No. 14-4315

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

MONTGOMERY COUNTY, PENNSYLVANIA, RECORDER OF DEEDS, by and through NANCY J. BECKER, in her official capacity as the Recorder of Deeds of Montgomery County, Pennsylvania, Plaintiff-Appellee,

v.

MERSCORP, INC., and MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of Pennsylvania, Civil Action No. 11-cv-6968 (Honorable Curtis Joyner)

BRIEF IN SUPPORT OF AFFIRMANCE OF AMICI CURIAE PENNSYLVANIA LEGAL AID NETWORK, COMMUNITY LEGAL SERVICES, INC., HOUSING ALLIANCE OF PENNSYLVANIA, NATIONAL ASSOCIATION OF CONSUMER ADVOCATES, and THE CONSUMER CREDIT COUNSELING SERVICE OF DELAWARE VALLEY d/b/a CLARIFI

Benjamin D. Geffen
Public Interest Law Center of Philadelphia
1709 Benjamin Franklin Parkway, 2nd Floor
Philadelphia, PA 19103
Phone: 215-627-7100
Fax: 215-627-3183
bgeffen@pilcop.org
Counsel for Amici Curiae

Dated: March 23, 2015

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

TREATISES

REGULATIONS

I. STATEMENT OF IDENTITY AND INTEREST OF AMICI

All parties have consented to the filing of this brief.

Pennsylvania Legal Aid Network

The Pennsylvania Legal Aid Network, Inc. ("PLAN") is a client-centered organization that provides leadership, funding, and support to improve the availability and quality of civil legal aid and direct legal services for low-income people and victims of domestic violence in Pennsylvania. PLAN is the state's coordinated system of organizations providing civil legal aid for those with nowhere else to turn. PLAN both provides funding to civil legal aid providers across the state and offers direct services itself. It conducts numerous statewide trainings for public interest lawyers, it administers and funds a Martin Luther King Jr. Internship and Fellowship Program, and it provides leadership and support for legal aid providers in their proper accounting for funds and contract compliance.

The network of programs throughout the state that PLAN funds offers a continuum of critically needed legal information, legal advice, and legal services through direct representation for low-income individuals and families who face urgent civil legal problems, including mortgage foreclosure actions. This network provides direct representation to clients in every Pennsylvania county. The PLAN programs handle over 80,000 cases annually, with the majority of funding coming from PLAN.

PLAN administers state appropriated funds and grants, including funds raised through the Pennsylvania Access to Justice Act. PLAN then monitors performance, coordinates training and technology, and helps develop new resources and programs for the entire network. The funds collected through the Access to Justice Act include the fees for mortgage assignments collected by county recorders of deeds. The MERS system at issue in this case—which allows mortgagees to avoid fees for recording of mortgage assignments—significantly reduces the funds available to provide civil legal services to low-income Pennsylvanians. Across Pennsylvania, the demand for legal representation for low-income homeowners facing mortgage foreclosure far outstrips the supply of legal services attorneys.

Community Legal Services

Community Legal Services of Philadelphia ("CLS") helps low-income Philadelphia residents obtain equal access to justice by providing them with advice and representation in urgent civil legal matters; advocating for their legal rights; and conducting community education about the legal issues that affect them. Created by the Philadelphia Bar Association in 1966, CLS helped more than 20,400 Philadelphians in 2014. Since its founding, CLS has served well over a million individuals. CLS addresses a wide range of legal issues of importance to low-income people, with eight units that focus on specific legal subject areas:

homeownership and consumer law, including mortgage foreclosures; aging and disabilities; employment; energy; family; rental housing; language access; and public benefits. This broad legal expertise empowers the organization to meet the individual legal needs of impoverished Philadelphians to basic needs such as shelter, food, income and health care, while simultaneously having a profound impact on local and national policy affecting these clients.

Because many low-income families own homes in Philadelphia, CLS's homeownership and consumer law unit has historically spent significant resources on supporting low-income Philadelphia homeowners, and the demand for those services has risen dramatically in recent years. Today, more than 90% of residential mortgage foreclosure defendants in Philadelphia are unrepresented. CLS provides direct representation to low-income homeowners facing mortgage foreclosure due to abusive and illegal lending practices. CLS also provides advice and referral services for homeowners at risk of foreclosure, while working with a coalition of community groups and policymakers to ensure laws and programs are in place to protect homeowners from predatory lending and to assist those who have already been victimized. As of March 19, 2015, CLS was actively representing 279 homeowners in residential mortgage foreclosure matters.

