-docman/1112-myths-and-merits-of-mers>; Slesinger, *supra* note 7, at 808, 810; Sikri, *supra* note 3, at 1; Cocheo, *supra* note 3, at 2; Carson Mullen, *MERS: Tracking loans electronically*, Mortgage Banking, May 31, 2000, at *2, 2000 WLNR 4330172 at 5.

Parties intent on committing fraud benefitted from the dysfunction.¹⁷ For example, loan applicants could apply for a loan with one lender while simultaneously pursuing other undisclosed loans with other lenders for the same property.¹⁸

Finally, the recordation process imposed financial impacts on the mortgage system nationwide. One author estimated that the administrative paperwork burden was adding \$65 to the cost of every loan transaction across the country.¹⁹

B. The Government Partners With Industry To Create The MERS® System.

The MERS® System innovation was born out of a unique public-private partnership to address these problems.

The MBA partnered in a steering committee with federal agencies that have played key roles in ensuring the availability and affordability of home ownership nationwide: the Federal National Mortgage Association (“Fannie Mae”), the Federal Home Loan Mortgage Corporation (“Freddie Mac”), the Federal Housing Administration (“FHA”), the Government National Mortgage Association (“GNMA”), and the Veterans Administration (“VA”).²⁰ The steering committee solicited input from

¹⁷ Dan McLaughlin, *MERS Role In The Fight Against Fraud*, Property Records Industry Association (2008).

¹⁸ *Id.* at 3.

¹⁹ Carr, *supra* note 7, at 2.

²⁰ Slesinger, *supra* note 7, at 807; Cocheo, *supra* note 3, at 2.

industry stakeholders such as the American Land Title Association, the American Bar Association, the American Escrow Association, county recorders' associations, loan originators and servicers, document custodians, and federal regulators.²¹

The solution arrived at was to (1) designate MERS as the mortgagee on the loan security instrument as nominee for the lender and its successors and assigns; and (2) register the loan on the national electronic MERS® System registry where it was given a unique Mortgage Identification Number (“MIN”).²² Thereafter, when a loan was transferred to another MERS® System member, the transfer was registered on the electronic MERS® System, MERS remained the mortgagee of record, and assignments of the security instrument became unnecessary.²³ This was true no matter how many times the loan might be transferred from one MERS® System member to another. The idea for the MERS® System concept was based on another national electronic registry – the Depository Trust Corporation (DTC) – which is used to record stock transfers electronically.²⁴

²¹ Slesinger, *supra* note 7, at 807, 811, 815.

²² *See* Petition For A Writ Of Certiorari at 7-8.

²³ *Id.*

²⁴ Mullen, *supra* note 16, at *2 (“DTC had long ago enabled the national securities markets to eliminate the need for paper stock certificates to record the purchase and sale of stocks, bonds and other securities. DTC is a participant-owned corporation that records securities transactions electronically, elimi-

The founders of the MERS® System published a white paper describing an electronic book entry system for the residential mortgage industry and estimated that the concept would result in cost savings of about \$77.9 million annually.²⁵ Based on the overwhelmingly positive response from various sectors of the mortgage industry, the effort to build the MERS® System moved forward.²⁶

In early 1997, FHA, Ginnie Mae, and the VA endorsed the MERS® System.²⁷ One FHA official stated that “[t]he system is a giant...critical step’ toward making the mortgage industry more efficient,”²⁸ and that “[w]e will in 1997 at the FHA be moving toward the goal we all share of paperless processing.... We believe the concept of a central registry in the marketplace makes sense.”²⁹

In October 1997, Fannie Mae and Freddie Mac “approved the listing of [MERS] as the original mortgagee” on a mortgage, a move that was considered by many to “be the incentive some lenders

nating the need to pass paper stock certificates or other security certificates back and forth”).

²⁵ Slesinger, *supra* note 7, at 811.

²⁶ *Id.* at 814-16.

²⁷ Karen Talley, *Mortgage Clearing House Garners Endorsement from Three Key Federal Agencies*, *American Banker*, Jan. 13, 1997, at 1, 1997 WLNR 2716282; Ted Cornwell, *Agency OK on Servicing Registry*, *Mortgage Servicing News* (Feb. 1997).

²⁸ Talley, *supra* note 27, at 1.

²⁹ Cornwell, *supra* note 27, at 2.

and services need[ed] to register loans on MERS.”³⁰ A senior Fannie Mae official remarked that “[t]his change will translate into direct savings for the lending community and will be a catalyst for the rapid adoption of MERS by the industry.”³¹

Federal government support for MERS grew in the years that followed. In 2008, the Treasury Department’s Office of Thrift Supervision approved the use of MERS.³² The Office of the Comptroller of the Currency’s February 2014 Mortgage Banking Handbook approved the use of MERS as well.³³ The Consumer Financial Protection Bureau advises consumers to search the MERSCORP website or call MERS’s toll-free number that appears on every mortgage where MERS is the mortgagee if they cannot find their mortgage servicer’s telephone number.³⁴

³⁰ Inside Mortgage Finance, *Fannie and Freddie Accept MERS as Mortgagee: Shift in Policy Eliminates Assignment Headache*, Issue 1997:39 (Oct. 10, 1997).

³¹ *Id.*

³² Office of Thrift Supervision, Department of the Treasury Regulatory Bulletin 37-28, at 750.18 (Nov. 13, 2008).

³³ Office of the Comptroller of the Currency, Comptroller’s Handbook: Safety and Soundness: Mortgage Banking at 35 (Feb. 2014).

³⁴ Consumer Financial Protection Bureau, *I Can’t Pay My Mortgage Loan, What Should I Do?* (Aug. 19, 2014).

