IN THE SUPREME COURT OF OHIO
CASE NO.: 2024-0257

SAMUEL VOSS,

Appellee,

v.

QUICKEN LOANS, LLC and MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.,

Appellants.

On Appeal from the Hamilton County Court of Appeals, First Appellate District

Court of Appeals Case No. C 2300065

Amici Curiae Brief of Dworken & Bernstein, Co., L.P.A. and Brian Ruschel in Support of Plaintiff-Appellee on Proposition of Law Number Two

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INTEREST OF AMICUS

Your Amici submit this brief in support of the position of Plaintiff-Appellee, and the position of Amicus David Yost, Ohio Attorney General, on Proposition of Law Number Two. The undersigned Amici are counsel who (on behalf of named Plaintiffs and numerous certified classes) have handled the vast majority of all late release cases in Ohio for the last several decades. These cases have included most cases decided by this court, and other courts, on the scope and operation of R.C. 5301.36, including *Rosette*, *Pinchot*, *Radatz*, *a*nd numerous others.

These suits were brought in response to the troubling but common practice of lenders and their servicers ignoring Ohio law requiring prompt (90 day) release of mortgage liens upon pay-off of residential mortgages. Releasing a lien costs money (the county filing fee for recording the release, cost of a title company or equivalent to perform the filing, etc.) But with a clear, mandatory statute requiring lien release within 90 days, yet little or no teeth to the obligation, lenders simply ignored the requirement.[1] This did not simply mean late releases. It often meant no release filed. The homeowner who diligently spent the last 15, 20 or 30 years paying their mortgage for thousands of dollars, ended-up with no clear title and a tangled, expensive mess at the recorder's office. No HELOC could be obtained. Forget a refinancing. Pledge your home equity for a new small-business start-up? Not happening.

[1] See, e.g., https://www.crainscleveland.com/article/20150529/BLOGS05/150529784/new-mortgage-satisfaction-statute-helps-with-completion-of ("For years, Ohio real estate professionals and parties to real estate transactions have faced a serious problem. Mortgages that had been paid off remained of record, and all-too-often it was extremely difficult to have them released. Because of the satisfied but unreleased mortgages that remained of record, many real estate transactions were delayed, and some transactions could not be completed.")

Fixing this required hours on phone calls with servicers (and their 'call centers' often out of the United States), and sometimes even the prohibitive expense of hiring an attorney to untangle the mess.

Early versions of R.C. 5301.36 had 'mini' enforcement provisions for consumers. An award of less than $250. Recovery of possible attorney fees. Liability to the lender for a whopping one-year of violations. But the sheer volume of late releases showed that those were toothless, and *late* releases were the rule throughout Ohio.

That is, until this court's tandem decisions in the seminal cases of *In re Consol. Mtge. Satisfaction Cases*, 97 Ohio St.3d 465, 2002-Ohio-6720 and *Rosette v. Countrywide Home Loans*, 2005-Ohio-1736. With those rulings by this Court, and a wave of class actions against non-compliant lenders, suddenly Ohio saw nearly total compliance with R.C. 5301.36.

That accomplishment has been highly valuable to home-owners throughout our state, and to County Recorders and others that depend on accurate records of real property titles, liens and encumbrances.

The effort today by Defendant-Appellant Quicken to blunt that success and jettison that law is bad policy, and should be rejected.

ARGUMENT

The maintenance of accurate records regarding property ownership is a fundamental function of local governments. The Ohio General Assembly, recognizing the importance of up-to-date property records, enacted R.C. 5301.36, which allows the owner of a property to recover $250 if a mortgagee fails to timely record satisfaction of a mortgage. The $250 is a *de minimis* amount in the context of interest and fees on a mortgage loan. But the threat of being sued under R.C. 5301.36 has been sufficient

incentive for Defendant-Appellant Rocket Mortgage to timely record over 99% of its mortgage satisfactions.

Despite Ohio courts repeatedly permitting homeowners to enforce R.C. 5301.36 for more than 20 years, Defendants-Appellants ask this Court to gut R.C. 5301.36 by holding that Plaintiff-Appellee Voss (and anyone like him) lacks standing and so cannot sue under R.C. 5301.36. Defendants' position should be rejected.

Defendants' argument is premised on applying the standing requirements of Article III of the United States Constitution to Ohio courts. This Court should decline to do so. The Ohio Constitution contains no provision comparable to Article III. Also, Article III jurisprudence is premised on limiting the powers of an unelected federal judiciary, a concern that does not apply to Ohio courts.

Finally, even if this Court chooses to adhere to federal court standards for standing, Plaintiff satisfies those standards, because his statutory claim bears a close relationship to a common-law action to quiet title, which, under federal law addressing Article III standing, makes his intangible harm a concrete injury.

FIRST PROPOSITION OF LAW: The limits on standing imposed on federal courts under Article III of the United States Constitution do not apply to Ohio state courts.

