IN THE SUPREME COURT OF OHIO

WELLS FARGO BANK, NATIONAL ASSOCIATION, AS TRUSTEE FOR SOUNDVIEW HOME LOAN TRUST 2007-OPT4, **PLAINTIFF-APPELLEE,** ***V.*** **GRACE M. DOBERDRUK, *ET AL.*,** **DEFENDANT-APPELLANT.**	**CONSOLIDATED CASE NOS. 2024-1669** **2025-0071**

BRIEF OF AMICI CURIAE LEGAL AID OF SOUTHEAST AND CENTRAL OHIO, LEGAL AID SOCIETY OF CLEVELAND, LEGAL AID SOCIETY OF SOUTHWEST OHIO, ADVOCATES FOR BASIC LEGAL EQUALITY, LEGAL AID OF WESTERN OHIO, AND COMMUNITY LEGAL AID SERVICES IN SUPPORT OF APPELLANT GRACE M. DOBERDRUK

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STATEMENT OF INTEREST OF AMICI CURIAE

Amici curiae include all the legal aid organizations in Ohio: Legal Aid of Southeast and Central Ohio, Legal Aid Society of Cleveland, Legal Aid Society of Southwest Ohio, Advocates for Basic Legal Equality, Legal Aid of Western Ohio, and Community Legal Aid Services, Inc. (collectively, "Ohio Legal Aid Organizations"). For decades, the Ohio Legal Aid Organizations have represented Ohioans facing the loss of their homes through foreclosure. The questions presented in this case directly concern the Ohio Legal Aid Organizations and their client population because the lower court's ruling wrongly expanded the concept of mootness in a way that would deny many low-income Ohioans their right to appellate review.

This case is about access to justice. With two economic crises in the last 20 years, the Ohio Legal Aid Organizations have witnessed the critical role of courts, particularly courts of appeals, in foreclosure cases. Rising case filings led to lax practices by the foreclosure industry. Problems like banks pursuing foreclosure without owning the loan, robo-signing, dual tracking, and other servicing errors grew exponentially. Erroneous foreclosure judgments followed. For Ohio's families, foreclosure is more than just the loss of a house. It typically means the loss of their largest asset, loss of wealth, and risk of homelessness. It is only fair, then, that the foreclosing plaintiffs prove their case for foreclosure. When those foreclosing plaintiffs fail to properly prove their case, the availability of appellate review in foreclosures provides crucial protection for Ohio's homeowners.

As discussed in more detail below, the Eighth District Court of Appeals' decisions, which found Ms. Doberdruk's appeal to be moot when the foreclosure sale was confirmed and the funds were disbursed, improperly denied her the right to appeal. Ms. Doberdruk's appeals are not moot and real, justiciable controversies exist because (1) if successful on appeal, Ms. Doberdruk

would be entitled to restitution under R.C. 2329.45, (2) parties to a foreclosure still have ongoing legal claims to a surplus or deficiency from a sale, (3) cases do not become moot unless they are voluntarily paid or satisfied, and (4) the requirement to post bond (in addition to the security of a mortgage) would, in effect, deprive all low-income homeowners of their right to appeal and encourage plaintiffs to rush execution.

STATEMENT OF THE CASE AND FACTS

Amici curiae the Ohio Legal Aid Organizations fully adopt the Statement of the Case and Facts in the merit brief of Appellant Grace Doberdruk.

ARGUMENT

Case No. 2024-1669, Proposition of Law No. 1: An appeal from the judgment of foreclosure is not moot when the proceeds of sale have been distributed because R.C. 2329.45 provides the remedy of restitution.

Case No. 2025-0071, Certified Question: Is an appeal of the judgment of foreclosure moot after the distribution of sale proceeds when an appellant filed a motion requesting a stay but could not post the bond or is the appeal not moot because R.C. 2329.45 provides the appellant with the remedy of restitution?

I. Foreclosure appeals are not moot after confirmation and distribution of funds because R.C. Chapter 2329 also provides (1) restitution if the confirmation order is reversed, (2) payment of a sale surplus, and (3) collection of a deficiency, all of which are directly impacted by the appeal.

Cases are only moot if the issues presented are no longer "live" or the parties "lack a legally cognizable interest in the outcome." *State ex rel. Gaylor v. Goodenow*, 2010-Ohio-1844, ¶ 10 (internal citations omitted). If "an actual controversy exists because it is possible for a court to grant the requested relief, the case is not moot, and consideration of the merits is warranted." *Id.* at ¶ 11. This question often depends on whether cases "become fictitious, colorable, hypothetical, academic or dead" and they "involve no actual genuine, live controversy, the decision of which

can definitely affect existing legal relations." *In re L.W.*, 2006-Ohio-644 (10th Dist.) (internal citations omitted). This foreclosure is not moot.

A. Under R.C. 2329.45, an appeal of a judgment of foreclosure and of the order confirming a sheriff's sale of real property is not mooted by the distribution of sale proceeds if the appellant filed a motion requesting a stay but could not post the bond.