C. The MERS® System Has Been A Resounding Interstate Success.

The MERS® System has succeeded in addressing the problems it was created to solve. By May 2000, lenders had registered one million loans on the MERS® System national registry and more than 100 companies had become MERS® System members, including many of the country's largest residential lenders.³⁵ Today, nearly 100 million security instruments have been recorded in the public land records designating MERS as mortgagee, and more than 65% of newly originated residential mortgage loans are registered on this national registry.³⁶ There are now more than 5,000 lenders, investors, and government institutions who are MERS® System members.³⁷ In fact, upwards of 1,000 cities, municipalities, and states throughout the country now use the MERS® System database free of charge, often to locate contacts for properties that have been abandoned by borrowers so that appropriate property preservation can occur.³⁸

Many of the MERS® System's members are national or regional lenders, including online lenders, whose businesses are national or regional in scope and who rely on interstate commerce of which

³⁵ Mullen, *supra* note 16, at 1.

³⁶ Sargent, *supra* note 16, at 10; *Quick Facts: An Introduction to the MERS System, MERSCORP Holdings, Inc., and Mortgage Electronic Registration Systems, Inc.* at 1 (Apr. 2016).

³⁷ *Quick Facts*, *supra* note 36, at 1.

³⁸ Sargent, *supra* note 16, at 10 n.83.

the MERS® System is an essential part. The MERS® System's new processes produced multiple benefits facilitating this cross-state lending activity.

First, the MERS® System simplified the process of loan transfers and lifted the burdens on local recording offices across the country. Now, the transfers of servicing and/or beneficial ownership rights in a loan can be tracked electronically on the MERS® System, and the fact that fewer assignments are being recorded makes the excessive paperwork of old unnecessary.

Lenders, servicers, and ultimately consumers have realized real cost savings from elimination of the need to create, track, account for, and correct paper mortgage assignments.³⁹ Just as the cost of excess paper had been borne by consumers before the MERS® System, consumers now benefit from the reduced administrative cost since the advent of the MERS® System. One lender noted that “[t]racking assignments back and forth [from] county recorders’ offices and just handling the paper is extremely expensive... These costs are embedded in the process, and eliminating assignments cuts these costs for us.”⁴⁰ In September 2009, the CEO of MERSCORP estimated that the MERS® System had saved approximately \$2.4 billion in costs and expenses since its inception.⁴¹

³⁹ *See id.* at 3-7.

⁴⁰ *Id.* at 6.

⁴¹ *MERS Mortgage Registry Comes Under Fire in Foreclosure Crisis*, NewsMax Finance (Oct 20, 2010, 1:01 pm), <http://www.newsmax.com/t/finance/article/374296>.

Delays and errors also were reduced. The Property Records Industry Association, which counts both industry and recording offices as its members, reported in 2012 that securitization, the “[r]efi-boom and new mortgage products created a tremendous amount o[f] paperwork” and “[r]ecording jurisdictions fell behind” in the 1990s, but “MERS overcame technology issues of the time.”⁴²

The MERS® System also eliminated the difficulty title companies faced when confronted with voluminous, inaccurate, and incomplete land records. It provided a reliable method for title companies to track liens, and identify the owners and servicers of loans, which helped homeowners and lenders arrange for loan consolidations, loan modifications, and loan payoffs.⁴³

The MERS® System also played an important role in the fight against fraud.⁴⁴ Because of the unique MIN number given to each loan on the MERS® System, the electronic search functions can show whether a loan applicant is applying for multiple undisclosed loans simultaneously.⁴⁵ For this reason,

⁴² PRIA Land Summit, *supra* note 3, at 10-12. *See also* Mullen, *supra* note 16, at 3 (“We buy and sell servicing frequently. When we buy portfolios, there are payoffs and foreclosures the next day and therefore there is a delay in the lien-release process for non-MERS loans. With MERS, we don't need to get attorneys to correct these, and that saves us thousands of dollars a year”).

⁴³ Sargent, *supra* note 16, at 10.

⁴⁴ McLaughlin, *supra* note 17.

⁴⁵ *Id.* at 3.

the Federal Bureau of Investigation and other law enforcement agencies are MERS members.⁴⁶

Finally, the MERS® System provides information about the servicer or owner of the loan to homeowners without having to pay a fee. They can use the MERS® System to identify the phone number for their mortgage servicer, which can be crucial if they are trying to obtain loan information, modify their loan, or avoid foreclosure.⁴⁷

In sum, the MERS® System represents a triumph of new technology where lenders throughout the country and the federal government came together to solve serious national problems in an innovative manner, on a national scope. The development was so significant that the Smithsonian Institution placed MERS in its permanent research collection on information technology innovation, and cited MERS for its “remarkable achievement in finance.”⁴⁸

II. The Connecticut Supreme Court’s Decision, If Not Overturned, Will Likely Adversely Affect Mortgage Lending And Interstate Commerce Generally.

The petition explains in detail how Connecticut’s two-tiered statute facially discriminates against

⁴⁶ Sargent, *supra* note 16, at 10.

⁴⁷ Press Release, Nat’l Consumers League, *New Web Site Helps Prospective Homeowners Avoid Predatory Lenders, Fraud, and Foreclosure* (Apr. 2, 2008).

⁴⁸ *In Brief: Loan Tracking System Makes Smithsonian*, *American Banker*, Apr. 3, 1998, at 1, 1998 WLNR 2761816.

interstate commerce by imposing recording fees three times higher for loans simply because they are registered on a national electronic database. *Amici* agree with those arguments, and urge that the Court grant review for the reasons outlined in the petition.

Amici further believe that the law, if allowed to stand, will likely cause negative impacts nationwide, not just on the MERS® System and mortgage lending, but also on interstate commerce generally.

A. Adverse Impacts On The MERS® System And Those Reliant On It.

The MERS® System is a nationwide electronic registry operating in every state.⁴⁹ Its members include national lenders who lend nationwide, regional lenders who lend in multiple states in a geographic region, and online lenders who lack brick and mortar offices but offer loans across the country. There are numerous costs and time constraints associated with such national, regional, and online lending efforts, but the efficiencies of the nationwide MERS® System have helped reduce these costs and cut down delays, while providing an easily-accessible database whose information is available to lenders and consumers regardless of their location.

