

IN THE SUPREME COURT OF OHIO

State of Ohio, <i>ex rel.</i>	:	Supreme Court
Michael DeWine,	:	Case No. 11-0890
Attorney General of Ohio, et al.,	:	
	:	On Review of Certified Questions
Petitioners,	:	From the United States District Court
	:	Northern District of Ohio,
v.	:	Eastern Division
	:	
GMAC Mortgage, LLC, et al.,	:	Case Nos. 3:10-cv-02537-JZ
	:	1:10-cv-02709-JZ
Respondents.	:	

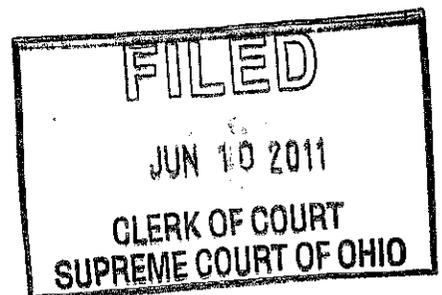
**PRELIMINARY MEMORANDUM OF AMICUS CURIAE
 BARCLAYS CAPITAL REAL ESTATE INC. D/B/A HOMEQ SERVICING
 IN SUPPORT OF ACCEPTANCE OF CERTIFIED QUESTIONS**

James D. Curphey (0015832)
 (COUNSEL OF RECORD)
 Kathleen M. Trafford (0021753)
 L. Bradfield Hughes (0070997)
 Michael A. Wehrkamp (0084942)
 PORTER WRIGHT MORRIS & ARTHUR LLP
 41 South High Street
 Columbus, OH 43215
 (614) 227-2096 (phone)
 (614) 227-2100 (facsimile)
 jcurphey@porterwright.com

R. Michael DeWine (0009181)
 OHIO ATTORNEY GENERAL
 Susan A. Choe (0067032)
 (COUNSEL OF RECORD)
 Jeffrey R. Loeser (0082144)
 OFFICE OF THE OHIO ATTORNEY GENERAL
 CONSUMER PROTECTION SECTION
 14th Floor, 30 East Broad Street
 Columbus, OH 43215
 (614) 466-1305 (phone)
 (614) 466-7900 (facsimile)
 susan.choe@ohioattorneygeneral.gov
 jeff.loeser@ohioattorneygeneral.gov

COUNSEL FOR AMICUS CURIAE
 BARCLAYS CAPITAL REAL ESTATE INC.
 D/B/A HOMEQ SERVICING
 IN SUPPORT OF ACCEPTANCE OF
 CERTIFIED QUESTIONS

COUNSEL FOR PETITIONERS STATE OF
 OHIO AND MICHAEL DEWINE, OHIO
 ATTORNEY GENERAL



Phillip F. Cameron (0033967)
(COUNSEL OF RECORD)
4300 Carew Tower
441 Vine Street
Cincinnati, OH 45202
(513) 421-4343 (phone)
pfclaw@gmail.com

Richard E. Hackerd (0055306)
2000 Standard Building
1370 Ontario Street
Cleveland, OH 44113
(440) 526-8780 (phone)
(866) 201-0249 (facsimile)
richard@hackerd.com

COUNSEL FOR PETITIONERS LOIS
BLANK, REBECCA LAWSON, BLAIR
RITZE, BRANDON RITZE, AND
WILLIAM STROBLE

Khary L. Hanible (0077095)
(COUNSEL OF RECORD)
Richard M. Kerger (0015864)
KERGER & HARTMAN LLC
33 South Michigan Street, Suite 100
Toledo, OH 43604
(419) 255-5990 (phone)
(419) 255-5997 (facsimile)
khanible@kergerlaw.com
rkerger@kergerlaw.com

COUNSEL FOR RESPONDENT
JEFFREY STEPHAN

David A. Wallace (0031356)
(COUNSEL OF RECORD)
Barton R. Keyes (0083979)
Jeffrey A. Lipps (0005541)
CARPENTER LIPPS & LELAND LLP
280 North High Street, Suite 1300
Columbus, OH 43215
(614) 365-4100 (phone)
(614) 365-9145 (facsimile)
wallace@carpenterlipps.com
lipps@carpenterlipps.com
keyes@carpenterlipps.com

COUNSEL FOR RESPONDENTS
GMAC MORTGAGE, LLC AND
ALLY FINANCIAL, INC.

