

**ORIGINAL**

**IN THE SUPREME COURT OF OHIO**

<b>STATE ex rel.</b>	:	
<b>DATA TRACE INFORMATION</b>	:	
<b>SERVICES, LLC, et al.,</b>	:	
	:	<b>Original Action in Mandamus</b>
<b>Relators</b>	:	<b>Case No. 10-2029</b>
	:	
<b>v.</b>	:	
	:	
<b>RECORDER OF CUYAHOGA</b>	:	
<b>COUNTY, OHIO,</b>	:	
	:	
<b>Respondent.</b>	:	

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**BRIEF OF AMICUS CURIAE OHIO LAND TITLE ASSOCIATION  
IN SUPPORT OF RELATORS DATA TRACE  
INFORMATION SERVICES, LLC, ET AL.**

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**I.**

**SUMMARY OF ARGUMENT**

This mandamus action properly challenges the Cuyahoga County Recorder's Office's violation of the Ohio Public Records Act by charging a per-page fee for providing electronic copies of public records that is astronomical in comparison to the office's actual cost.

The purpose of this Amicus Curiae Brief is to separately emphasize the vital public interests advanced by companies such as Relator Data Trace Information Services, LLC ("Data Trace"), and Relator Property Insight, LLC ("Property Insight"), that will be compromised if recording offices are permitted to charge copying fees vastly higher than their cost.

The public interest at issue is no less than the proper functioning of the American system of buying and selling real estate, which is not only a significant industry in and of itself but is also at the heart of the rest of our economy, as real estate is what people live on and forms the foundation for virtually all other economic activity. In a nutshell, the Relators are in the business of storing, organizing, and processing information gleaned from public records obtained from county recorders' offices – deeds, mortgages, liens, etc. – and in turn selling that information in readily usable form to companies that evaluate and insure the quality of title to land. Time is of the essence in most land transactions, and Relators provide the information needed for transactions to close in prompt, orderly fashion.

If forced to pay the exorbitant copying costs demanded by Cuyahoga County, Relators would have to pass on significant price increases to their customers, who likely would pass them on to their customers, ultimately to the parties entering into transactions. It does not take a Ph.D. in economics to predict that this would significantly increase the costs of property transactions for home buyers and businesses alike, likely precluding some economically valuable transactions from ever happening.

To understand the service provided by Relators and those who depend on their services, it is necessary to understand what a county recorder's office does – and does not do. To start, it is necessary to debunk the myth that government's recordation of instruments such as deeds, mortgages, etc., somehow assures that whomever holds the most recently recorded instrument has a valid instrument, or "good title." Not so. As will be explained, it takes more than that.

Section A of this Brief asserts that the objective of any system of assuring title to real property is to enable interests in real estate to move freely in commerce. Three principles have been identified for achieving this objective. First, the system must give adequate security for land titles. Otherwise no one but the foolish will invest money in land. Second, the system must allow speedy determination of title status, so transactions can be closed in orderly fashion. Third, the method must be relatively inexpensive, so that the transactional costs do not kill the transaction. The best system balances all three objectives.

Section B provides a short history of the system of the public recording of land titles and encumbrances to title in American jurisdictions. Recording acts were the product of American entrepreneurial spirit coupled with the availability of land and the necessity of using land to secure borrowing. Today, all fifty states have recording acts, which are valuable tools for preventing disputes over property rights and creating certainty in private bargains.

Section C illustrates what the prevalent system of title recording does not do, primarily by contrasting it with another system that does – the Torrens title registration system, which originated in Australia. The Torrens system has been tried in America but never caught on. The most attractive feature of the Torrens system is that it does well at providing adequate security for titles – the first of the three principles identified above. Under Torrens, the government office functions as the guarantor of the quality of title, aided in part by an insurance component

paid for by participants that compensates parties harmed by errors in title registration. The downside of the Torrens system is that it requires a complex examination and registration process that is time-consuming and costly for both the government and the parties involved. Thus, the Torrens system satisfies only one of the three principles and, in America at least, is generally considered not worth the cost.

Section D describes features of the title recordation system used in most American jurisdictions, including Cuyahoga County. Unlike the Torrens system, the title recordation system, by itself, provides no guarantee of title or even any assurance that recorded documents were legally valid in the first instance. Rather, recordation provides a repository of documents that skilled experts such as real estate attorneys, title abstractors, title insurance agents, and underwriters can use to search the chain of title and come to a conclusion about the quality of title held by the seller or prospective mortgagor.