I. Ohio courts do not have to adhere to federal standing requirements.

In the federal judicial system, the injury requirement is "grounded in the constitutional requirements of Section 2, Article III of the United States Constitution", which necessitates a showing of injury in fact. *State ex rel. Ohio Academy of Trial Lawyers v. Sheward,* 86 Ohio St.3d 451, 470 (1999). "Ohio has no constitutional counterpart to Section 2, Article III[.]" *James A. Keller, Inc. v. Flaherty,* 74 Ohio App.3d 788, 791 (10th Dist. 1991). Therefore, federal decisions

on standing "are not binding upon" the Ohio Supreme Court, which is "free to dispense with the requirement for injury where the public interest so demands." *Sheward* at 470; *ASARCO Inc. v. Kadish*, 490 U.S. 605, 617 (1989) (the "constraints of Article III do not apply to state courts" so "the state courts are not bound to adhere to federal standing requirements"); *Ohio Democratic Party v. LaRose*, 2020-Ohio-4778, ¶ 14 (10th Dist.) ("Ohio courts are not bound by federal standing principles derived from Article III of the United States Constitution's 'cases' and 'controversies' requirement.").

"Nothing mandates nor suggests state and federal courts must share standing doctrines; to the contrary, state courts can formulate their standing rules without any regard to the federal doctrine." Strotman, *No Harm, No Problem (In State Court): Why States Should Reject Injury In Fact*, 72 Duke L.J. 1605, 1608-09 (2023).

II. The Framers drafted Article III in the context of preexisting state courts.

When Article III was adopted, a primary concern of the drafters was "protecting the general primacy of state courts in deciding traditional categories of disputes between private parties outside the maritime context." Golden & Lee, *Federalism, Private Rights, and Article III Adjudication*, 108 Va. L. Rev. 1547, 1549 (2022). The delegates to the Constitutional Convention were "cautious about displacing state courts." *Id.* at 1565. Consequently, Article III reflects a compromise between the need for a national judiciary and preservation of the traditional powers of state courts. *Id.*; *Strotman*, 72 Duke L.J. at 1619 (in drafting

the federal Constitution, "the Framers limited the federal judicial power rather than making it equivalent to the broad judicial power of the states").

III. Federal court standing requirements arise from separation of powers concerns that are largely mitigated by Ohio judicial elections.

Article III standing "is 'built on a single basic idea—the idea of separation of powers.'" *Food and Drug Admin. v. Alliance for Hippocratic Medicine*, 602 U.S. 367, 378 (2024), quoting *United States v. Texas*, 599 U.S. 670, 675 (2023). And "federal justiciability doctrine equates separation of powers with a particular set of institutional arrangements: Article III Courts that are unelected and independent, a bicameral Congress ..., and a single President aided by administrative agents." (Emphasis added.) *Hershkoff,* 114 Harv. L. Rev. 1833 1882 (2001). "'All of the doctrines that cluster about Article III [including standing] ... relate in part ... to an idea ... about the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government.'" (Emphasis added.) *Allen v. Wright*, 468 U.S. 737, 751 (1984), *overruled on other grounds by Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 128 (2014). "That federal judges are unelected, and federal courts presumed undemocratic figures prominently as a justification for Article III restraint." (Emphasis added.) Hershkoff, 114 Harv. L. Rev. at 1885. Thus, Ohio judicial elections "dilute the counter majoritarian concerns associated with the Article III system." *Id.* at 1886.

IV. The Ohio General Assembly decides who may sue and be sued.

"Ordinarily, it is for the Legislature to determine who may sue or be sued so long as it does not interfere with vested rights, deny any remedy, or transgress constitutional

inhibitions. As a general rule, every state has control over the remedies it offers litigants in its courts." *Lyons v. American Legion Post No. 650 Realty Co.,* 172 Ohio St. 331, 333-34 (1961). Here, our General Assembly determined that "the mortgagor of the unrecorded satisfaction and the current owner of the real property to which the mortgage pertains may recover" damages under R.C. 5301.36(C)(1). That determination does not transgress any Ohio constitutional inhibitions.

V. The General Assembly's decision to allow homeowners to recover statutory damages for violations of the mortgage satisfaction laws has proven to be an effective mechanism for compelling lenders to comply with those laws.

R.C. 5301.36 addresses an indispensable function of local government—maintaining accurate and current land records. The wisdom of the General Assembly's decision to provide property owners with the ability to recover statutory damages for violations of R.C. 5301.36 is evident from Defendants' brief, in which they note that Rocket Mortgage had a 99.95% compliance rate with R.C. 5301.36. Defendants' Merit Brief, p. 5.

The Ohio mortgage industry has been educated on the need to timely release mortgages through the certification by this Court of multiple class actions brought under R.C. 5301.36. Those decisions by this court have consistently given liberal and remedial application to the operation of this statute, in the precise way it is being used in the present case. See, for example, *In re Consolidated Mortgage Satisfaction Cases,* 97 Ohio St.3d 465 (2002) (reinstating class certification in a matter in which the plaintiffs alleged violations of R.C. 5301.36); *Pinchot v. Charter One Bank, F.S.B.,* 2003-Ohio-4122 (Federal banking regulation does not preclude or preempt operation of $250 recovery under R.C. 5301.36 for late release class action); *Rosette v. Countrywide Home*

Loans, 2005-Ohio-1736 (late release class action under R.C. 5301.36 governed by six-year statute of limitations, not shorter one-year period; dismissal reversed); *Radatz v. Fed. Natl. Mtge. Assn.*, 2016-Ohio-1137 ('stay order' by federal agency did not divest Ohio court of jurisdiction of class action against Federal National Mortgage Association under R.C. 5301.36, and relief for late releases was within court's jurisdiction when FNMA left conservatorship).