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INTRODUCTION

Two United States District Judges from the Northern District of Ohio have contemporaneously certified related and compelling questions of Ohio law to this Court for its determination pursuant to Rule 18 of the Court's Rules of Practice. For the reasons that follow, pursuant to Supreme Court Practice Rule 18.6, Amicus Curiae Barclays Capital Real Estate Inc. d/b/a HomEq Servicing ("HomEq"), the Petitioner in *Anderson v. Barclays Capital Real Estate Inc. d/b/a HomEq Servicing* (Ohio Supreme Court Case No. 11-0908), respectfully urges this Court to accept jurisdiction over both of these certified-question cases, to establish separate briefing schedules in both cases, and to set both cases for oral argument on the same day. The Court's acceptance of both certified-question cases is the only way to ensure that all interested parties have a full and adequate opportunity to be heard on these important issues. Resolution of these questions will promote judicial economy by allowing this Court to put to rest multiple issues of first impression that have arisen under the Ohio Consumer Sales Practices Act ("CSPA"), R.C. 1345.01 et seq., in multiple state and federal lawsuits against multiple mortgage-servicing firms like HomEq.

STATEMENT OF THE INTERESTS OF AMICUS CURIAE

HomEq is a mortgage servicer of residential mortgage loans held by individuals residing in the State of Ohio. HomEq's mortgage service obligations are set forth in various contracts, known as Pooling and Service Agreements, between HomEq and the owners of the mortgage loan notes. As a mortgage servicer, HomEq receives scheduled periodic payments from borrowers pursuant to the terms of residential mortgage loans, including amounts received for deposit in escrow accounts, and applies the mortgage

loan payments received toward principal, interest, and other obligations of the borrower.

The questions certified here by District Judge Zouhary and by District Judge Carr in *Anderson* concern the applicability of the CSPA to mortgage servicers and mortgage servicing. As mortgage servicers, HomEq and other similarly situated entities have compelling interests in a definitive ruling from this Court regarding whether the CSPA applies to them and their mortgage-servicing activities. Accordingly, in addition to submitting a Preliminary Memorandum as Petitioner in *Anderson*, HomEq also respectfully submits this brief as amicus curiae in this case, respectfully urging this Court to answer the questions certified by District Judge Zouhary.

STATEMENT OF THE CASE AND FACTS

The Certification Order issued by Judge Zouhary covers two consolidated cases pending before him – *State of Ohio v. GMAC Mortgage, LLC, et al.* (hereinafter “*State of Ohio*”) and *Lois Blank, et al. v. GMAC Mortgage, LLC, et al.* (hereinafter “*Blank*”). In both *State of Ohio* and *Blank*, Defendant GMAC is the holder of promissory notes and mortgages executed by Ohio homeowners. GMAC is also a mortgage servicer in the business of servicing residential mortgages of individuals for personal, family, or household purposes. The *Blank* Plaintiffs are Ohio homeowners with note obligations secured by mortgages held by GMAC or serviced by GMAC, or both. Similarly, in *Anderson*, Defendant HomEq is a mortgage servicer in the business of servicing residential mortgages of individuals for personal, family, or household purposes. Plaintiff Sondra Anderson is an Ohio homeowner with a note obligation secured by a mortgage serviced by HomEq.

In *State of Ohio, Blank, and Anderson*, the respective Plaintiffs allege, among other things, that the Defendants violated the CSPA. As the Certification Orders and the complaints in *State of Ohio, Blank, and Anderson* make clear, however, there are important differences between *State of Ohio* and *Blank*, on the one hand, and *Anderson*, on the other. The CSPA allegations in *State of Ohio* and *Blank* are based on GMAC's alleged activities in connection with foreclosure actions prosecuted by GMAC in Ohio as either the mortgage noteholder, the servicer for the mortgage noteholder, or the sub-servicer for the mortgage noteholder.¹ Ms. Anderson's CSPA allegations, in contrast, are based only on HomeEq's servicing of Anderson's mortgage loan.²

ARGUMENT IN SUPPORT OF ACCEPTANCE OF CERTIFIED QUESTIONS

THIS COURT SHOULD AGREE TO ANSWER THE QUESTIONS OF OHIO LAW CERTIFIED BY DISTRICT JUDGE ZOUHARY HERE, AND BY DISTRICT JUDGE CARR IN *ANDERSON v. BARCLAYS CAPITAL REAL ESTATE INC. D/B/A HOMEQ SERVICING*, OHIO SUPREME COURT CASE NO. 11-0908, AND SET BOTH CERTIFIED-QUESTION CASES FOR ARGUMENT ON THE SAME DAY

A. The Questions Certified By Judge Zouhary Here Present Compelling Issues Under The Ohio Consumer Sales Practices Act That This Court Should Hear And Determine Pursuant To Rule 18 Of The Court's Rules Of Practice.