The MERS system has a direct, negative influence on CLS and its clients. The incompleteness of public data sources forces CLS to expend extra time and

resources in discovery to confirm the holders of its foreclosure clients' mortgages. Also, the services provided by CLS are funded, in significant part, by fees collected by Plaintiff and other class members for recordation of mortgage assignments. As discussed more fully below, the Access to Justice Act requires Plaintiff and class members to collect such fees. In the 2014-2015 fiscal year, CLS anticipates receiving $2,197,000, or twenty-one percent of its budget, in Access to Justice funding. (Access to Justice funding includes other types of fees in addition to fees for mortgage assignments.)

Housing Alliance of Pennsylvania

The Housing Alliance of Pennsylvania is a statewide coalition working to provide leadership and a common voice for policies, practices, and resources to ensure that all Pennsylvanians, especially those with low incomes, have access to safe, decent, and affordable homes. The Housing Alliance promotes common-sense solutions to balance Pennsylvania's housing market and increase the supply of safe, decent homes for low-income people. Many coalition members provide direct assistance to homeowners faced with foreclosure. One significant activity of the Housing Alliance was to successfully advocate for a law authorizing the creation of County Housing Trust Funds in Pennsylvania, including the Philadelphia Housing Trust Fund, which is funded in part by mortgage-assignment recordation fees.

National Association of Consumer Advocates

The National Association of Consumer Advocates ("NACA") is a non-profit corporation whose members are private and public sector attorneys, legal services attorneys, law professors, and law students whose primary focus involves the protection and representation of consumers. NACA's mission is to promote justice for all consumers by maintaining a forum for information-sharing among consumer advocates across the country and serving as a voice for its members as well as consumers in the ongoing effort to curb unfair and abusive business practices. NACA's members, as representatives of homeowners across the nation, have witnessed firsthand the negative impact of predatory lending practices in the subprime market, unscrupulous "foreclosure mill" law firms, and outdated procedures that deprive consumers of a meaningful opportunity to defend their homes from foreclosure. NACA has an active Pennsylvania membership chapter.

Clarifi

The Consumer Credit Counseling Service of Delaware Valley, d/b/a Clarifi, is a 501(c)(3) nonprofit community service organization founded in 1966. Clarifi is certified by the United States Department of Housing and Urban Development as a comprehensive housing counseling agency and approved as a Pennsylvania Housing Finance housing counseling agency. In addition to counseling individuals throughout the homeownership process, Clarifi provides foreclosure prevention

counseling that helps homeowners achieve loan modifications, repayment plans, forbearances, or other home retention solutions. In 2014, Clarifi provided foreclosure-prevention services to 3,700 clients. Clarifi cannot provide high-quality counseling to clients regarding options to save their homes when the specific holder of mortgages are obfuscated by a non-public database system. Clarifi has experienced difficulties helping clients to obtain a solution when the servicer switches in the midst of the application and the mortgagee is not recorded. In those instances Clarifi's advocacy for the client is difficult or impossible because the counselor cannot identify the party to which the complaint should be directed.

II. STATEMENT OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 29(c)(5)

No party's counsel authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting this brief. No person other than the amici curiae, their members, or their counsel contributed money that was intended to fund preparing or submitting this brief.

III. ARGUMENT

PLAN, CLS, the Housing Alliance of Pennsylvania, NACA, and Clarifi (collectively, "Amici") submit this brief in support of the Appellee and other class members, who are county recording officials seeking to enforce Pennsylvania law in accordance with their legal duties and the public interest. The District Court correctly concluded that, in Pennsylvania, the transfer of a mortgage interest must be reduced to writing and recorded publicly, and that denominating MERS as a common "nominee" at the inception of the mortgage to hold the so-called "legal title" does not displace that statutory requirement.