R.C. 2329.45 expressly provides for restitution after a successful appeal of a judgment that has already resulted in the sale of real property. It allows a good-faith purchaser to keep the property, while also making the appellant whole again after the appellant was unlawfully dispossessed of the property. Ohio law has provided this remedy for over 75 years, starting with the General Code and adopting it into the Revised Code with its enactment in 1953. In 2016, the General Assembly updated R.C. 2329.45 to clarify that by reversal it meant "on appeal", the amount of restitution owed and by whom, and that everyone who was impacted should be considered when making restitution. Am.Sub.H.B. No. 390, 2016 Ohio Laws 117, 77. No part of the statute has ever been removed or omitted.

The text and history of R.C. 2329.45 show that the General Assembly contemplated that foreclosure appeals can and should be reviewed even after a sale is confirmed and a deed is issued. *Boley v. Goodyear Tire & Rubber Co.*, 2010-Ohio-2550, ¶ 21 (courts should "give effect to every word and clause" and avoid construction that "renders a provision meaningless or inoperative.") The legislature changed the law in less than ten years ago to add the language "on appeal" and clarify its application. The only way restitution in R.C. 2329.45 could arise is if a home is foreclosed, sold, sale is confirmed, and then the foreclosure judgment is subsequently reversed. Holding otherwise renders the statutory language in R.C. 2329.45 meaningless.

1. Currently, Ohio Courts of Appeals are split on whether an appellate court may decide a live controversy because R.C. 2329.45 provides for restitution, or whether the issue is moot once the proceeds of the sale have been distributed.

Due to the difficulty in obtaining a stay under Civ.R. 62(B) and App. R. 7(A), discussed *infra*, several appellate courts have addressed similar situations. Over the past two decades, two conflicting bodies of case law have emerged regarding whether the appeal of a judgment of foreclosure is moot when the appellant was unable to post a supersedeas bond. The Fifth, Eighth, Ninth, and Twelfth Districts rely on the mootness doctrine to conclude that when no stay is put in place, the judgment is satisfied through the sale of the property and distribution of proceeds, making the appeal moot and R.C. 2329.45 inapplicable. *See, e.g.*, *Bankers Trust Co. of Cal., N.A. v. Tutin*, 2009-Ohio-1333, ¶ 1 (9th Dist.). These courts hold that appellants who did not seek a stay of the judgment do not have the right to appeal under R.C. 2325.45. *Cooper v. Westerville*, 2013-Ohio-4652, ¶ 17 (5th Dist.). Even in instances when the appellant seeks a stay, if they are unable to post bond, the appeal is considered moot. *U.S. Bank Trust Nat'l Assn. v. Janossy*, 2018-Ohio-2228, ¶¶ 7-8 (8th Dist.). The satisfaction of the judgment ends the controversy and prevents any further litigation, even a motion to vacate judgment, according to these courts. *Id.* However, these courts hold that R.C. 2329.45 still can provide restitution when the appellant has obtained a stay of the distribution of proceeds from the sheriff's sale. *Tutin*, 2009-Ohio-1333, ¶ 15.

In contrast, the Second, Sixth, Tenth, and Eleventh Districts rely on R.C. 2329.45 to determine that even when there is no stay in place to prevent the distribution of proceeds, the appeal can proceed because the satisfaction of the judgment through distribution was involuntary and there is the possibility of restitution. *See, e.g.*, *MIF Realty L.P. v. K.E.J. Corp.*, 1995 WL 311365 (6th Dist. May 19, 1995). Instead, "[r]estitution is appropriate in cases such as these,

where the foreclosed property has been sold, and the appellant filed for a stay, but was unsuccessful due to his or her failure to post a supersedeas bond." *Ameriquest Mortg. v. Wilson*, 2007-Ohio-2576, ¶ 19 (11th Dist.). The opportunity for restitution provides "protection of a good-faith purchaser of property, but also provide[s] a remedy to debtors after their property is foreclosed and title passed." *LaSalle Bank Natl. Assn. v. Murray*, 2008-Ohio-6097, ¶ 28 (7th Dist.). The Tenth District may have said it best: "[i]t is a suspect argument to assert that a void, voidable, or merely erroneous judgment might evade appellate review simply because it was rendered rapidly, completely, and without notice." *Everhome Mtge. Co. v. Baker*, 2011-Ohio-3303, ¶ 14 (10th Dist.).

This Court should follow the precedent established by the Second, Sixth, Tenth, and Eleventh Districts and hold that R.C. 2329.45 allows for the remedy of restitution after reversal upon appeal regardless of whether the appellant has effectuated a stay of distribution of proceeds by posting a supersedeas bond. Accordingly, the Eighth District's decision should be reversed.

2. There is no expectation of finality to a foreclosure at the time of distribution of proceeds because R.C. 2329.45 provides restitution as an option.

The plain and unambiguous text of R.C. 2329.45 provides that restitution is an available remedy when a foreclosure sale occurs and the foreclosure is later reversed on appeal. *See Ayers v. Cleveland*, 2020-Ohio-1047, ¶ 17 ("When a statute is plain and unambiguous, we apply the statute as written."). There is no prescribed limitation on the timing or availability of restitution as a remedy. If an appellant has attempted to obtain a stay of execution of a foreclosure order, the appeal should be allowed because there is no expectation of finality simply because proceeds have been distributed following the sale.