On May 24, 2011, District Judge Zouhary properly invoked this Court's jurisdiction under Rule 18 of the Court's Rules of Practice to answer the following three questions of Ohio law that he found to be potentially dispositive in both the *State of Ohio* and *Blank* cases pending before him:

¹ See *State of Ohio*, N.D.Ohio No. 3:10-cv-02537, First Amended Complaint, ECF No. 15, at ¶55-58 (Dec. 3, 2010); *Blank*, N.D.Ohio No. 1:10-cv-02709, Class Action Amended Complaint, ECF No. 1-24, at ¶151-67 (Dec. 1, 2010).

² See *Anderson*, N.D.Ohio No. 3:09-cv-2335, Second Amended Complaint, ECF No. 35, at ¶67-82 (Aug. 10, 2010).

1. Does the servicing of a borrower's residential mortgage loan constitute a "consumer transaction" as defined in the Ohio Consumer Sales Practices Act, R.C. § 1345.01(A)?
2. Does the prosecution of a foreclosure action by a mortgage servicer constitute a "consumer transaction" as defined in the Ohio Consumer Sales Practices Act, R.C. § 1345.01(A)?
3. Is an entity that services a residential mortgage loan, and prosecutes a foreclosure action, a "supplier . . . engaged in the business of effecting or soliciting consumer transactions" as defined in the Ohio Consumer Sales Practices Act, R.C. § 1345.01(C)?

HomEq believes, as explained below, that the third question certified by Judge Zouhary here would more appropriately be broken into two additional questions, in order to ensure that this Court's answer to the certified issue distinguishes between entities that merely service mortgages, and mortgage-servicing entities that also prosecute foreclosure actions. And for the reasons that HomEq will explain in its Preliminary Memorandum in the *Anderson* certified-question case, Judge Zouhary's certified questions present pure questions of law, are determinative of the proceedings, and are not governed by controlling precedent. Accordingly, Amicus Curiae HomEq respectfully urges the Court to order separate briefing in this certified-question case and in *Anderson* pursuant to Rule 18.7 of the Rules of Practice. HomEq also respectfully urges the Court to set both related cases for oral argument on the same day, as the Court has done in prior, similar contexts.³

³ On February 18, 2009, for example, this Court held oral arguments in 2008-0972, *Stetter v. R.J. Corman Derailment Serv. LLC* (a certified-question case concerning the constitutionality of Ohio's employer intentional tort statute) and 2008-

B. Amicus Curiae HomEq, The Petitioner In *Anderson*, Seeks A Meaningful Opportunity To Brief And Argue The Certified Questions Of First Impression Presented In *Anderson*.

If this Court accepts jurisdiction over both certified-question cases and sets both cases for oral argument on the same day, then HomEq (as Petitioner in *Anderson*) will have a meaningful opportunity to brief and argue the certified questions of first impression presented both here and in *Anderson*. If, however, the Court accepts this certified-question case but not *Anderson*, or takes *Anderson* but places it in abeyance pending the disposition of this case, then HomEq will be relegated to the status of amicus curiae in this case, left without complete and meaningful participation as Petitioner during briefing and oral argument. For the reasons below, therefore, HomEq respectfully urges the Court to accept jurisdiction over and hear both certified-question cases so that HomEq has a complete and meaningful opportunity to participate.

As an initial point, *Anderson* was pending for over a year before *State of Ohio* and *Blank* commenced. When Judge Zouhary ordered that the parties in *State of Ohio* and *Blank* provide for his consideration potential questions for certification to this Court, he instructed them to consider the language that HomEq and the other *Anderson* parties, per Judge Carr's order, had already proposed for certification two weeks before.⁴ Thus, the *Anderson* parties were "first out of the gate" in proposing questions for certification to this Court.

In fact, at least three other courts have acknowledged *Anderson*, as opposed to *State of Ohio* and *Blank*, and have expressed an interest in the resolution of the

0857, *Kaminski v. Metal & Wire Products Co. et al.* (a direct appeal also concerning the constitutionality of the same statute).