Contrary to the alarmist rhetoric of Appellants' amici, Federal Home Loan Mortgage Corporation ("Freddie Mac"), the Pennsylvania Bankers Association ("PBA"), and the Pennsylvania Land Title Association ("PLTA"), requiring public disclosure of mortgage transfers in county title registries and requiring payment of filing fees will not "disrupt the modern systems used to finance mortgage lending in the United States," Freddie Mac's Brief at 4, impose "new and onerous obligations," PBA's Brief at 15, or force "a giant step backwards," PLTA's Brief at 7. By its own admission, Freddie Mac—which owns 16.5% of Appellant MERSCORP—alone accounts for over 178,000 of the unrecorded mortgage interests in Pennsylvania homes. Freddie Mac's Brief at 4 n.2, 9. The sky will not fall if the public records concerning these 178,000 mortgages, instead of being

fictionally lodged in the name of "MERS," were to disclose the fact of Freddie Mac's ownership, and if a proper recordation fee were paid to the county offices at the time Freddie Mac purchases a mortgage.

Because Appellants' amici could not justify MERS's deliberate circumvention of Pennsylvania law, which the District Court found to be at the heart of the MERS scheme, they instead attack the court's understanding of what a mortgage is under state law, arguing that the Court "failed to grasp" or "chose to disregard . . . fundamental legal principles." Freddie Mac's Brief at 22. They also take the astonishing position that requiring them to pay the filing fees they have evaded will cause harm to "consumers and the recorder of deeds themselves." PBA's Brief at 2. As organizations that work with and represent consumers, Amici submit this brief to supplement Appellee's argument and to respond to Freddie Mac, PBA, and PLTA. Specifically, this brief will show that the District Court correctly understood and applied Pennsylvania's law of mortgage conveyancing, and that consumers and the public at large not only do not benefit from, but in fact are harmed by, incomplete public land records and the evasion of filing fees that fund essential civil legal services and affordable housing for low-income people.

A. Under Pennsylvania Mortgage Law, a Mortgage and the Note It Secures Cannot Be Transferred Separately

The legal principle that, according to Freddie Mac, the lower court "failed to grasp or chose to disregard," is that a mortgage interest in real property and the

indebtedness the mortgage secures are two separate legal instruments. Freddie Mac's Brief at 22. It is certainly true that a mortgage obligation, when created, requires the borrower-homeowner to execute two documents: (1) a note or bond that embodies the underlying loan and describes its terms, and (2) the mortgage instrument itself. The District Court expressly understood that these two components of a mortgage obligation function as separate "legally operative documents." *Montgomery Cnty. v. MERSCORP, Inc.*, 904 F. Supp. 2d 436, 439 (E.D. Pa. 2012). It also correctly recognized that these two components of the mortgage obligation cannot be severed in a manner such that ownership of one is transferred without the other.

It has long been understood in the common law that a mortgage cannot meaningfully exist without the underlying indebtedness it secures, meaning that a transfer of the note effectively transfers ownership of the mortgage interest also to the transferee. *E.g.*, *Nat'l Live Stock Bank of Chi. v. First Nat'l Bank of Geneseo*, 203 U.S. 296, 306 (1906). As famously explained, "The note is the cow and the mortgage the tail. The cow can survive without a tail, but the tail cannot survive without the cow." Restatement (Third) of Prop.: Mortgages § 5.4, Reporters' Notes (quoting the late Professor Chester Smith); *see also* 13 Pa. Cons. Stat. § 9203(g) (codifying the common law rule in the case of a bulk sale of notes, such that the bulk purchaser, by operation of law, also acquires ownership of any mortgages

securing the purchased notes); Elizabeth Renuart, *Uneasy Intersections: The Right to Foreclose and the U.C.C.*, 48 Wake Forest L. Rev. 1205, 1237 (2013) ("If the note and mortgage are split between different parties, the assignee of only the mortgage ordinarily holds a worthless piece of paper."). Indeed, Freddie Mac's own Pennsylvania mortgage form reflects the nonseverability of the mortgage and the note, as many of the key terms of the mortgage obligation, such as the interest rate and charges for prepayment and late payment, appear only in the separate note, which is incorporated into the mortgage by reference. *See* Freddie Mac Form 3039, Pennsylvania Mortgage, *available at* http://www.freddiemac.com/uniform/doc/3039-PennsylvaniaMortgage.doc. "Since the Mortgage expressly incorporates the terms of the Note . . . it rarely makes logical sense to conceive of ownership of a mortgage being severed from ownership of the note." Irv Ackelsberg, *Residential Mortgage Foreclosure: Pennsylvania Law and Practice*, at 2-8 (2d ed. 2014).