Ms. Doberdruk's situation is analogous to *Green Tree Servicing LLC v. Asterino-Starcher*, 2018-Ohio-977 (10th Dist.). In *Asterino-Starcher*, the Tenth District held that an appeal of a foreclosure judgment was not moot because the language of the statute makes it clear that restitution is an available remedy regardless of whether the proceeds have been distributed. *Id.* at ¶¶ 15–16. The court reasoned that reversal of the trial court's decision would allow for the trial court to consider the merits of restitution *after* the proceeds have been distributed. *Id.* at ¶ 18. As in *Asterino-Starcher*, it follows that the disbursal of funds does not create an expectation of finality.

Courts that have construed a narrow avenue of restitution under R.C. 2329.45 have misinterpreted the statute's plain language. For example, in *Bankers Tr. Co. of Cal., N.A. v. Tutin*, 2009-Ohio-1333 (9th Dist.), the Ninth District held that the distribution of foreclosure proceeds rendered the appeal moot because a successful appeal "cannot have any practical effect upon the issues raised by the pleadings." *Tutin* at ¶ 8 (quoting *Sedlak v. Solon*, 104 Ohio App.3d 170, 178 (8th Dist. 1995)). This understanding fails to take into account that restitution under R.C. 2329.45 is an equitable remedy directly related to the foreclosure issues raised in a pleading, regardless of whether the foreclosure proceeds have been distributed.

The Ninth District acknowledged the importance of the plain language of statutes. *Tutin* at ¶ 12. However, the court mistakenly found that allowing a case to proceed through an appeal, rather than declaring it moot, would require an expansion of the time period during which R.C. 2329.45 applies to a foreclosure case and create an exception to the mootness doctrine. *Id.* at ¶ 15 ("[T]hey have extended it to situations in which the property has been sold *and* the proceeds of the sale have been distributed" (emphasis in original)). Despite *Tutin's* emphasis on the plain language statutory interpretation, the Court read restrictions into the plain language of the statute

to hold that the statute applies *only* when the proceeds have not yet been distributed. *Id.* Logically, when a statutory provision regarding scenarios is broad, it is assumed that other scenarios under that umbrella are included rather than excluded. *See State ex rel. Sanford v. Bureau of Sentence Computation*, 2017-Ohio-8723, ¶¶ 5–6. To say that "land is sold" includes scenarios in which "land is sold and proceeds are distributed" does not change the meaning of the statute. This Court should find that *Tutin*'s interpretation of R.C. 2329.45 is incorrect and contrary to the plain language of the statute.

Furthermore, cases in which the appellant takes no action to effectuate a stay, rendering the appeal moot, are distinguishable from this case. In a Fifth District case, rather than seek a stay of execution, the appellant sold the real estate prior to the scheduled date for a sheriff's sale. *Cooper v. City of Westerville*, 2013-Ohio-4652, ¶ 17 (5th Dist.). There may be an expectation of finality when appellants themselves voluntarily sold the real estate, but this was not the case for Ms. Doberdruk where her home was sold at a sheriff's sale.

In addition, Ms. Doberdruk took steps to effectuate a stay. She filed a motion to stay the sheriff's sale, which was denied. (R. at 90, 92). She also filed a motion to stay confirmation of the sale and distribution of the proceeds (R. at 94.) However, her motion to stay confirmation was conditioned on her posting a bond (R. at 96), which she was unable to do. In another case, the Twelfth District similarly held that the appeal was moot after the appellant failed to request a stay at any point. *Villas at the Pointe of Settlers Walk Condo. Assn. v. Coffman Dev. Co.*, 2010-Ohio-2822, ¶ 5 (12th Dist.) (Appellant was a cross-claim defendant attempting to prioritize its lien on the home and not the homeowner defendant in the action). The real estate was sold, and proceeds were distributed. *Id.* The facts in *Villas* are distinguishable from the instant case because Ms. Doberdruk did what was in her power to attempt to effectuate a stay.

Because R.C. 2329.45 permits restitution as a remedy specifically in situations where a judgment of foreclosure is overturned on appeal and Ms. Doberdruk attempted to effectuate a stay of execution, her appeal therefore is not moot and the decision of the Eighth District therefore should be reversed.

B. The Court of Appeals also overlooked the remaining justiciable issues regarding deficiencies and surplus funds which are wholly dependent upon the confirmation order.

Confirmation of a sheriff's sale does not end the proceedings. There are additional statutory processes in R.C. Chapter 2329 ("Execution Against Property"), including the homeowner's right to surplus funds (R.C. 2329.44) and the plaintiff's collection of a deficiency on the loan (R.C. 2329.08). These are ongoing, pending, real, and actual controversies between the parties that are directly affected by the confirmation order.

The property in this case sold for $412,600 (R.93), which is less than the judgment to the plaintiff on the loan, $449,905.31 (R. 78 at 6). That leaves a deficiency balance owed to the plaintiff. The plaintiff can still attempt to collect that deficiency for two years after confirmation. R.C. 2329.08. The existence and amount of this deficiency balance and the ongoing possibility of collection are remaining controversies that prevent mootness. *Miner v. Witt*, 82 Ohio St. 237, 238 (1910). The deficiency (and therefore the homeowner's ongoing liability) depends largely on whether the confirmation order was appropriate – a question the Eighth District declined to decide here.