If Connecticut's law is not overturned and other states follow suit, however, such statutes would have a direct and significant financial impact on potential homeowners and residential lenders; recording fees

⁴⁹ MERS, FAQ, <https://www.mersinc.org/join-mers/faq#canIdesignatemers> (last visited July 14, 2016).

could easily exceed ***\$500 million*** nationwide for filing new mortgages in a single year alone.⁵⁰

These substantial additional costs will adversely affect borrowers in one of two ways. First, borrowers may pay the recording costs when they close their loans. Borrowers already pay significant closing costs in connection with residential loans, and having an additional cost imposed could force some borrowers to increase their loan amounts to pay those expenses, or may dissuade others from getting a loan at all. Alternatively, some lenders may include the increased recording fee costs in their costs to extend credit, and interest rates would likely rise. In both scenarios, the effective costs of obtaining a loan will increase. Borrowers will be deprived of available monies which they could put to other uses, or even may be discouraged from obtaining a loan at all – simply because their lender registered their loan on an efficient, comprehensive, national database that avoids the impacts resulting from outdated recording office systems.

⁵⁰ In 2015, there were approximately 7.7 million residential loans originated. Jacob Passy, *Mortgage Origination Volume Jumped 43% in 2015: Equifax*, National Mortgage News (Apr. 6, 2016). MERS mortgages comprise two-thirds of the total, or 5.1 million mortgages. Mortgage recording fees typically are \$50 depending on the jurisdiction. Charles Davis, *Closing Costs: What They Are and How Much They Cost*, WalletHub, <https://wallethub.com/edu/closing-costs-guide/616/> (last visited July 18, 2016), and so tripling that fee would increase recording fees by approximately \$510 million. This estimate is conservative: Connecticut also increased recording fees for assignments where MERS is a party, which would add to the increased costs.

Some MERS® System members may decide to reduce or even discontinue their use of the MERS® System rather than pay the three-fold increased recording fees.⁵¹ If enough lenders did so, the serious paper-based problems that existed before the advent of the MERS® System would quickly return, substantially interfering with the operation of the nationwide secondary mortgage market. The delays at recording offices would likely be far worse now than they were before the MERS® System, because recording volumes have been significantly lower over the last two decades, and records offices undoubtedly reduced staffing and resources. Errors would creep back into the process, with misfiled document and inaccurate indexes clouding title. Without the identifying MIN, mortgage fraud will become more elusive. Lenders will have to expend considerable time and money to create, execute, record, and maintain the additional paperwork the MERS® System had eliminated.

Even greater impacts would be felt on the residential lending market generally. The MERS® System was needed because, as the use of securitizations rose in the 1990s, recording offices could not cope with the increased numbers of filings each time interests in a loan were transferred. The use of securitizations has been credited with sharply lowering mortgage interest rates (which had been over 20% in the 1960s) to their current low levels, which made homeownership a possibility for more

⁵¹ The magnitude of the costs imposed by Connecticut's law dwarfs the costs the MERS® System was designed to avoid. Carr, *supra* note 7, at 2 (estimated savings of \$65 per loan).

people.⁵² Loss of the MERS® System as an efficient, reliable, and economical method of tracking transfers of interests in loans threatens to roll back these important benefits for the Nation's housing market and economy.

The Connecticut Supreme Court's decision imposes no boundaries on the degree to which a state could impose fees on those who register loans on a national registry and designate MERS as the mortgagee. Other states may increase recording fees for such MERS® System loans beyond the tripling which Connecticut undertook, which could destroy this nationwide system and cause some lenders to reduce or discontinue lending in certain jurisdictions. National lending would be undermined, turning the Commerce Clause on its head, depending on the degree to which states decide to burden the activities of the national loan registry system.

All of this would come at a time when the country is seeking to increase home ownership after the last recession, and to become a more efficient and effective economy as we move through the twenty-first century. The Connecticut Supreme Court's decision, if left to stand, threatens those salutary goals by interfering with the interstate secondary mortgage market.

⁵² Derrick Land, *Residential Mortgage Securitization and Consumer Welfare*, Consumer Finance Law Quarterly Report, 61 Consumer Fin. L.Q. Rep. 208, 211 (2007).

B. Other Adverse Impacts On Residential Lenders And Borrowers.

Every state has a variety of regulations that it imposes on residential lending but the degree of imposition on the national mortgage market in this case is so far unique. Nevertheless, the implications of the Connecticut Supreme Court's decision could extend to other types of statutes and further increase costs on national lenders, thereby burdening interstate commerce.

For example, many states require lenders to obtain a license to operate and pay a licensing fee to obtain the license.⁵³ If the Connecticut law is allowed to stand, states could raise revenues by increasing the licensing charges on national lenders compared with local lenders.

States also require lenders to pay fees when state regulators conduct examinations of lenders' activities. In Virginia, for example, the fee is currently calculated to "bear a reasonable relationship to the business volume of an individual mortgage lender, the actual cost of the examination, and to other factors relating to the supervision and regulation."⁵⁴ Under the Connecticut Supreme Court's rationale, however, a state would be free to triple the cost of those examination fees for national lenders if a state believed that doing so was

⁵³ *E.g.* S.D. Codified Laws § 54-14-16 (mortgage lender license costs up to \$1,000); Montana Code Ann. § 32-9-117 (licensing fee for mortgage lending and servicing between \$250 and \$750).

⁵⁴ Va. Code Ann. § 6.2-1612.

rationally related to generating revenue of which it believed it had been deprived.

Likewise, Georgia charges mortgage lenders a “tax at the rate of \$1.50 for each \$500.00 or fraction thereof of the face amount” of the loan, with a maximum allowable tax of \$25,000.⁵⁵ If the Connecticut model is followed, those already significant costs could be increased by a dual scheme in which out-of-state lenders paid higher taxes than Georgia-based lenders.

Many lenders are also now increasing their reliance on new internet-based, financial technology innovations. State legislatures regulate these activities, and they have, for example, recently moved to regulate lenders’ use of virtual currencies.⁵⁶ Emboldened by Connecticut’s lead, states could impose more onerous fees or taxes in this area on national entities than on local companies.