Specifically under Pennsylvania law—as recognized by the District Court but ignored by Appellants and their amici—a mortgage transfer is considered a real property conveyance that requires compliance with the state's recording statute. *Pines v. Farrell*, 848 A.2d 94 (Pa. 2004). Therefore, when a mortgagee negotiates the mortgage note, and by that act effectively transfers ownership of the mortgage interest in the mortgaged property, it must also execute and record an assignment of mortgage. This has long been understood by Pennsylvania real estate

practitioners, which is why, years before the District Court's ruling, the leading commentator on Pennsylvania conveyancing law expressed skepticism about the legality of the MERS device as a proper substitute for a mortgagee's recording obligations. 2 Ronald M. Friedman, *Ladner Pennsylvania Real Estate Law* at 26-2 (5th ed. 2006) (characterizing the industry players behind the creation of MERS as "willing to assume the risks of not following [the] time-honored [recording] procedures").

The District Court did not rule, and the Appellee is not advocating, that promissory notes must be recorded in the public property registries. Rather, what the court did rule, correctly, is that in Pennsylvania, a mortgage "title theory" jurisdiction, *see Pines*, 848 A.2d at 100, the mortgage is not considered a mere accompaniment to the note, but rather a recognized real property interest that must be reflected in the public real estate records. What the industry players behind MERS apparently assumed would work in other states—maintaining static, recorded title in the name of the fictional MERS "nominee" while ownership in the mortgage notes is transferred from one entity to another—simply does not work in Pennsylvania.

B. There Is No Public-Interest Justification for Allowing MERS to Ignore the Pennsylvania Recording Statute

A founding executive of MERS, whom PBA cites as an authority, once candidly described the system as "by and for the mortgage industry." R.K. Arnold,

Yes, There is Life on MERS, 11 Prob. & Prop. 32, 36 (1997). Appellants' amici now urge that the MERS system is for the people, and that evasion of recordation fees must not perish from the Commonwealth. *See* PBA's Brief at 3 (asserting that "the MERS System also helps consumers"); Freddie Mac's Brief at 9 (the MERS system "allow[s] more mortgage loans to be made at lower costs to homeowners"). There is no basis in fact—and certainly none in the record below—supporting those representations. MERS benefits no one but large players in the mortgage and title industries, and there are numerous reasons homeowners and the general public will not suffer any harm, and indeed will benefit, from requiring mortgagees to comply with Pennsylvania's recording laws.

First, individual homeowners and the public at large benefit from comprehensive public land records. Homeowners plainly have an interest in knowing the identity of those who own mortgage interests in their homes, as do potential purchasers of or investors in real estate. Courts around the country have recognized that "having a single front man, or nominee, for various financial institutions makes it difficult for mortgagors and other institutions to determine the identity of the current note holder." *Landmark Nat'l Bank v. Kesler*, 216 P.3d 158, 168 (Kan. 2009) (citing *In re Schwartz*, 366 B.R. 265, 266 (Bankr. D. Mass. 2007); *Johnson v. Melnikoff*, 873 N.Y.S.2d 234, 2008 N.Y. Misc. LEXIS 5353, at *14-15 (Sup. Ct. 2008), *aff'd*, 882 N.Y.S.2d 914 (App. Div. 2009)).

For one example, CLS often represents a delinquent homeowner who has applied for a loan modification but has been denied on the grounds that the requested modification does not meet the modification guidelines of the owner of the mortgage; when this happens, the servicer seldom advises the homeowner who owns the mortgage, and it is therefore impossible to learn what the guidelines are, who is denying the loan modification, and whether the denial was correct under those guidelines. For another example, homeowners frequently receive letters indicating that their mortgage servicers have changed and they must now send their monthly mortgage payments to different entities, but it is cumbersome or impossible for homeowners to check with the owners of their mortgages to confirm that the supposed new servicers do have legitimate claims to the mortgages and are not just perpetrating a scam. *See generally* Christopher L. Peterson, *Predatory Structured Finance*, 28 Cardozo L. Rev. 2185, 2268 (2007) ("[E]ven marginal increases in the cost of dispute resolution can have a dramatic impact on subprime mortgage borrowers.").