While title recordation advances two of the principles above, in that it is relatively inexpensive and the process of recording instruments is speedy, actual title searches can take a long time under the cumbersome process dictated by the grantor-grantee indexes used in most counties. Even more critically, this system, by itself, does not provide adequate security of title.

As Section E discusses, private enterprise has stepped in to bridge this gap so that government title recordation systems can be used to accomplish the first essential goal of securing quality of title. Companies such as Data Trace and Property Insight organize information so that their industry clients can more quickly evaluate the quality of title and determine insurability of title at the most reasonable rates, all for the benefit of parties to real estate transactions. This public-private partnership promotes all three of the key principles identified above. It enhances speed of transactions, and effectively privatizes what government

agencies would do to guarantee title if they had Torrens-style title registration systems, and this is done under a competitive, market-driven cost structure. Thus, Relators and similar companies serve the public interest and provide a vital service that the community would not have with county recording offices alone.

As noted above, however, the economical provision of this service is jeopardized if counties such as Cuyahoga charge copying fees wholly out of line with the actual cost of duplicating electronic documents. Thus, as we conclude in Section F, this case is not simply about whether Cuyahoga County should be ordered to comply with the Public Records Act, it is about preserving a public-private system of property title assurance that serves the public well.

For these reasons, as further explained below, we respectfully request the Court grant the requested mandamus relief.

## **II. STATEMENT OF AMICUS INTERESTS**

Amicus Ohio Land Title Association (“OLTA”), founded in 1910, is a trade association that represents nearly 800 licensed title insurance agents, underwriters, abstractors, and real estate/title attorneys who operate or practice in all of Ohio’s 88 counties. OLTA’s mission is to advocate for and promote the legislative, educational, ethical, and professional interests of its members. It also strives to benefit the public by promoting product quality and integrity in real estate transactions. Relators Data Trace and Property Insight are OLTA associate members, although OLTA has no direct financial or other interest in this mandamus action. OLTA shares in and agrees with the objective of the Relators of retaining affordable public access to public records, as this access is crucial for documenting title to real property and serves OLTA’s interest in promoting certainty and integrity in real estate transactions.

### III.

### ARGUMENT

#### A. Introduction: Why Every State Has A Land Title Assurance System.

*"[Land] is permanent, immovable, and, with minute exceptions, not produced by man. Moreover, it is the source from which most other property must come. He who controls the land does, in fact, control the destiny of man. This monopoly, which we call private property in land, must come by a grant from the sovereign. ... [O]nce the land has been granted it belongs to that individual to sell or give to another."*

[John E. Cribbet & Corwin W. Johnson, Principles of the Law of Property, at 11 (3<sup>rd</sup> ed. 1989) (hereinafter "Cribbet & Johnson")]

Thus, in classic theory, a parcel of land is formed, and at some point it is conveyed by the sovereign to its "first" private owner. The typical parcel will then be sold and resold to different owners many, many times as the years pass. Lesser interests, such as easements, liens, and mortgages, will be granted, imposed, attached, received, released, conveyed, and reconveyed, multiple times. The obvious question that springs to mind, as Cribbet and Johnson identify in their leading treatise on property law, is that, if one is the buyer, "[h]ow can you ever be sure that you are dealing with the true owner of the land when the chain of title must go back many years to a government grant?" Enter public land title assurance systems.

A basic objective of a land title assurance system is to enable real estate interests to "move freely and easily in commerce." John L. McCormack, Torrens and Recording Land Title Assurance in the Computer Age, 18 Wm. Mitchell L. Rev. 61, 74 (1992) (hereinafter "McCormack") (quoting Cribbet & Johnson at 346). Commentators in this area have formulated three principles that should be observed to achieve this objective:

- *First*, the system must give adequate security for land titles. Unless the purchaser or mortgagee can be assured that his investment is sound, the particular method fails, whatever other virtues it may possess.

- *Second*, it must provide speed in the determination of title status so that the transaction can be closed with a minimum amount of cliff-hanging.
- *Third*, the method must be relatively inexpensive so that a disproportionate amount of the purchaser's dollar is not channeled into title service.