These examples could be repeated for any number of activities engaged in by companies that offer residential loans to the public. Under the Connecticut Supreme Court’s approach, all that is required is that a fee or tax be “rationally related to the goal of raising revenues or recouping lost fees” (Pet. App. 17) – a standard so low few charges could not meet it. The end result would be sharply higher costs for lenders, higher interest rates, and fewer individuals purchasing homes – all to the national

⁵⁵ Ga. Code Ann. § 48-6-61.

⁵⁶ Peter Van Valkenburgh, *Tracking Bitcoin Regulation State By State* (June 2, 2015), <http://coincenter.org/entry/tracking-bitcoin-regulation-state-by-state>.

detriment. The Founders enacted the Commerce Clause to foster economic activity across the states, not to inhibit it in this manner.

C. Adverse Impacts On Other National Industries.

Finally, the Connecticut Supreme Court's decision could have consequences far beyond the residential lending industry.

For example, the State of Colorado has estimated that it is losing more than \$170 million annually because consumers purchasing goods from online retailers such as Amazon are not paying state use taxes, and has passed a statute imposing notice and reporting obligations on retailers that sell goods to Coloradans but do not collect state sales tax.⁵⁷ Under the rationale adopted by the Connecticut Supreme Court, Colorado could further make up the lost revenue by tripling the sales tax rate for national companies located in Colorado whose goods, such as kitchen appliances, sporting goods, and the like, are sold on Amazon's online marketplace. Such an approach like Connecticut's law would burden interstate commerce.

The same logic could apply to legislation affecting interstate commerce through Netflix, an online media service that streams movies and television shows over the internet. To the extent Netflix has

⁵⁷ *E.g.*, Alicia Wallace, *Amazon to collect Colorado sales tax on purchases*, Denver Post (Jan. 15, 2016), <http://www.denverpost.com/2016/01/15/amazon-to-collect-colorado-sales-tax-on-purchases-starting-feb-1/>; *Direct Mktg. Ass'n v. Brohl*, 135 S. Ct. 1124, 1127-28 (2015).

caused a decline in state sales tax revenue because people do not buy or rent DVDs or go to the movie theater as often, states could seek to recoup the revenue by imposing extra taxes on national companies that provide Netflix content to offer on its streaming service, or on national companies that make smart TVs, computers, and other streaming devices whose sales may have increased thanks to Netflix's online content.⁵⁸ As in Connecticut, such legislation would unduly burden interstate commerce in favor of local protection, a result that would impair a national market at a time when such markets offer lower cost products sought by consumers.

III. Review Should Occur Now, Before Other Statutes Follow Suit.

The Court's review is needed now rather than at some undetermined later date. If the decision below which embraced the notion that Connecticut's law is constitutional is allowed to stand, other states can be expected to move forward with similar legislation of their own. If review is delayed until another statute is reviewed by a state supreme court and a conflict develops, states in the interim will have collected millions of dollars in fees, adversely impacting borrowers' costs, and in some cases causing lenders to reduce lending and/or change their lending practices in particular states. Worse, delay would allow additional states to interfere with the

⁵⁸ Cook County, Chicago recently extended its 9% "Amusement" levy, which applied to events like shows and baseball games, to many online services. Jeff John Roberts, *Netflix and Amazon users sue to stop Chicago's 9% streaming tax*, Fortune (Sept. 14, 2015), <http://fortune.com/2015/09/14/netflix-tax-lawsuit/>.

interstate secondary mortgage market. Unscrambling the changes which such statutes could cause would pose practical problems which could be obviated entirely if review is granted before other cash-strapped states move to mimic Connecticut's law.

If left in place, the Connecticut statute, and others like it that could follow in its wake, threaten to cause serious adverse consequences for the country's interstate secondary residential lending market and interstate commerce generally. We respectfully urge the Court to step in now and ultimately hold that the Constitution forbids the type of harmful, discriminatory regulation that Connecticut has adopted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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July 25, 2016

Counsel for Amici Curiae

APPENDIX A

THIS IS NOT AN ARBITRATION MATTER. AN
ASSESSMENT OF DAMAGES HEARING IS NOT
REQUIRED.

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PENNSYLVANIA LAND TITLE ASSOCIATION
24 Louella Court
Wayne, Pennsylvania 19087-0233

Plaintiff,

v.

CITY OF PHILADELPHIA
c/o Law Department
1101 Market Street, 10th Floor
Philadelphia, Pennsylvania 19106

and

COMMISSIONER OF THE DEPARTMENT OF
RECORDS Room 156, City Hall Philadelphia,
Pennsylvania 19107,

Defendants

PHILADELPHIA COUNTY COURT OF COMMON
PLEAS CIVIL ACTION - LAW

JANUARY TERM, 1997

No. 003127

COMPLAINT - CIVIL ACTION

23000 (MANDAMUS)

COMPLAINT - CIVIL ACTION

23000 (MANDAMUS)

A. The Parties

1. Plaintiff, Pennsylvania Land Title Association (the "PLTA"), is a non-profit corporation duly organized and existing under the laws of the Commonwealth of Pennsylvania, maintaining its principal place of business at 24 Louella Court, Wayne, Pennsylvania 19087-0233.

2. The PLTA is a trade association which acts on behalf of the title insurance industry in Pennsylvania, including title insurance underwriters and their agents.

3. The purpose of the PLTA is to:

- (a) promote the improvement of systems for maintaining real estate records;
- (b) improve practices and procedures relating to the insuring of title to real estate; and
- (c) improve business conditions in the field of title insurance.

4. Defendant, City of Philadelphia (the "City"), is a first class municipality encompassing both the City and County of Philadelphia. The City maintains an address for the service of process c/o Law Department, 110.1 Market Street, 10th Floor, Philadelphia, Pennsylvania 19106.

5. The City is a defendant in this matter as a result of the conduct of one of its departments, the Department of Records (the "Department").

6. The Department is charged, inter alia, with the responsibility for (1) recording and indexing documents involving title to real estate located in the City of Philadelphia, including but not limited to deeds, mortgages and certain non-monetary encumbrances on real estate and (2) maintaining a system for the retrieval of those documents for purposes of making title searches, all of which are to be performed in accordance with the laws of the Commonwealth.