⁴ See *State of Ohio* (Mar. 10, 2011), N.D.Ohio No. 3:10-cv-02537, Order, ECF No. 38.

questions certified by Judge Carr in *Anderson*. See *State of Ohio v. Barclays Capital Real Estate Inc. d.b.a. HomEq Servicing* (May 10, 2011), No. 2009 CV 10136, Montgomery County Court of Common Pleas, Decision, Order Granting Joint Motion to Stay Proceedings (staying proceedings until this Court answers or declines to the questions certified by Judge Carr); *American Home Mortgage Servicing, Inc. v. State of Ohio, et al.* (Mar. 18, 2011), No. 09CVH-11-16491, Franklin County Court of Common Pleas, Order Granting Joint Motion to Stay Proceedings (granting the parties' Joint Motion Stay Proceedings, filed March 10, 2011, based on the anticipated certification of questions by Judge Carr); *Kline v. Mortgage Electronic Registration Systems, Inc., et al.* (Mar. 29, 2011), S.D.Ohio No. 3:08cv408, Decision and Entry, ECF No. 241, at 10 (“This Court anticipates that the parties will inform it of the progress of *Anderson* before the Ohio Supreme Court, assuming that that matter was certified.”).

Second, HomEq affirmatively moved to dismiss Ms. Anderson’s CSPA claim, arguing that mortgage servicers are not “suppliers” and mortgage servicing is not a “consumer transaction” under the CSPA. Judge Carr held in abeyance his ruling on those issues in HomEq’s motion and indicated that he intended to certify those questions to this Court.⁵ HomEq supported certifying questions to this Court from the moment Judge Carr indicated that he intended to do so. Accordingly, Judge Carr designated HomEq as the moving party in the *Anderson* certified-question case.

When the Ohio Attorney General – the plaintiff in *State of Ohio* – learned that Judge Carr intended to certify questions concerning the applicability of the CSPA to mortgage servicers, the Ohio Attorney General appeared in *Anderson* as amicus curiae

⁵ See *Anderson* (June 18, 2010), N.D.Ohio No. 3:09-cv-2335, Order, ECF No. 26, at 18.

and initially argued against certification.⁶ Based in large part on the Ohio Attorney General's opposition, Judge Carr decided not to certify questions at that time; however, Judge Carr did so without prejudice to further consideration of possible certification to this Court.⁷ It was not until a year later that the Ohio Attorney General changed course and supported certification.⁸ Judge Zouhary designated the Ohio Attorney General as the moving party here in the *State of Ohio* certified-question case even though the Ohio Attorney General initially opposed certification in *Anderson*, and even though GMAC moved to dismiss the *State of Ohio* and *Blank* Plaintiffs' CSPA claims.⁹

The moving parties in *State of Ohio* and *Anderson* – the Ohio Attorney General and HomEq, respectively – thus are not counterparts with shared interests in their underlying cases. In fact, they are in direct opposition to one another. Moreover, HomEq's counterpart in *State of Ohio* – GMAC – opposed certification of questions to this Court and therefore does not adequately represent HomEq's interests.¹⁰ As a matter of fundamental fairness, then, HomEq respectfully requests that this Court afford it the opportunity to fully brief and argue, as a Petitioner, the certified questions addressing the applicability of the CSPA to mortgage servicers.

⁶ See *Anderson*, N.D. Ohio No. 3:09-cv-2335, Status Report of Ohio Attorney General Richard Cordray, ECF No. 38 (Aug. 25, 2010).

⁷ See *Anderson* (Oct. 18, 2010), N.D. Ohio No. 3:09-cv-2335, Order, ECF No. 51.

⁸ See *Anderson*, N.D. Ohio No. 3:09-cv-2335, Joint Status Report, ECF No. 63 (Feb. 4, 2011).

⁹ See *State of Ohio*, Ohio Supreme Court Case No. 11-0890, Certification Order, at 4.

¹⁰ See *State of Ohio*, N.D. Ohio No. 3:10-cv-02537, Position of Ally Financial, Inc. and GMAC Mortgage, LLC with Respect to Draft Certification Order, ECF No. 43 (May 13, 2011).

Third, as discussed above in the Statement of the Case and Facts, the CSPA allegations present here in *State of Ohio* and *Blank*, on the one hand, and in *Anderson*, on the other hand, center on different activities. The CSPA allegations in *State of Ohio* and *Blank* are based on GMAC's alleged activities in connection with foreclosures prosecuted by GMAC in Ohio as either the mortgage noteholder, the servicer for the mortgage noteholder, or the sub-servicer for the mortgage noteholder.¹¹ The CSPA claims in *State of Ohio* and *Blank* are not based purely on GMAC's mortgage-servicing activities.¹² For this reason, GMAC proposed alternate certified questions to Judge Zouhary limited only to foreclosure activities.¹³