[Cribbet & Johnson, at 347-348  
(emphasis and bulleting added)]

It stands to reason that the best title assurance system would provide the greatest degree of security of property title, would allow transactions to be conducted quickly and relatively easily, and would impose the lowest cost to government and parties involved in transactions. [McCormack 121] We will briefly touch on each of these three objectives.

### 1. Security Of Title.

Under the first principle – security of title – a system of title assurance should generate reliable expectations in sellers and owners about the rights and liabilities associated with the use of and acquisition of interests in real estate. [McCormack 74] The parties should have reasonable assurance that: (1) they will have the legal right to possess their interest and exercise their rights in the real estate; (2) there are no undisclosed liabilities that detract from their interest, (3) their ownership will remain secure, and (4) the interest will be transferable to a purchaser. [McCormack 74-75] Assurance of security of title depends largely on the reliability and completeness of the available title information. [Id. 75] In an ideal system, land title records would contain all facts relevant to title, ownership, and use, and the file or database would be accurate and complete, so as to eliminate the need for outside research. [Id.]

### 2. Speed Of Determining Title Status.

Commerce values speed. Once parties to a transaction have a meeting of the minds, they want the deal to be consummated as quickly as possible with no hitches. For the goal of the second principle – speed – to be met, input into the database should be swift and administratively

simple, and data relevant to status of title should be quickly retrievable. [McCormack 75] Data evaluation should be as prompt and efficient as possible, and, except in rare instances, make it unnecessary to redo or reconsider previous determinations of title status. [Id.]

### **3. Economy Of Determining Title Status.**

Achieving the third principle – economy – also depends in part on the efficiency of data management and evaluation. [McCormack 75] Economy results when user costs are reasonably related to the cost of maintaining and operating the system. [Id.] Where part or all of the system is operated by private businesses, is it necessary that this cost include a reasonable return for investors yet remain attractive to users. [Id. 75 n.50]

Where a government agency conducts the necessary work, economy suggests that users should pay a fair share of the cost, and the system should be self-sustaining without a subsidy from other sources. [Id. 75 n.51] There is one important caveat: The land title assurance system should not be used as a profit center for government, in effect taxing property transactions to raise revenue for unrelated needs. [Id. 75] That would defeat the purpose of economy and imperil the overall goal that real estate should move freely and easily in commerce.

## **B. A Short History Of The American Land Title Assurance System.**

### **1. The Peculiar American Question: Who Owns The Real Estate?**

To understand the importance of an accurate and efficient land title assurance system, it is helpful to take a brief look at early American history of making deeds and mortgages public records and why the European colonists who eventually became Americans have been doing that since the 1600s.

It should come as no surprise that America was different. The English colonists in America transferred real property more freely among non-family members than did their

forebears in England, as land ownership in 17<sup>th</sup> and 18<sup>th</sup> century England was still locked in a feudal system that concentrated land among a relative few aristocratic families. With most land tied up in successive generations of the same families, it was well known who owned most every bit of land even without having to consult public records.

In America, however, public land title records have been a fundamental feature of the law since before the founding of the Republic. See Christopher L. Peterson, Foreclosure, Subprime Mortgage Lending, and the Mortgage Electronic Registration System, 78 U. Cinn. L. Rev. 1359, 1363 (2010) (hereinafter “Peterson”). Most early colonists came to America to seek new opportunities – and new lands.<sup>1</sup> [Id.] Thus, the relatively wide “availability” of land and lack of feudal ancestral estates enabled American colonists to make more frequent transfers of real property among businesses and families. [Id.]

The colonists’ entrepreneurial spirit coupled with, for most, lack of great wealth also created demand for lending secured by the one widely available asset – real estate. [Id.] Thus, it is not surprising that in the early 1600s, Americans began experimenting with laws requiring that that parties to land transactions create public records of conveyances and mortgages. [Id.] For example, in 1636, Massachusetts’ Plymouth Bay Colony adopted its first recording law, which required that “all sales exchanges giftes mortgages leases or other Conveyances of howses and landes the sale to be acknowledged before the Governor or any one of the Assistants and committed to publick Record.” [Peterson 1363] Similarly, in 1639 Connecticut insisted that

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<sup>1</sup> The issue of the native Americans who held the land for centuries before the Europeans arrived is a different historical topic. Throughout history, the “origin” of land title tends to date to the last general conquest. Thus, in what is now the United States, the United States Supreme Court deemed that conquest of native populations by Europeans essentially invalidated any claims to the land through the inhabitants who predated the arrival of Europeans. See Johnson v. McIntosh, 21 U.S. 543 (1823). In England, the acquisition of “original” title usually dates to the Norman conquest in 1066, wiping out Anglo Saxon claims. [Cribbet & Johnson at 11]