7. Defendant, Commissioner of the Department of Records for the City ("Commissioner"), is the individual charged with overseeing the functioning of the Department. The Commissioner maintains an address at Room 156, City Hall, Philadelphia, Pennsylvania 19107.

8. The Commissioner's responsibilities include, but are not limited to, insuring that the Department fully complies with its duties and obligations under the applicable Pennsylvania laws relating to the recording and indexing of transactions involving real estate located in the City of Philadelphia.

9. This case involves the Department's and the Commissioner's willful disregard of their duty and responsibility to:

- (a) immediately record and index documents affecting real estate in the City of Philadelphia as required by the laws of the Commonwealth of Pennsylvania;
- (b) take all necessary steps to insure that the land records of the City accurately reflect the ownership of, and encumbrances on, real estate located within the City of Philadelphia; and
- (c) maintain a system which provides interested persons with access to current information regarding ownership of, and certain encumbrances on, real estate.

B. The Honor System

10. Prior to the enactment of statutes providing for the recording and indexing of documents affecting interests in land, parties engaging in real estate transactions operated under the "Honor System".

11. Under the Honor System, a deed and/or mortgage was effective merely upon execution and delivery of the document to the grantee and/or mortgagee. Such document had priority over any

subsequently executed and delivered deeds or mortgages.

12. In the absence of a "recording and indexing" system, a grantee and/or mortgagee was unable to determine if the person executing and delivering the deed and/or mortgage was actually the owner of the real property.

13. Similarly, a grantee and/or mortgagee was unable to determine if the person selling or mortgaging the real estate had previously granted other mortgages on the property to third parties.

14. The Honor System left the grantee and/or mortgagee wholly at the mercy of the integrity of the person executing and delivering the deed or mortgage.

C. The Official Recording System for Pennsylvania

1. Documents must be recorded immediately.

15. Recognizing the inherent problems with the Honor System and the unreasonable risks to which grantees and/or mortgagees were subjected, the Pennsylvania legislature enacted various statutes since 1775 which compel the recording and indexing of documents affecting interests in real estate and which enable grantees and/or mortgagees to avoid the obvious risks inherent in the Honor System.

16. Pennsylvania law provides for the recording of all deeds and mortgages conveying real estate. See 53 P.S. § 16951-16957 (1857), 53 P.S. § 16958-16960 (1867), 21 P.S. § 351 (1925).

17. In order to effectively monitor the recording of deeds and mortgages, and in order to provide an orderly system for (a) recording documents, (b) determining ownership of real estate, and (c) identifying encumbrances on real estate, every Recorder of Deeds ("Recorder") in Pennsylvania must comply with certain statutes pertaining to land records. Those statutes provide as follows:

- (a) Each Recorder must maintain a "fair book" in which the Recorder is required to make an entry of every deed or writing presented for recording. 16 P.S. § 9731.
 - (i) Each entry must be made "immediately" upon presentation of the item to be recorded. 16 P.S. § 9731.
 - (ii) Each entry must include the date and time the documents are brought into the Recorder's office for recording. 16 P.S. § 9731.
- (b) Each Recorder must "record all deeds and writings in regular succession according to their

priority of time in being brought into said office." 16 P.S. § 9731.

2. Receipts must be given to confirm when documents are recorded.

18. To enable grantees and/or mortgagees to establish the time when documents are presented for recording, section 9731 requires the Recorder to supply to the presenter of the document a receipt bearing the date on which the document was presented for recording.

19. The Pennsylvania legislature considered the requirements of section 9731 to be so critical to an effective land records system that it included within section 9731 a monetary penalty against the Recorder personally for failure to comply with its provisions.

3. Recorded documents must be indexed immediately.

20. The Pennsylvania legislature recognized that it is also critical for accurate land records to be available to the general public so that interested persons could readily determine the ownership of, and encumbrances on, real estate at any particular time.

21. To fulfill this purpose, the Pennsylvania legislature mandated that each Recorder must maintain current indexes for all of the deeds and mortgages which are recorded. 16 P.S. §§ 9851, 9852 (1875, amended 1980).

22. Those indexes must accurately and timely reflect all filed documents so that a search of the land records will disclose the current ownership and the existence of certain encumbrances on a parcel of real estate.

23. The Pennsylvania legislature considered the requirements of section 9852 to be so critical to an effective land records system that it imposed on the Recorder personal liability for damages if he or she fails to comply with the provisions of section 9852.

24. To facilitate the ability to review the indexes, section 9851 provides that the "indexes shall be arranged alphabetically and in such a way as to afford an easy and ready reference to said deeds and mortgages respectively, and shall be written in plain and legible hand."

25. To assure that the indexes are current at all times, the law provides that it is the duty of each Recorder to index every deed and mortgage "*at the time the same is recorded*". 16 P.S. § 9852 (1875) (emphasis added).

4. Establishing parcel numbers.

26. As a supplement to the above referenced recording statutes, and not as a replacement for them, the Pennsylvania legislature in 1988 adopted the Uniform Parcel Identifier Law (the "Pennsylvania UPI Law"), which sets forth an additional system for identifying real estate by uniform parcel identifier numbers ("UPI numbers").

See 16 P.S. § 9781.1 (1988), 16 P.S. § 9854.1-9854.2 (1988), 21 P.S. § 10.1, 21 P.S. §§ 331-337 (1988).

27. The Pennsylvania UPI Law allows each county, upon written recommendation of its Recorder of Deeds, to adopt an ordinance requiring the Recorder to: (a) refuse to record any instrument which does not make reference to the UPI for the parcel of land at issue, 16 P.S. § 9781.1; (b) enter the UPI number on the various indexes, 16 P.S. § 9854.1; and (c) maintain an additional index organized by UPI numbers, 16 P.S. § 9854.2.

28. The UPI Law was adopted by the City in 1989 by ordinance adopting Bill No. 478 (the "City's UPI Law"), but was not implemented until 1992. See Philadelphia, PA, Ordinance adopting Bill No. 478 (August 3, 1989).