In other cases where the sale proceeds exceed the balance owed on the liens, taxes, and costs, there are surplus funds that must be remitted to the clerk of court. R.C. 2329.44(A) and R.C. 5721.20 (surplus funds in tax foreclosures). The homeowner is entitled to recover those excess funds. R.C. 2329.44(B). The orders distributing those surplus funds are appealable. *See*

Treasurer of Cuyahoga County v. Berger Props. of Ohio, LLC, 2021-Ohio-3204 (8th Dist.) and *Villas at East Pointe Condo. Assn. v. Strawser*, 2019-Ohio-03554 (10th Dist.). Such orders would not be appealable if they did not affect a substantial right. *See* R.C. 2505.02(B)(2). So, the inescapable conclusion here is that the homeowner's right to surplus funds is a substantial right. That substantial right remains even after a trial court confirms a foreclosure sale and disburses funds.

The Eighth District's sweeping holding–that appeals are moot after confirmation of a sale and distribution of proceeds–overlooks the remaining legal processes regarding excess funds and deficiency proceedings.

Case No. 2024-1669, Proposition of Law No. 2: If a homeowner files a motion to stay the distribution of proceeds, then there is no voluntary satisfaction of the judgment and the appeal is not moot.

I. Involuntary execution or payment cannot render something moot.

It is well established that only voluntary payment or satisfaction of an underlying judgment will render an appeal moot. *Blodgett v. Blodgett*, 49 Ohio St.3d 243, 245 (1990) (if "judgment is voluntarily paid and satisfied, such payment puts an end to the controversy, and takes away from the defendant the right to appeal or prosecute error or even to move for vacation of judgment.'"). This doctrine arises, in part, from the justiciability of issues and appellate courts rendering decisions on actual cases and controversies. *See Poppa Builders, Inc. v. Campbell*, 118 Ohio App. 3d 251, 255 (2d Dist. 1997) ("Accordingly, by voluntarily paying the final judgment in full, [appellants] have rendered this appeal moot for want of an actual controversy."); *Kelm v. Hess*, 8 Ohio App. 3d 448, 448 (10th Dist. 1983) ("[A]n appeal from the order will be dismissed as moot since reversal of the order would be ineffectual in affording any relief to the appellant.")

The through-line in all of these cases has been voluntary nature of the payment of a judgment or compliance with an order by the parties.

This principle that satisfaction be voluntary to dismiss an appeal goes back centuries. In 1859, this Court wrote: "A payment, made after the issuance of an execution, to prevent a levy upon or a sale of the property of the defendant in execution is not such a voluntary payment as will preclude the party paying from setting aside the judgment for irregularity." *Knox Cnty. Bank v. Doty*, 9 Ohio St. 505 (1859), synopsis. *Accord Pittsburgh, Ft. W. & C.R. Co. v. Martin*, 53 Ohio St. 386, 402 (1895); *Lynch v. Bd. of Ed. of City Sch. Dist. of City of Lakewood*, 116 Ohio St. 361, 372 (1927); *In re Appropriation for Highway Purposes*, 169 Ohio St. 314, 315 (1959).

These decisions, however, also underscore the shifting interpretation of the "voluntary" nature of any satisfaction of judgment. As this Court wrote in 1927, "[i]t has frequently been decided that, when a judgment is paid after issuance of an execution, it is not a voluntary payment." *Lynch* at 372.

For decades, Ohio appellate courts followed suit. For example, in *Favret Co. v. West,* the Tenth District held, if "payment was voluntarily made, the issue raised by the appeal is moot and the appeal must of necessity be dismissed. However, if the payment was an involuntary one, then the question raised is not moot." *Favret*, 21 Ohio App.2d 38, 40 (1970).

Then, in *Blodgett*, this Court analyzed the voluntary nature of an appellant that was going through financial hardship. In finding the appeal moot, the Court determined that the hardship of one party did not make the settlement of the matter "involuntary" and subsequently moot, especially considering that the other party, the appellee, did not cause the hardship or duress. *Blodgett*, 49 Ohio St.3d at 245.

In time, and with the ability of an appellant to request a stay of execution under Rule 62 of the Ohio Rules of Civil Procedure, the voluntary nature of satisfaction began to invert. In *Hagood v. Gail*, the Eleventh District analyzed the *Blodgett* decision, and determined that because appellants are entitled to a stay under Rule 62, the failure to seek a stay meant that an appellant was voluntarily satisfying a judgment. *Id.* at 790. Because a party was entitled by right to a stay of execution, the failure to seek a stay amounted to a voluntary satisfaction. As the court in *Hagood* wrote, "[a]ccordingly, since the merits of this appeal could be rendered moot if the judgment was fully executed, it was necessary for appellant to obtain a valid stay order under Civ.R. 62(B) or App.R. 7(A)." *Hagood*, at 790.

This reasoning caught on through Ohio appellate districts – that parties and appellants must proactively seek a stay of execution or face the possibility that their appeal would be mooted. "Generally, a party may avoid a voluntary satisfaction of judgment by moving to stay execution of the judgment and by posting a supersedeas bond […]" *Ma v. Gomez*, 2023-Ohio-524, ¶ 52 (8th Dist.); This change continued, "[the] appeal is moot, as the property in question has been sold, the proceeds have been distributed, and Anthony did not request a stay of the foreclosure judgment at any point." *U.S. Bank Natl. Assn. v. Marcino*, 2010-Ohio-6512, ¶ 1 (7th Dist.).

Some appellate districts began highlighting the ambiguity between seeking a stay in execution and successfully obtaining a stay by posting a bond.