Second, the importance to homeowners of having this information is now embodied in federal law. A servicer is obligated under the Truth in Lending Act ("TILA") to identify the beneficial owner of the mortgage upon a mortgagor's written request, *see* 15 U.S.C. § 1641(f)(2), and, for mortgage assignments occurring after a 2009 amendment to TILA, both the assignor and assignee of a

mortgage must disclose the assignment to the homeowner within 30 days of the assignment, 15 U.S.C. § 1641(g). PBA argues that, because of this federal law, the District Court's ruling is unnecessary since borrowers now have a mechanism other than the public mortgage records for locating the owner of their mortgage. PBA's Brief at 18. There is a certain irony in this argument, given that Congress would likely not have seen the need to establish this homeowner right-to-know had not the mortgage industry abandoned its use of the public mortgage registries through its use of the MERS system. In any event, a homeowner cannot use a request for information under TILA to obtain her mortgage's complete chain of title, which would be available as a public record if all assignments were recorded, and which is crucial for a homeowner facing foreclosure. Nor can parties other than the homeowner, such as potential purchasers of or investors in real estate, use TILA to learn who owns a mortgage.

Third, for mortgages that are eventually foreclosed, mortgage assignments have to be filed anyway, but the MERS system has diminished the quality and usefulness of such assignments. The Pennsylvania Rules of Civil Procedure require a foreclosure complaint, in its description of the plaintiff, to "set forth" all relevant assignments of the underlying mortgage. Pa. R. Civ. P. 1147(a)(1). In order to comply with this rule, when a mortgage is lodged in the name of MERS rather than the actual owner of the mortgage, foreclosure plaintiffs will file a purported

mortgage assignment from MERS to the foreclosure plaintiff in advance of filing the foreclosure. Such an "assignment" is not an actual conveyance, but rather "appears to be functioning as a kind of announcement by the MERS 'signing officer' in the public recording system about some earlier transfer of the mortgage obligation." Ackelsberg, *supra*, at 7-17 to 7-18.[1] That earlier, actual transfer could have occurred years previously, during which time records of the actual ownership were missing from the public records.

Fourth, even though MERS has now granted homeowners (but not interested third parties) permission to review certain information in its database, the incomplete information offered by MERS is no substitute for clear, comprehensive records of ownership, available publicly and officially in the county registries. As one commentator, who has written extensively on MERS, notes:

> First, unlike the traditional public system, MERS does not reveal to consumers the chain of ownership linking the original lender to the current owner of the loan. MERS also does not provide copies of the documents that purport to transfer ownership interests in the land, making it difficult to spot forgery or errors.
>
> Second . . . for securitized mortgages, MERS only reveals the name of the securitization trustee, rather than the trust it serves. . . . Learning the name of a borrower's securitization trustee does not allow the borrower to research the pooling and servicing agreement that controls a servicer's or trustee's authority to negotiate loan modifications. It also does not identify the name of the trust that could

[1] Such "assignments" are particularly troublesome when the attorney for the plaintiff, *i.e.*, the supposed assign*ee*, signs the instrument in the capacity of a MERS "signing officer," i.e, on behalf of the assign*or*. Ackelsberg, *supra*, at 7-21.

> be liable for purchasing loans that violate the Home Ownership and Equity Protection Act or other state predatory lending laws. Even when the borrower knows the name of a securitization trustee, this search result is still not a legally authoritative search upon which a searcher may rely in ruling out the possibility of other potential purchasers that could achieve priority in an ownership dispute. Rather, the search is simply a query to see whether any companies happened to have used an optional electronic handshake to enter assignment information on a private database.