29. The system for the recording and indexing of documents affecting real estate set forth in paragraphs 15-27 of this complaint shall be referred to as the "Official Recording System."

D. Protections afforded under Pennsylvania law to recorded and indexed documents

30. The Official Recording System is a race-notice recording system. See 21 P.S. § 351.

31. When there are parties claiming competing interests in a parcel of real estate, the party who has recorded his or her document, without actual or constructive knowledge of the rights of the other party, is deemed to have superior rights in the real estate.

32. As it would be impossible to provide actual notice to the world in order to protect a grantee's or mortgagee's interest in real estate, the adoption of a recording and indexing system enables a grantee or mortgagee to provide constructive notice to the world of his or her interest in real estate.

33. Similarly, recording and indexing enables persons interested in purchasing or obtaining a mortgage on real estate to determine the ownership of the property and the extent of certain other encumbrances affecting the property.

34. Under the Official Recording System, if a document is presented for recording, but is not recorded immediately, the grantee and/or mortgagee has no protection against a subsequent bona fide purchaser and/or mortgagee. 21 P.S. § 351; 21 P.S. § 622; 42 Pa.C.S.A. § 8141.

35. In addition, the grantee and/or mortgagee has no protection against liens, encumbrances or other matters affecting real estate (e.g., judgments, mechanic's liens, lis pendens, bankruptcies, etc.) which are filed in other departments of the City (e.g., Prothonotary, Register of Wills) or in other courts.

36. Furthermore, the special protections afforded purchase money mortgages, which establish priority from the date of the mortgage - not from the date of recording - are only available if the mortgage is recorded within ten (10) days after the date of the mortgage. 42 Pa.C.S.A. § 8141.

37. The failure to immediately index a document which has been accepted for recording is equivalent to failing to record the document at all. If the document is not immediately listed in the appropriate index, as required by law, it cannot be found by a person who is searching the title. If the document has not been indexed immediately, it does not provide constructive notice of rights granted in the recorded document until it is so indexed.

38. If documents are not recorded and indexed immediately, as required by law, the Official Recording System ceases to function and purchasers and mortgagees are relegated to the "Honor System."

E. The "Philadelphia System"

39. In the counties where the Official Recording System is followed,

- (a) grantees and mortgagees are able to have their deeds and mortgages recorded immediately;
- (b) grantees and mortgagees are able to have their deeds and mortgages indexed immediately in order to protect them from claims of subsequent purchasers and mortgagees; and
- (c) potential purchasers and mortgagees are able to accurately determine ownership of the

property and the extent of certain liens and encumbrances thereon.

40. The Department and the Commissioner are not complying with the Official Recording System which prevails throughout the Commonwealth of Pennsylvania.

41. Instead, the Department and the Commissioner have arbitrarily determined that they are not required to comply with the Official Recording System and have implemented their own system for the recording and indexing of documents (the "Philadelphia System"), which is not only in complete derogation of the duties imposed on them under the Official Recording System, but is a system which changes without notice to the public.

42. Under the "Philadelphia System", the Department and the Commissioner have ignored the statutory requirements for immediate recording and indexing of deeds and mortgages.

43. Instead, under the Philadelphia System, documents are recorded and indexed "when the Department gets to them."

1. Under the "Philadelphia System", documents are not recorded immediately.

44. Significant delays have developed between the time when a document is presented for recording and the time the document is actually recorded, indexed and returned to the person who lodged it for recording.

45. Since the backlogged documents have not been recorded and indexed, there is no protection for the grantees and/or mortgagees against subsequent bona fide purchasers or mortgagees.

46. In addition, there is no protection against other interests in real estate created by the filing of documents with other departments within the City of Philadelphia (e.g., Prothonotary, Register of Wills).

47. The City has been fully aware of the failure to record documents since its failure to comply with the Official Recording System was disclosed in an audit of the Department performed by the Office of the Controller for fiscal year 1992 (the "1992 Audit"). A true and correct copy of the 1992 Audit is attached hereto as Exhibit "A" and made a part hereof.

48. The 1992 Audit noted that:

Because ... documents are not tracked when they enter the Records Department'[sic] system, their fate becomes jeopardized. Further, since the backlogged documents are not recorded in the order received as required by law, this creates a potential legal issue for the department.

49. The 1992 Audit further provided that the Department needed to increase the number of employees who are involved in the processing of documents presented for recording and indexing.

50. Despite the findings of the 1992 Audit, the Department and the Commissioner did not take the required actions to comply with their obligations under the Official Recording System and instead continued to operate the "Philadelphia System."

51. As a result, the backlog of documents in the Department increased substantially.

52. The "Philadelphia System" had a backlog in 1994 of over 30,000 documents that had been delivered to the Department for recording but were neither recorded nor indexed.

53. The 1994 Audit by the City Controller's Office (the "1994 Audit") repeatedly condemns the Department for the backlog and admonishes the Commissioner and the Department to rectify the situation. A true and correct copy of the 1994 Audit is attached hereto as Exhibit "B" and made a part hereof.

54. The 1994 Audit stated in relevant part:

At the time of our audit, the Records Department had a backlog of 30,000 unrecorded legal documents. This backlog, in an apparent violation of State law, delays by up to six months the recording of new documents received and added to the backlog. As a result, Records' database of recorded documents, subject to public inspection, does not properly reflect an accurate picture of Philadelphia properties because mortgages, deeds, or other of the 30,000 backlogged documents are not yet included in this database.

55. The 1994 Audit further noted that "the backlog and the aforementioned negative effects of the six month recording delay is intolerable and must be addressed immediately. "

56. Despite the findings of the 1992 Audit and the 1994 Audit, the Department and the Commissioner have failed to comply with the law and continue to operate under the Philadelphia System.

57. Despite the growing backlog and a general increase in the volume of documents presented for recording, the Department reduced its staff, which exacerbated the situation.

58. The Department reduced its staff despite the fact that the revenue generated from its operations substantially exceeded its expenses.

59. As a result of its disregard of the Official Recording System, as of the end of 1996 there were at least 20,000-30,000 documents stored in over 100 boxes in the Department waiting to be recorded and indexed.