For example, the Eighth District often requires an appellant not only seek a stay, but obtain a stay: "[i]f an appellant fails to obtain a stay of the judgment, the nonappealing party has the right to attempt to obtain satisfaction of the judgment even though the appeal is pending." *City of Cleveland v. Embassy Realty Invs., Inc.*, 2018-Ohio-4335, ¶ 20 (8th Dist.); *Francis David*

Corp. v. Mac Auto Mart, Inc., 2010-Ohio-1215*,* ¶ 12 (8th Dist.)*. See also Wiest v. Wiegele*, 2006-Ohio-5348, ¶12. (1st Dist.). The opinions at bar here further highlight this requirement.

The Tenth District, in contrast, does not appear to require a party to fully obtain a stay. *U.S. Bank Natl. Assn. v. Mobile Assoc. Natl. Network Sys., Inc.*, 2011-Ohio-5284, ¶ 20 (10th Dist.); *Bob Krihwan Pontiac-GMC Truck, Inc. v. Gen. Motors Corp.*, 145 Ohio App. 3d 671, 676 (10th Dist. 2001); *Everhome Mgte. Co. v. Baker*, 2011-Ohio-3303, ¶ 14 (10th Dist.) ("It is a suspect argument to assert that a void, voidable, or merely erroneous judgment might evade appellate review simply because it was rendered rapidly, completely, and without notice.")

The Second, Seventh, and Eleventh Districts have also expressed doubt on a bright line rule simplifying the "voluntary" satisfaction doctrine to merely whether a party can or does obtain a supersedes bond. *LaSalle Bank Natl. Assn. v. Murray*, 2008-Ohio-6097, ¶ 26 (7th Dist.); *Ameriquest Mtge. Co. v. Wilson*, 2007-Ohio-2576, ¶ 8 (11th Dist.); *Governors Place Condo. Owners Assn., Inc. v. Unknown Heirs of Polson*, 2017-Ohio-885, ¶ 30 (7th Dist.); *Chase Manhattan Mtge. Corp. v. Locker*, 2003-Ohio-6665, ¶ 34 (2d Dist.).

The origins of the voluntary satisfaction doctrine are no longer served by the current implementation of the doctrine being used in Ohio. In cases from the 1850s through the 1970s, Ohio courts did not dismiss appeals as moot when a judgment was satisfied through an execution, a garnishment, or was otherwise involuntary. The nature of these collection activities by prevailing parties was understood to be what it, in fact, was – an involuntary use of execution mechanisms. Even the requirement that an appellant ask Ohio courts for a stay of execution can be understood as a party attempting to preserve their rights by preventing a satisfaction.

However, once the requirement that an appellant actually obtain a stay of execution was introduced, the burden on a party seeking to correct a legal error morphed into an extraordinary

burden. Now it is considered "voluntary" if a party demonstrably does not want the prevailing party to collect, asks the court to stay the execution, but is not able to post a bond or tender the judgement while appealing a legal error.

Too many Ohio courts now require an appellant to not only seek, but obtain, a bond to prevent the "voluntary" satisfaction of the trial court judgment. This standard effectively limits the ability to appeal to a party's financial position and perversely deems anyone unable to marshal what is often hundreds of thousands of dollars in bond as "voluntarily" satisfying a judgment. This Court should return to the standard used in Ohio for decades and to clarify the standard for mootness on "voluntary" satisfaction and find that seeking a stay of execution – not obtaining a stay – is the bright-line rule for preventing voluntary satisfaction.

II. Most litigants who are appealing a judgment of foreclosure would be unable to effectuate a stay by posting a full supersedeas bond, rendering the appeals process in a foreclosure inaccessible all those who cannot afford to post a bond.

R.C. 2505.09 provides the guidelines for supersedeas bonds when an appellant wishes to pursue a stay of execution on the judgment. The statute provides that the sureties of the bond must be "not less than . . . the cumulative total for all claims covered by the final order [or] judgment[.]" R.C. 2505.09. The only statutory limitation is that a "bond shall not exceed fifty million dollars." *Id.* This layout creates the possibility of arbitrary outcomes in instances involving supersedeas bonds. This system is particularly inequitable in the context of foreclosures, in which the bond—if there is one—is likely to be significant and beyond the reach of most people trying to resolve issues with paying their mortgage.

Different Ohio appellate districts have agreed that financial standing should not be a barrier to accessing the appeals process. For instance, in *Chase Manhattan Mortg. Corp. v. Locker*, a Second District foreclosure case, the supersedeas bond was set at $152,401.71, which

was the principal amount of the judgment. *Chase Manhattan Mortg. Corp. v. Locker*, 2003-Ohio-6665, ¶ 34 (2d Dist.). Although the trial court's stay was conditioned upon the appellants posting the bond, the Second District held that the appeal was not moot because the appellants had attempted to maintain a stay and were simply financially unable to post bond. *Id.* at ¶¶ 41–42.