Significantly, the legislature tried a variety of methods to gain compliance with the requirement of timely release of paid-off mortgages. The original approaches of a smaller incentive amount (less than $250); an award of attorney fees instead of a fixed payment amount; liability for only one year of violations (rather than six), made little impression on the industry, and tens of thousands of late releases occurred every year, county to county. It was not until an onslaught of class actions for $250 recovery for every late release, over a broad six-year period, was instituted (and approved in *Rosette*) that the standard industry practice of ignoring timely release duties ended. The threat of exposure to millions of dollars for late releases was potent and effective medicine, and accomplished exactly what our General Assembly targeted—timely filing of releases.

These class actions (and this court's uniform support for their goal) showed that mere statutory language requiring the timely recording of mortgage satisfactions, without a mechanism for property owners to enforce that requirement, is totally insufficient to motivate lenders to timely record mortgage satisfactions. Only after class claims were brought by individuals, classes certified, and statutory damages awarded on a long-term (six year) class-wide basis did lenders learn to conform to the statutory requirements. These facts show both that (1) the General Assembly knew what it was doing in allowing property owners to recover statutory damages for a late release,

without more, and (2) mortgage satisfactions will not be timely recorded if homeowners are denied standing to bring these claims, as is now allowed.

SECOND PROPOSITION OF LAW: Voss' claim satisfies federal standing requirements.

I. An intangible harm can be a concrete injury.

"Various intangible harms can also be concrete. Chief among them are injuries with a close relationship to harms traditionally recognized as providing a basis for lawsuits in American courts." *TransUnion LLC v. Ramirez*, 594 U.S. 413, 425 (2021). "In other words, an intangible injury may be concrete if it has a close historical or common law analogue." *Freeman v. Ocwen Loan Servicing,* 2024 WL 3381718, *3 (7th Cir. July 12, 2024). The "historical analogue need not be an 'exact duplicate' to make this showing." *Ward v. Nat'l Patient Acct. Servs. Sols., Inc,* 9 F.4th 357, 362 (6th Cir. 2021), quoting *TransUnion* at 424.

V. The common-law analogue to R.C. 5301.36 is a quiet title action.

"A suit to quiet title is an equitable action that involves clearing a title of an invalid charge against the title[.]" 65 Am. Jur. 2d Quieting Title § 2. The quiet-title action is a common law action. *Id.* at § 30; Schetroma and Holland, *The Quiet Title Action,* 34 E Min. L. Found. § 15.03 (2013). "Defective title is known by various names in various states and regions. In some cases, defects are called 'clouds' and the quiet title action is stated to be an action to 'remove' a 'cloud' from title." Schetroma at § 15.

This court would be plowing no new ground, since it previously recognized this point. Indeed, it did so in a case dealing with this same issue, to wit, a R.C. 5301.36 late release class action addressing whether the subject statute was a state law antecedent for protection of clear title to real property, rather than a regulation of lending. See,

Pinchot, 2003-Ohio-4122 at ¶46 ("The mortgage is taken to secure the loan and filed to perfect the lien. When the loan is paid, the mortgage is satisfied, leaving a cloud on the title to the realty until the satisfaction is recorded.")

CONCLUSION

This appeal raises a center-stage question on application of a statutory amendment to a pending case (on which Your Amici take no position). But it also seeks to raise, in the wings, the issue whether the Ohio General Assembly has the power, under the Ohio constitution, to enact laws that accomplish compliance by monetary award to citizens subject to violation of the law, without further proof of harm. See, Proposition of Law Number Two. On that issue this *Amici* brief is submitted.

The General Assembly has passed dozens of such laws, far beyond just R.C. 5301.36, making Proposition of Law Number Two the driving-force behind Quicken's appeal to this court: extinguish statutes which impose monetary payments for violations without additional proof of loss. But our General Assembly made the policy choice to enact such laws, and they have been effective. Quicken disagrees with that approach to law-making and would like this court to end it. But Separation of Powers makes it for the legislature, not the courts, to decide the laws governing activity within our state, including laws like R.C. 5301.36 which operate based on violation alone, not based on additional harm.

No constitutional impediment stands in the way of that core function of our legislature. Ohio's regimen of payment to owners for late releases provided by R.C. 5301.36 is squarely within the ambit of Ohio's right to confer standing on its own courts, even beyond the bounds of federal Article III. Further, it is even within the scope of 'concrete injury' for federal standing.

Thus, whether Ohio approaches this through Ohio's right to craft its own standing beyond Article III, or by complying with federal Article III standing (which it need not), this Court should reject Defendant's invitation to ignore separation of powers and to override our General Assembly on myriad statutes, like R.C. 5301.36, that provides a statutory recovery (including for deterrence) based on violation alone.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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