60. The storage of such documents in boxes is inherently dangerous. In fact, in August of 1991, a maintenance employee of the City discarded more than 700 documents which were awaiting recording and indexing when he threw away a box containing such documents. A true and correct copy of an article regarding the incident is attached hereto as Exhibit "C".

61. The Department is unwilling to comply with the Official Recording System because it objects to the number of documents which are being presented for recording.

62. As the volume of documents has continued to increase in recent years, the Department has failed to adequately respond to the demand. Instead, the Department has deliberately allowed the backlog to increase.

2. Under the "Philadelphia System", documents are not indexed immediately after recording.

63. In addition to the failure to record documents immediately, the Department does not immediately index documents as required by the Official Recording System.

64. In 1994, the Department did not index the recorded documents in the requisite grantor-grantee/mortgagor-mortgagee indexes for approximately three (3) to four (4) months.

65. Since the indexes were not current, it was impossible to accurately determine who owned a particular parcel of real estate or whether it was subject to other mortgage liens.

66. As of the filing of this complaint, the requisite grantor-grantee/mortgagor-mortgagee indexes are approximately five (5) to six (6) months behind.

67. As the indexes are not current as of this date, it continues to be impossible to accurately determine from the City's indexes who holds title to a particular parcel of real estate or whether mortgages have been granted on the real estate.

68. This "gap", which has been created by the failure to immediately record and index, forces grantees and/or mortgagees to rely on the Honor System when engaging in real estate transactions in the City.

3. The Department fails to record documents in the order in which they are received for recording.

69. Contrary to the Official Recording System, the Department does not record documents in the order in which they are presented.

70. The failure to record documents in sequence was noted in the 1992 Audit and continues to this date.

71. Documents submitted by mail are routinely not opened for days after receipt by the Department. In fact, larger packages (i.e., containing multiple documents to record) are routinely not opened until after smaller packages are opened.

72. Documents submitted by mail are routinely not recorded until after documents which are delivered by hand.

73. Documents presented by "bulk filers" (i.e., persons who present more than twenty-five (25) documents per week for recording) are routinely not recorded until after documents presented by individual filers.

74. The failure to record documents in the order in which they are presented exposes grantees and/or mortgagees to the risk that subsequent purchasers and/or mortgagees may obtain a superior interest in the real estate. It also exposes the grantees and/or mortgagees to risks from judgments, mechanic's liens, bankruptcies and other matters affecting real estate.

4. Beyond its arbitrary failure to immediately record and index documents, the Department regularly rejects documents for recording which are properly completed and acknowledged.

75. In addition to failing to immediately record and index documents, the Department regularly rejects documents which fully comply with the statutes establishing the Official Recording System, but which allegedly fail to meet unpublished and burdensome recording requirements imposed by the Department under the "Philadelphia System".

76. Not only are documents improperly rejected for recording but, as a result of the Department's delay in recording and indexing documents, the persons submitting the documents for recording are not informed of such rejection for as

long as six (6) months after the documents were presented for recording.

77. During that period of time, and despite the fact that the Department is obligated by law to record the documents, the grantees and/or mortgagees are at risk of intervening deeds and liens on the real estate.

5. The Department has closed the "Walk-in Window" for recording, thereby precluding a person from obtaining a receipt showing the date and time a document has been left with the Department for recording.

78. Previously, the Department has made available to the public a window to present documents for recording in person (the "Walk-in Window").

79. Complaining that too many documents were being presented for recording, the Department initially reduced the number of days during the week that the Walk-in Window was open for business and then ultimately closed the Walk-in Window completely. A true and correct copy of the Department's notice of the closing of the window is attached hereto as Exhibit "D".

80. By closing the Walk-in Window, the Department has violated the law by not providing filers with a receipt showing the date and time the documents were left for recording.

6. The Department fails to promptly return recorded documents to filers.

81. As a result of the delays in the recording and indexing of documents under the "Philadelphia System", in 1994 the Department did not return recorded and indexed documents for almost seven months.

82. As of the filing of this complaint, the Department is not returning original recorded and indexed documents to filers for almost eleven (11) months.

7. The Department arbitrarily discriminates against members of the PLTA on the basis that they file more documents than individual filers.

83. On or before September of 1994, the Department claimed that it could not immediately record and index documents because members of the PLTA were delivering documents for recording in bulk.

84. The Department made the argument that filings in bulk were a problem despite the fact that, if the individual grantees and/or mortgagees delivered the documents for recording (as opposed to members of the PLTA), the same number of documents would still be presented for recording.

85. Claiming it needed additional revenues to record and index documents immediately, in or

about September 1994, the Department implemented a bulk filing fee (the "Bulk Filing Fee") of six dollars (\$6.00) per document for any documents recorded in groups of twenty-five (25) or more.

86. The Department represented to the PLTA and to the public that the Bulk Filing Fee was intended to generate revenue in order to pay for overtime staff who would devote their time to reducing the backlog.

87. Despite the implementation of the Bulk Filing Fee and the Department's representation that additional staff and overtime work were being devoted to reduce the backlog, the delay in recording and indexing documents continued to increase.

88. As of June, 1996, the Department has collected over \$439,000 in revenue from the Bulk Filing Fees. Despite this tremendous influx of revenue, the backlog actually increased and the attendant problems at the Department have continued to grow.

89. As of this date, filers who present documents in bulk are subjected to the following delays in having their documents recorded:

- (a) an eight (8) week wait until a counter-number is assigned;
- (b) a wait of an additional four (4) months until the document is posted to the grantor-grantee/mortgagor-mortgagee index; and

- (c) a wait of an additional six (6) months until the documents are microfilmed and returned to the person who lodged them for recording.

F. Harm to the PLTA and others due to the "Philadelphia System"

90. The purpose of the Official Recording System, which requires the immediate recording and indexing of real estate documents, is to:

- (a) allow grantees and/or mortgagees to provide constructive notice to the world of their interest in real estate in order to obtain protection against subsequent purchasers, mortgagees, judgment holders and/or holders of other interests in real estate; and
- (b) allow persons dealing in real estate to determine the ownership of, and encumbrances on, real estate as of the date of the search of the public records maintained by the Department.