The main principle from *Locker*—that steps to obtain a stay paired with a failure or inability to post bond due to the appellant's financial circumstances is sufficient to prevent a finding of mootness—has been followed by several Ohio appellate courts. For instance, the Eleventh District held that an appeal was not moot in part because the appellant's failure to post the supersedeas bond was because of the appellant's financial inability to post bond. *Ameriquest Mortg. v. Wilson*, 2007-Ohio-2576, ¶ 19 (11th Dist.), citing *MIF Realty L.P. v. K.E.J. Corp.*, 1995 WL 311365, at *6 (6th Dist. May 19, 1995) (holding that under R.C. 2329.45, an appeal is not moot when the appellant applied for a stay but is unable to post the supersedeas bond).

Other Ohio appellate courts have emphasized that for an appeal to be not moot, the failure to post bond should be because of an appellant's inability to pay, rather than a refusal to pay. *LaSalle Bank Nat'l. Assn. v. Murray*, 2008-Ohio-6097, ¶¶ 26, 28–29 (7th Dist.); *Green Tree Servicing LLC v. Asterino-Starcher*, 2018-Ohio-977, ¶ 16 (10th Dist.).

Ms. Doberdruk's case is analogous to this line of precedent. Ms. Doberdruk took action to effectuate a stay but was unable to complete the final step of posting bond because of the bond's exorbitant amount.

Even in cases where appeals were found to be moot, courts have acknowledged the important distinction between a refusal to post bond and an inability to post bond. In one case, the Eighth District stated that the application of proceeds satisfies a judgment "unless a judgment debtor takes steps in furtherance of stalling the sale." *U.S. Bank Tr. Nat'l Assn. v. Janossy*, 2018-

Ohio-2228, ¶ 7 (8th Dist.). Similarly, when the Twelfth District held that an appeal was moot, it emphasized that the appellant had never requested a stay prior to appealing. *Villas at the Pointe of Settlers Walk Condo. Assn. v. Coffman Dev. Co.*, 2010-Ohio-2822, ¶ 5 (12th Dist.). The court distinguished the facts of *Villas at the Pointe* from the facts in *Locker* because in *Locker*, there was a stay pending bond paired with financial difficulties. *Villas* at ¶ 13. The court also distinguished its case from *Ameriquest Mortgage Co. v. Wilson*, 2007-Ohio-2576 (11th Dist.) for the same reason. *Id.* ¶¶ 14–15.

These distinctions suggest that cases in which appeals were moot are nonetheless compatible with the principle that there should be discretion in mooting an appeal based on an appellant's financial standing. *Janossy* and *Villas* are different from Ms. Doberdruk's case because in the present matter, Ms. Doberdruk took the steps that she could to effectuate a stay.

Accordingly, because of the inherently high values of supersedeas bonds in the foreclosure context, this Court should hold that it is within a court's discretion to permit an appeal to proceed even when failure to post a bond results in a sheriff's sale and distribution of the sale proceeds. Ms. Doberdruk did all that she was able; she simply could not afford the bond, as would be the case of the average litigant in a foreclosure matter.

A. Civil bonds are difficult to obtain and unaffordable, depriving low-income homeowners of the right to appellate review.

Ms. Doberdruk's situation is an unfortunate reality for many Ohio appellants. To secure a stay, appellants must post an "adequate" bond. Civ.R. 62(B). Unfortunately, in many cases, supersedeas bonds are set at or above the amount of the judgment in the underlying case. *See, e.g.*, *Verhoff v. Time Warner Cable, Inc.*, 2007 WL 4303743, *3 (N.D. Ohio 2007) ("Courts generally require that the amount of the bond include the full amount owed under the award, post-judgment interest, attorney's fees and costs.") Further, R.C. 2505.09 states that a stay of

proceedings may be conditioned on the posting of a bond ". . . in a sum that is not less than, if applicable, the cumulative total for all claims covered by the final order, judgment, or decree and interest involved . . ." R.C. 2505.11 explicitly allows, but does not mandate, the conveyance of property in lieu of a supersedeas bond. *Id.*

Here, unfortunately, the trial court chose to impose a nearly $500,000 bond instead of allowing the title to the home to stand as security. (R. at 96). Requiring an unattainable bond defeats one of the fundamental principles of the judicial stay, maintaining the status quo. *See U.S. Natl. Assn. v. Perdue*, 2014-Ohio-155, ¶ 5 (6th Dist.).

In many ways, a supersedeas bond functions as a loan and comes with many of the same requirements. Appellants must submit to credit checks and provide sufficient collateral to satisfy any resulting concerns about default. The amount of collateral can vary but is typically the full amount of the bond being underwritten. *See, e.g.*, COURT SURETY BOND AGENCY, *Supersedeas Bonds*, https://courtsurety.com/types-of-bonds/supersedeas-bonds/ (last visited June 30, 2025) [https://perma.cc/95XB-F43P]*;* JW SURETY BONDS, *Supersedeas Bonds*, https://www.jwsuretybonds.com/court-bonds/supersedeas-bond/ (last visited June 30, 2025). The difficulties continue after the approval process, as appellants must pay a premium ranging between one and ten percent of the requested bond SURETY NOW, *Navigating Ohio Appeal Bonds: Your Guide to Supersedeas*, https://shorturl.at/2TGUP (last visited June 30, 2025) [https://perma.cc/XR9M-YJ7L]; *accord* COURT SURETY BOND AGENCY, *Supersedeas Bonds*, which can be prohibitively expensive. For appellants already facing financial difficulty, these requirements are frequently insurmountable.