Christopher L. Peterson, *Two Faces: Demystifying the Mortgage Electronic Registration System's Land Title Theory*, 53 Wm. & Mary L. Rev. 111, 129-30 (2011) (footnotes omitted).[2]

Moreover, contrary to the representations of Freddie Mac, *see* Freddie Mac's Brief at 8 (contrasting the MERS system to the "error-prone" public recordation systems), the records in the MERS system are notoriously incomplete and unreliable. The information in the MERS database is entered not by public servants, or even by employees of MERS, but rather by employees of MERS's members, meaning the tens of thousands of employees of lenders, servicers, law firms, or title companies throughout the country, a fact that caused one court to describe MERS as a "Wikipedia" of mortgage ownership information. *Culhane v.*

[2] MERS's circumvention of the public recordation system has, as a practical matter for some homeowners facing foreclosure, reduced the mortgage system to the level of the consumer debt-collection system, which lacks any public recording system for debts, and which has become notorious for aggressive dunning by debt-collection agencies that may have no proof that they have been properly assigned a debt, *see, e.g.*, Andrew Martin, *Automated Debt-Collection Lawsuits Engulf Courts*, N.Y. Times, July 12, 2010, at B1.

Aurora Loan Servs., 826 F. Supp. 2d 352, 368 (D. Mass. 2011), *aff'd*, 708 F.3d 282 (1st Cir. 2013). These individuals often receive no training or oversight from MERS, and they obtain permission to write to the database via "a boilerplate corporate resolution" that can be generated on the MERS web site. Peterson, *Two Faces*, *supra* at 144; *see also* Dustin A. Zacks, *Standing in Our Own Sunshine: Reconsidering Standing, Transparency, and Accuracy in Foreclosures*, 29 Quinnipiac L. Rev. 551, 589 (2011) ("MERS admits that its attitudes about accuracy in ownership transfer records are blasé: when asked how MERS verifies that certifying officers were signing accurate documentation, MERS's President and CEO remarked, 'Well, if nobody challenges it, then it's probably true.'").

The MERS system's vulnerability to error or fraud is no mere academic concern. A survey of 396 foreclosure cases from six states, including Pennsylvania, "found that where MERS was mortgagee of record (fifty percent of cases), the plaintiff asserting the right to foreclose matched an identified 'investor' in the MERS public record only twenty percent of the time." Alan M. White, *Losing the Paper—Mortgage Assignments, Note Transfers and Consumer Protection*, 24 Loy. Consumer L. Rev. 468, 486 & n.90 (2012). A United States Bankruptcy Court in Nevada reviewed the status of twenty-seven motions to lift stays filed by MERS, and it found that in six of them MERS had erroneously filed "as nominee of an entity that no longer has any ownership interest in the note." *In*

re Mitchell, No. BK-S-07-16226, 2009 Bankr. LEXIS 876, at *17-21 (Bankr. D. Nev. Mar. 31, 2009), *aff'd*, 423 B.R. 914 (D. Nev. 2009). Numerous other lawsuits have brought to light assignments within the MERS system that were improperly documented, or not documented at all. *E.g.*, *In re Carrsow-Franklin*, 524 B.R. 33 (Bankr. S.D.N.Y. 2015); *In re Vargas*, 396 B.R. 511 (Bankr. C.D. Cal. 2008); *Bellistri v. Ocwen Loan Servicing, LLC*, 284 S.W.3d 619, 623-24 (Mo. Ct. App. 2009); *Wells Fargo Bank, Nat'l Ass'n v. Reyes*, 867 N.Y.S.2d 21, 2008 N.Y. Misc. LEXIS 3509, at *1-2 (Sup. Ct. 2008).

"[P]rior to 2011 MERS was not regulated by any state or federal agency, and its database was not regularly audited." White, *supra*, at 486. This changed only when Appellants entered into a consent order with five federal agencies that included findings that Appellants had "failed to establish and maintain adequate internal controls, policies, and procedures, compliance risk management, and internal audit and reporting requirements" and that they had "engaged in unsafe or unsound practices that expose them and [member banks] to unacceptable operational, compliance, legal, and reputational risks." *In re MERSCORP, Inc.*, Joint Docket No. 2011-044 (Apr. 13, 2011), *available at* http://www.occ.treas.gov/news-issuances/news-releases/2011/nr-occ-2011-47h.pdf.