In contrast, Ms. Anderson's CSPA claim against HomEq is based only on HomEq's servicing of her mortgage loan.¹⁴ It is no surprise, then, that Judge Zouhary's Certification Order here lists only three mortgage-servicing activities of GMAC, whereas Judge Carr's Certification Order in *Anderson* lists eight sets of mortgage-servicing activities – offering a more complete picture of what mortgage servicers do. In other words, because *Anderson* more accurately and completely paints a picture of mortgage servicing and involves a CSPA claim based purely on mortgage-servicing activities, *Anderson* presents the better vehicle for this Court to definitively answer certified

¹¹ See *State of Ohio*, N.D. Ohio No. 3:10-cv-02537, First Amended Complaint, ECF No. 15, at ¶155-58 (Dec. 3, 2010); *Blank*, N.D. Ohio No. 1:10-cv-02709, Class Action Amended Complaint, ECF No. 1-24, at ¶151-67 (Dec. 1, 2010).

¹² See *State of Ohio*, N.D. Ohio No. 3:10-cv-02537, Position of Ally Financial, Inc. and GMAC Mortgage, LLC with Respect to Draft Certification Order, ECF No. 43 (May 13, 2011) (“[Plaintiffs] are seeking to prosecute claims based exclusively on activities concerning foreclosure actions, i.e., the filing of affidavits and execution of assignments of mortgages and notes.”).

¹³ See *id.*

¹⁴ See *Anderson*, N.D. Ohio No. 3:09-cv-2335, Second Amended Complaint, ECF No. 35, at ¶67-82 (Aug. 10, 2010).

questions about the applicability of the CSPA to mortgage servicers. For these reasons, and because HomEq's interests are not adequately represented by the parties here in *State of Ohio* and *Blank*, HomEq respectfully requests that the Court grant it the opportunity to fully brief and argue the questions certified in *Anderson*.

C. If The Court Chooses To Answer The Certified Questions Here, But Not In *Anderson*, Or Chooses To Take And Hold *Anderson* In Abeyance Pending The Disposition Of This Case, Then The Court Should Modify Certified Question No. 3 In Order To Distinguish Between Entities That Only Service Mortgages, And Entities That Service Mortgages And Prosecute Foreclosure Actions.

As noted above, given the distinction of issues and parties as between this case and *Anderson*, HomEq respectfully urges this Court to accept jurisdiction over both certified-question cases and to set both cases for oral argument on the same day. HomEq understands, however, that this Court, in its discretion, may choose to accept jurisdiction over this case but not *Anderson*. Or, this Court may choose to take and hold *Anderson* in abeyance pending the disposition of this case. In either of these scenarios, though, it would be critical for this Court to modify the third question certified by Judge Zouhary here. As written, that question applies to entities that both service mortgages and prosecute foreclosures. Answering that question precisely as certified would presumably resolve whether a mortgage servicer that prosecutes foreclosure actions is a "supplier" under the CSPA. Left unresolved, though, would be the question of whether mortgage servicers conducting only mortgage-servicing activities (and not prosecuting foreclosures) are also "suppliers" under the CSPA.

Therefore, if this Court accepts jurisdiction over this certified-question case but not *Anderson*, or if this Court accepts *Anderson* but holds it in abeyance pending

disposition of this case, then HomEq respectfully proposes that the questions certified here be modified as follows:

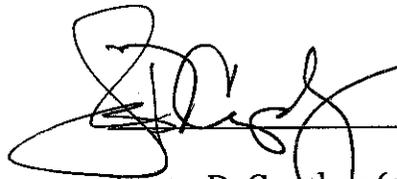
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2. Is an entity that services a residential mortgage loan a "supplier . . . engaged in the business of effecting or soliciting consumer transactions" as defined in the Ohio Consumer Sales Practices Act, Ohio Revised Code § 1345.01(C)?
3. Is an entity that services a residential mortgage loan, and prosecutes a foreclosure action, a "supplier . . . engaged in the business of effecting or soliciting consumer transactions" as defined in the Ohio Consumer Sales Practices Act, R.C. § 1345.01(C)?
4. Is an entity that prosecutes a foreclosure action a "supplier . . . engaged in the business of effecting or soliciting consumer transactions" as defined in the Ohio Consumer Sales Practices Act, Ohio Revised Code § 1345.01(C)?
5. Does the prosecution of a foreclosure action by a mortgage servicer constitute a "consumer transaction" as defined in the Ohio Consumer Sales Practices Act, Ohio Revised Code § 1345.01(A)?