It is difficult to analyze the real-world effects of the credit rating process. The factors leading to a denial by one creditor might be acceptable to another, and the credit rating world

overall is intentionally vague. What *is* known is that appellants rated lower by sureties are required to post more collateral and pay higher policy premiums to obtain a bond. *Id.*

Far and away, the two largest classes of assets available to most appellants are securities in retirement accounts and equity in their own home, together accounting for two-thirds of average household. *See* Brian Sullivan and Shomik Ghosh, *The Wealth of Households: 2022* (2024), pg. 7, Fig. 2, *Current Population Reports*, P70BR-202, U.S. Census Bureau, Washington, D.C., https://www2.census.gov/library/publications/2024/demo/p70br-202.pdf (last visited June 30, 2025) [https://perma.cc/XDT9-BYE7]. However, only sixty-two percent of households owned their own home and only sixty percent held retirement accounts.[1] *Id. at 5.* In other words, forty percent of all appellants would have had few options when attempting to collateralize a bond and "[ten percent of] households had wealth of zero dollars or less." *Id. at 1*. Sureties will accept cash deposits as collateral, but half of all Americans have less than $11,000 in cash accounts. *Id.* The situation is similar for stocks and bonds held outside of retirement accounts, where the median is only $38,000. *Id.* These figures seem substantial until one considers the median price of homes across Ohio.

Average home prices in Ohio rose to $285,000 in February 2025, OHIO REALTORS, *Home Sales News Release*, https://www.ohiorealtors.org/home-sales-news-release/ (last visited June 30, 2025) [https://perma.cc/P5EB-A989], while the median value of all asset holdings by American households was $176,500 in 2022.[2] *The Wealth of Households: 2022* at 5, a figure that includes

[1] The median retirement account holds approximately $75,000, but those securities are often not accepted as collateral. *See, e.g.*, COURT SURETY BOND AGENCY, Collateral Options, https://courtsurety.com/how-to-apply/collateral-options/ (last visited June 30, 2025) [https://perma.cc/QJ7R-DCKF].

[2] Even factoring in a generous ten percent annual return on all household assets to adjust for the three-year difference leaves an insurmountable gap for most households.

home equity. *Id.* Without access to home equity, the collateral required to post a $285,000 bond to stay enforcement is out of reach for most. Enforcement of a foreclosure judgment literally and figuratively forecloses an owner's/appellant's meaningful access to capital.

Appellants who manage to gather the necessary collateral must still pay the bond premiums. "Generally, premiums range from 1% to 10% of the bond amount." SURETY NOW, *Navigating Ohio Appeal Bonds: Your Guide to Supersedeas,* https://shorturl.at/2TGUP. *See also* COURT SURETY BOND AGENCY, *Supersedeas Bonds*. Returning to the previous example, if appealing a foreclosure judgment of the median $285,000 home, an appellant would be required to pay a premium of at least $2,850. Since foreclosure often indicates that the appellant's overall financial situation is subprime, it is safe to assume the necessary premium would be much higher. So, even appellants who are fortunate enough to post the requested collateral might still be stymied. If the underlying judgment is large, that inability to "pay to stay" can lead to financial ruin.

One such case is *Pennzoil Co. v. Texaco Inc.*, where over ten billion dollars in damages were awarded. *Pennzoil Co. v. Texaco Inc.*, 1985 WL 1276957, *2 (D.Texas Dec. 10, 1985). For Texaco to receive a stay under then existing Texas law would have required a bond of more than thirteen billion dollars. *Pennzoil Co. v. Texaco Inc*., 481 U.S. 1, 5 (1987). Hoping to avoid a financial collapse, Texaco filed suit in the United States District Court for the Southern District of New York challenging the Texas proceedings on Constitutional and other federal statutory grounds. *Id.* at 1. The action proceeded to the United States Supreme Court, which ruled that jurisdiction remained with the Texas state courts. *Id.* at 17-18. Upon remand, Texaco was unable to post the supersedeas bond and filed for bankruptcy in 1987. Castro, *Texaco's Star Falls*, Time,

(April 20, 1987), https://time.com/archive/6708915/texacos-star-falls/ (last visited June 30, 2025) [https://perma.cc/ZA34-TGK5].

To combat similar unintended consequences, post-*Texaco*, at least forty-one states have enacted supersedeas bond caps. Jesse Wenger, *The Applicability of State Appeal Bond Caps in Suits Brought in Federal Courts Pursuant to Diversity Jurisdiction*, 162 U.Pa.L.Rev. 979, 980 (2014). In 2002, Ohio amended R.C. 2505.09 to include a cap of fifty-million dollars on supersedeas bonds. *Id.* Under these statutes, trial courts generally retain broad discretion to set supersedeas bonds pursuant to Civ.R. 62(B), but as noted above, mirroring the amount of the underlying judgment is still the default. *Verhoff* at 3. Many statutes, including Ohio's, specify setting the bond at the cumulative total of all claims plus interest. R.C. 2505.09, perpetuating the problem they were designed to correct. The practical effect is that only the wealthiest individuals and companies enjoy protection.

Denying a stay of enforcement to appellants with low or no income, with or without animus, forecloses access to justice. A losing party that is unable to post the necessary bond can do nothing to stop the opposing party from seizing some or all of their assets. With little or no money remaining to fund an appeal, indigent parties could spend years working to satisfy a judgment that might have been overturned if only they had been wealthier. This is an anachronism that can easily be avoided by requiring trial courts to more carefully weigh, on the record, the interests of all parties before setting supersedeas bonds.