Finally, as recognized by the District Court (JA38-39), the MERS system has had the effect of denying funds to civil legal services organizations statewide

and an affordable housing trust fund in Philadelphia. Pursuant the Pennsylvania Access to Justice Act ("AJA"), 42 Pa. Cons. Stat. §§ 4901 *et seq.*, county recorders of deeds must remit a certain amount of each mortgage-assignment fee, as well as other types of fees that they collect, to a state fund dedicated to organizations that provide civil legal assistance to poor and disadvantaged persons in this Commonwealth. This AJA amount recently increased from $3.00 per record to $4.00 per record. *See* 42 Pa. Cons. Stat. §§ 3733(a.1)(1)(v), 3733(a.1)(2)(iii), 3733.1(a)(3), 3733.1(c)(3). According to the summary judgment record below, and projecting the numbers of Pennsylvania mortgages lodged in the name of MERS, if each mortgage were assigned just once—a conservative estimate given the trading activity in secondary mortgage market—the amount lost to civil legal services programs for low-income Pennsylvanians would be $499,293 (166,431 x $3.00) in just one year. (JA456 ¶ 7; *see also* JA451-453.) If recordations remain constant in 2015, the recent increase to $4.00 per record would raise this conservative estimate to $665,724.

In Philadelphia, $86 of the $198 fee for recording a mortgage assignment is allotted to the Philadelphia Housing Trust Fund, which provides resources for affordable housing for low- and moderate-income and disabled Philadelphians. *See* 53 Pa. Cons. Stat. § 6021; City of Philadelphia, *Restated Fees of the Department of Records, available at* http://www.phila.gov/records/pdfs/82-Misc.-132.pdf. By

allowing lenders to bypass public recordation of assignments through use of the MERS system, it is estimated that from 2006 through 2012, MERS diverted nearly $11 million from this fund. (JA469 ¶ 10.) As a result, significantly less money is available to support (1) non-profit developers for the building and development of both for-sale and rental homes; (2) organizations that preserve existing rental housing developments; (3) major, systematic home repairs by low-income homeowners city-wide; (4) making for-sale or rental homes accessible to people with disabilities; and (5) emergency assistance to individuals and families in danger of losing their homes and subsidies for those with mental illnesses or chronic homelessness. *Id.*; *see also* Philadelphia Housing Trust Fund, *2013 Annual Report* (2014), *available at* http://www.phila.gov/ohcd/reports/HTF%202013.pdf ("Since its creation in 2005, the Housing Trust Fund has supported more than 14,000 households through the production of 1,372 new homes, major repairs to 1,589 homes, improved accessibility for 1,194 people with disabilities, repair of 6,125 heaters, homelessness prevention for 2,358 households, and utility assistance for 1,701 Philadelphians.").

IV. CONCLUSION

The decision of the District Court correctly applied Pennsylvania law and should be affirmed. Requiring public recordation of all mortgage transfers will benefit Pennsylvania homeowners, as well as low-income people in need of civil legal services and affordable housing.

Respectfully submitted,

/s/ Benjamin D. Geffen
Benjamin D. Geffen
Pa. Bar No. 310134
Public Interest Law Center of Philadelphia
1709 Benjamin Franklin Parkway, 2nd Floor
Philadelphia, PA 19103
Phone: 215-627-7100
Fax: 215-627-3183
bgeffen@pilcop.org

Counsel for Amici Curiae

Dated: March 23, 2015

V. CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,795 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in 14 point Times New Roman, a proportionally spaced typeface, using Microsoft Word 2007 word-processing software.

3. This brief complies with L.A.R. 31.1(c) because the text of the electronic brief is identical to the text in the paper copies, and a virus detection program, Microsoft Security Essentials version 4.6.305.0, has been run on the electronic file and no virus or risk was detected.

/s/ Benjamin D. Geffen
Benjamin D. Geffen
Pa. Bar No. 310134
Public Interest Law Center of Philadelphia
1709 Benjamin Franklin Parkway, 2nd Floor
Philadelphia, PA 19103
Phone: 215-627-7100
Fax: 215-627-3183
bgeffen@pilcop.org

Counsel for Amici Curiae

Dated: March 23, 2015

VI. CERTIFICATE OF BAR MEMBERSHIP

The undersigned hereby certifies that he is a member in good standing of the bar of this Court.

/s/ Benjamin D. Geffen
Benjamin D. Geffen

Dated: March 23, 2015

VII. CERTIFICATE OF SERVICE

On this date, I caused a true and correct copy of the foregoing Brief of Amicus Curiae to be served upon all counsel of record via the Court's ECF system, in accordance with L.A.R. Misc. 113.4.

/s/ Benjamin D. Geffen
Benjamin D. Geffen

Dated: March 23, 2015