This Court has previously invoked its power to modify questions certified. See, e.g., *Mentor Exempted School Dist. Bd. of Edn. v. Mohat*, 126 Ohio St.3d 1542, 2010-Ohio-3855, 932 N.E.2d 337 ("The court will answer the following modified question as stated in the petitioners' memorandum *** [.]"), dismissed as improvidently allowed, 128 Ohio St.3d 395, 2011-Ohio-1421. See, also, Uniform Certification of Questions of Law [Act] [Rule] (1995), Approved by the American Bar Association, Section 4, Comment ("Requiring a question to be answered precisely as it is certified imposes a counterproductive rigidity that could decrease the utility of the answer received.")

CONCLUSION

For the reasons set forth above, Amicus Curiae Barclays Capital Real Estate Inc. d/b/a HomEq Servicing respectfully urges this Court to answer the questions of Ohio law certified here by District Judge Zouhary and by District Judge Carr in *Anderson v. Barclays Capital Real Estate Inc. d/b/a HomEq Servicing*, Ohio Supreme Court Case No. 11-0908. Due to the nature of the questions certified in these cases, and due to HomEq's status as the Petitioner in *Anderson*, HomEq respectfully urges this Court to establish a briefing schedule in both cases and to set them both for oral argument on the same day. In the alternative, if this Court chooses to answer the questions certified here, but not in *Anderson*, or if this Court chooses to take and hold *Anderson* in abeyance pending the disposition of this case, then HomEq respectfully asks this Court to modify the certified questions as set forth above.

Respectfully submitted,



James D. Curphey (0015832)
(COUNSEL OF RECORD)
Kathleen M. Trafford (0021753)
L. Bradfield Hughes (0070997)
Michael A. Wehrkamp (0084942)
PORTER WRIGHT MORRIS & ARTHUR LLP
41 South High Street
Columbus, OH 43215
(614) 227-2096 (phone)
(614) 227-2100 (facsimile)
jcurphey@porterwright.com

COUNSEL FOR AMICUS CURIAE
BARCLAYS CAPITAL REAL ESTATE INC.
D/B/A HOMEQ SERVICING
IN SUPPORT OF ACCEPTANCE OF
CERTIFIED QUESTIONS

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Preliminary Memorandum of Amicus Curiae Barclays Capital Real Estate Inc. d/b/a HomeEq Servicing In Support Of Acceptance Of Certified Questions was sent by first class mail, postage prepaid, this 10th day of June, 2011 to the following:

R. Michael DeWine (0009181)
OHIO ATTORNEY GENERAL
Susan A. Choe (0067032)
(COUNSEL OF RECORD)
Jeffrey R. Loeser (0082144)
OFFICE OF THE OHIO ATTORNEY GENERAL
CONSUMER PROTECTION SECTION
14th Floor, 30 East Broad Street
Columbus, OH 43215

Phillip F. Cameron (0033967)
(COUNSEL OF RECORD)
4300 Carew Tower
441 Vine Street
Cincinnati, OH 45202

Richard E. Hackerd (0055306)
2000 Standard Building
1370 Ontario Street
Cleveland, OH 44113

COUNSEL FOR PETITIONERS STATE OF
OHIO AND MICHAEL DEWINE, OHIO
ATTORNEY GENERAL

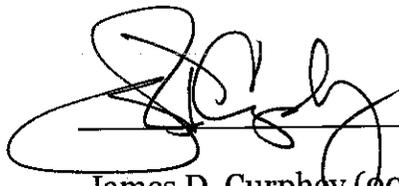
COUNSEL FOR PETITIONERS LOIS
BLANK, REBECCA LAWSON, BLAIR
RITZE, BRANDON RITZE, AND
WILLIAM STROBLE

David A. Wallace (0031356)
(COUNSEL OF RECORD)
Barton R. Keyes (0083979)
Jeffrey A. Lipps (0005541)
CARPENTER LIPPS & LELAND LLP
280 North High Street, Suite 1300
Columbus, OH 43215

Khary L. Hanible (0077095)
(COUNSEL OF RECORD)
Richard M. Kerger (0015864)
KERGER & HARTMAN LLC
33 South Michigan Street, Suite 100
Toledo, OH 43604

COUNSEL FOR RESPONDENTS
GMAC MORTGAGE, LLC AND
ALLY FINANCIAL, INC.

COUNSEL FOR RESPONDENT
JEFFREY STEPHAN


James D. Curphey (0015832)
(COUNSEL OF RECORD)