In foreclosure actions specifically, judgment creditors are generally protected by holding title to the property at issue. Requiring an additional bond denies appellants the right to full and fair access to the appeals process. Without a stay, the owner of foreclosed property must watch as the judgment creditor takes and transfers ownership while the appeal is in its earliest stages.

Even if the debtor can see the appeal through to a reversal, they will not regain title to property purchased by a good-faith third party. That is the unfortunate reality in this case. Wells Fargo's interests could have been protected with title to the home; there was no need to condition the stay on an additional bond. The trial court's imposition of the additional bond foreclosed Ms. Doberdruk's last chance to retain her home. Even if her appeal is ultimately successful, she will likely never set foot in that home again.

B. In non-foreclosure situations, courts have discretion in setting bond conditions and the inability to post bond does not render an appeal moot.

In non-foreclosure cases, courts have acknowledged the importance of allowing for an appeal regardless of the appellant's ability to post bond. For example, in a breach of contract case involving unjust enrichment from construction and restoration of a commercial building, when the Second District held that an appeal was moot, it was because the appellant did not *attempt* to maintain a stay. *Poppa Builders, Inc. v. Campbell*, 118 Ohio App.3d 251, 255 (2d Dist. 1997). In *Campbell*, the appellant could have attempted to maintain a stay but chose not to: "Further, the Campbells could have filed a supersedeas bond that would have stayed the judgment and forestalled Poppa Builders' collection efforts." *Id.* at 255, citing *Kelm v. Hess*, 8 Ohio App.3d 488 (10th Dist. 1983) (emphasizing that the "appellant was in a financial position to pay the judgment" and thus "undoubtedly would have been able to give an adequate appeal bond"). In Ms. Doberdruk's case, she certainly was not in a financial position to pay the $472,905 bond.

The indigent clients that the Ohio Legal Aid Organizations work with have limited income and few resources. They are highly unlikely to be able to post a bond equal to the amount of the judgment to effectuate the stay. Where a supersedeas bond is not feasible, but the appellant made an effort to apply for a stay, the court should consider the totality of the circumstances. A supersedeas bond should not be used as a tool to prevent indigent litigants from accessing the full

justice system and obtaining restitution as a remedy under Ohio law. This Court should find that so long as an appellant does what is in their power to lawfully appeal a case and seek restitution, the remedy should be a possibility for them and not foreclosed by an inability to post a supersedeas bond.

C. Requiring a low-income homeowner to post an excessive and unaffordable foreclosure bond violates due process and equal protection.

Having created the right to appeal, Ohio must ensure that the right conforms to constitutional standards of Due Process and Equal Protection. Appellate courts have jurisdiction in " any cause on review as may be necessary to its complete determination" and "as may be provided by law to review and affirm, modify, or reverse judgments." Ohio Const., art. IV, § 3(B)(1)(f) and (2). "[E]very injured party 'shall have remedy by due course of law, and shall have justice administered without denial or delay.'" *Moldovan v. Cuyahoga Cty. Welfare Dept.*, 25 Ohio St.3d 293 (1986), quoting Ohio Const., art I, § 16. Every final order "may be reviewed on appeal[.]" R.C. 2505.03(A). This Court has held that "every litigant" is "entitled to '[a]n appeal as of right . . . by filing a notice of appeal . . . within the time allowed[.]" *Atkinson v. Grumman Ohio Corp.*, 37 Ohio St.3d 80, 84-85 (1988). Accordingly, due process protects the right to appeal in Ohio. *Id.* at 85.

The right to access courts applies to rich and poor litigants alike. *Boddie v. Connecticut,* 401 U.S. 371 (1969); *Lindsey v. Normet*, 405 U.S. 56, 77 (1972) ("When an appeal is afforded, however, it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause.") *Lindsey* involved an equal protection challenge to an Oregon statute requiring tenants appealing an eviction to post bond equal to two times the rent expected to accrue during the appeal. *Id.* at 64. The U.S. Supreme Court found that bond

requirement arbitrarily discriminates against indigent litigants and interferes with the right to appeal in violation of the Equal Protection Clause. *Id.* at 79.

Here, by requiring an unaffordable bond and proceeding with execution on the judgment, the trial court deprived Ms. Doberdruk of her right to appeal. In foreclosures, plaintiffs' interests are often adequately secured by the real estate. Bonds to secure a stay pending appeal should be used sparingly and in a way that does not deny the right to appeal. *See Winton S&L Co. v. Eastfork Trace, Inc.*, 2001-Ohio-4386 (Clermont C.P. Aug. 17, 2001) (real estate provided adequate security for appeal of foreclosure). Foreclosure defendants, like Ms. Doberdruk, are often in these situations because they had difficulty making a mortgage payment. It defies reality to expect them to be approved for a bond and pay for it. This case shows that, to make the right of appeal more than hypothetical for people like Ms. Doberdruk, the bond required for appellate stays must be attainable.

CONCLUSION

For the reasons stated above, *amici curiae* the Ohio Legal Aid Organizations respectfully request that this Honorable Court reverse the decisions of the Eighth District Court of Appeals in these consolidated cases.

Respectfully submitted,

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