91. The members of the PLTA are an integral part of the real estate business in the City of Philadelphia.

92. The members of the PLTA issue title insurance policies to purchasers and/or mortgagees

insuring ownership and/or lien priority on real estate.

93. Title insurance is a requirement in almost all real estate transactions.

94. The members of the PLTA search the public records on behalf of purchasers and/or mortgagees of real estate to determine ownership and the extent of any encumbrances on the real estate.

95. Title insurance companies have a statutory duty to make a "reasonable examination of the title" before a title insurance policy is issued. See 40 Pa. C.S.A. § 910-7 (1921, amended 1963) .

96. Title insurance companies are unable to make a reasonable examination of title because the Department's records are not current.

97. Under the Philadelphia System, the PLTA and the public cannot rely on the accuracy of the Department's records.

98. At best, a search of the Department's records will disclose the owner of the property six (6) months prior to the search and the existence of a mortgage on the property six (6) months prior to the search.

99. This problem is particularly exacerbated by the fact that the records of other departments affecting real estate (e.g., Prothonotary, Register of Wills) are current and documents filed in those departments take unintended priority over

documents left with the Department for recording and indexing.

100. The Department's delinquencies have forced title companies to rely on incomplete and out-of-date information in making decisions to insure properties.

101. By being forced to rely on incomplete and out-of-date information, members of the PLTA are exposed to the risk that transactions involving real estate have occurred which are not reflected in the Department's records.

102. As title insurance companies issue title insurance policies in reliance upon the status of title as shown in the Department's records, and as those records are admittedly not correct, title insurance companies are improperly exposed to damages for breach of their policies.

103. In addition, the "Philadelphia System" creates problems for other individuals and/or companies whose business is related to real estate in the City. For example,

- (a) lenders are unable to obtain accurate information as to the status of title when taking a mortgage on Philadelphia real estate;
- (b) lenders are unable to promptly sell their mortgages in the secondary market because such transactions require the delivery

of the original mortgage documents to the purchaser and such documents do not come "off-record" for up to eleven and one-half (11^{1/2}) months;

- (c) appraisers do not have available for their review the most recent sales information on properties within Philadelphia due to the fact that sales transactions do not appear in the appropriate indexes for six (6) months; and
- (d) property owners and/or mortgagees are exposed to the possibility that their rights may be wrongfully ignored in a Sheriff's Sale if some other party is listed as record owner of the parcel at issue.

104. The "Philadelphia System" also creates substantial problems for the City in that:

- (a) the City cannot be sure it is bringing code violation claims against the proper party because the Department's records are not current or accurate;
- (b) the City cannot be sure it is assessing local taxes against the proper party as the Department's records are not current or accurate; and

- (c) transfer tax monies due to the City and the Commonwealth are not promptly received because the checks are not deposited until the deeds are recorded.

105. The City, itself, has acknowledged that the delay in recording and indexing and the resulting backlog is a source of significant problems for the City's real estate industry and business environment.

106. City officials at all levels have had notice of the backlog and its attendant ramifications for several years and have failed to respond to the crisis.

107. For several years, the PLTA has attempted to obtain the Department's agreement to comply with its obligations under the Official Recording System.

108. Despite its clear obligation to do so, the Department continues to ignore its obligations under the Official Recording System and continues to operate under the "Philadelphia System", all in violation of the laws of the Commonwealth of Pennsylvania.

MANDAMUS CLAIM

109. The allegations of paragraphs 1-108 inclusive are incorporated herein by reference.

110. The PLTA has established the requisite elements for mandamus relief.

111. This Court has full authority to compel the City and the Commissioner to comply with their obligations under the Official Recording System.

112. The PLTA does not have any other adequate remedy at law.

WHEREFORE, plaintiff demands judgment for declaratory and mandatory relief compelling the Department and the Commissioner to comply with all statutes of the Commonwealth establishing and implementing the Official Recording System and, further, that plaintiff be provided such other and further relief as may be just and necessary.

[SIGNATURE]

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Dated: January 30, 1997

APPENDIX B

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PENNSYLVANIA LAND TITLE ASSOCIATION

v.

CITY OF PHILADELPHIA, et al.

COURT OF COMMON PLEAS OF PHILADELPHIA
COUNTY

JANUARY TERM, 1997

No. 3127

ORDER OF MANDAMUS

AND NOW, this day of November, 1997, after hearing in this matter, and Plaintiff having established by a preponderance of the evidence that:

- a. Plaintiff has standing to bring this action;
- b. the Defendants are knowingly violating their clear duties under the laws of the Commonwealth of Pennsylvania relating to the recording and indexing of documents;

c. the Plaintiffs members have suffered actual monetary losses and are exposed to the risk of substantial loss as a result of the Defendants' failure to comply with the laws relating to the recording and indexing of documents; and

d. there is no appropriate or adequate remedy other than relief in mandamus; it is hereby ORDERED AND DECREED as follows:

1. The Defendants shall immediately take all action as is necessary, including but not limited to, the hiring of personnel and the expenditure of monies necessary to pay salaries and overtime, to eliminate the recording backlog and the indexing backlog (the "backlogs"), which backlogs shall be fully eliminated in no less than months from the date hereof.
2. The Department shall not record and/or index any new documents presented to the Department prior to any documents that were previously presented to the Department for recording and indexing. The Defendants shall take such action as is necessary to insure that any new document presented to the Department shall be recorded and indexed in the order in which they are presented to the Department.
3. Once the backlogs are eliminated, the Defendants shall take all action necessary to avoid the creation of any new backlog in the recording and/or indexing of documents.

4. The Defendants are directed to fully comply with all statutes of the Commonwealth of Pennsylvania relating to the recording and indexing of documents.

5. This Court shall retain jurisdiction of this matter to enforce compliance with the terms of this Order.

6. Defendant shall report to the Court a plan of compliance no later than December 23, 1997.

BY THE COURT:

[SIGNATURE]