“all bargaines or mortgages of land whatsoever shall be accounted of no value until they be recorded.” [Id.] Unlike Connecticut Yankees, the landed gentry of Virginia tended to favor large plantation-style landholdings kept within families. Virginians were particularly suspicious of concealed ownership, however, so their early law required public recording of real property interests when the grantee did not take possession of the property. [Id. 1364]

## 2. The Fifty-State Solution: Public Records Of Land Transactions.

By the time of the American Revolution, every English colony had adopted statutes requiring that parties to a land transaction, including conveyance of mortgages, must record their names and a description of the property in a public office designed for that purpose. At that time, just as now, buyers or mortgagees who failed to record their assignments risked losing the ability to enforce their contract as against a subsequent purchaser in good faith who paid value, *i.e.*, the “bona fide purchaser for value,” or “BFP.”<sup>2</sup> [Peterson 1364] The necessity and usefulness of these early title recording acts is attested to by their nearly universal and uninterrupted force in law. Currently, all fifty states and the District of Columbia have recording statutes similar to those to their colonial predecessors. [Id.]

Of course, title recording systems do more than facilitate individual transactions. Recording systems create an archive that protects communities from commercial chaos following disasters such as floods, earthquakes, fire, hurricanes, or financial panics. [Peterson

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<sup>2</sup> A major benefit to this system is to protect the interests of bona fide purchasers for value. As Cribbet & Johnson explain, recording adds nothing to the validity of a legal document except as that document affects the rights of BFPs. “Title will pass from the grantor to the grantee as soon as the deed is delivered. Recording the deed simply assures the grantee that the world has constructive notice of the conveyance thus cutting off the grantor’s power to defeat the former’s interest by a new conveyance to a b.f.p.” [Cribbet & Johnson at 309] Thus, while recording provides public notice of a likely or possible encumbrance on land, it does not give validity to a void deed or mortgage. The recording system places the instrument in a public file but does not indicate whether the conveyance was void for want of delivery, forgery, lack of capacity in the grantee, etc. [Id. 309]

1365] Public land title records created an infrastructure upon which private commerce could take place – a practical expression of the American commitment to the use of the rule of law in the preservation and orderly exchange of property rights. [Id.]

**C. An “Ideal” Property Title Assurance System And Costly Dead End: The Torrens Title Registration System In America.**

**1. The Perfect v. The Merely Very Good.**

Given that all fifty states use a similar land transaction recordation system, it is fairly easy to conclude that the current system must simply be the best system bar none:

In a complex society purchasers have no way of checking on the status of title unless they can rely on some official record which shows all of the transactions in regard to the land in question. In the United States the recording system has furnished the solutions to the purchaser’s dilemma by creating a permanent record which can be examined by anyone wishing to buy land or lend money to it as a security interest.

[Cribbet & Johnson at 306-07]

To be sure, the system of recording land transfers is a solution to a number of problems. But let us not fall into the trap of assuming that the system of government recordation of property transfers is – as Voltaire’s Candide might say it, “the best in the best of all possible worlds” – without knowing why.

As noted in the Summary of Argument above, the title recordation system, when considered in isolation is not ideal. In fact, it has significant flaws. But the point of this Brief is that that this system is transformed into a very good one by the combination of the best attributes of a government recording office – the provision of a low-cost, centralized compilation of key documents that are public record – with private enterprise’s ability to rapidly collect and process the data contained in the public records, thus allowing parties involved in a transaction to quickly

reach conclusions about quality of title and to privately insure titles against defects for a reasonable premium.

The “ideal” system is probably impossible or so expensive that no one, least of all the government, would pay for it. To understand why, it is helpful to understand a “more perfect” system that has been tried in this country but which has largely proved unworkable: the aforementioned Torrens title registration system.

## 2. Origin Of The Torrens Title Registration System.

The Torrens system has been touted as almost the ideal system of property title assurance, and it has been successful in other countries. But although Torrens has been tried in the United States, it has almost completely failed because of the enormous expense and the delays in assuring clear title.

The Torrens system dates from the late 1850s, when Sir Robert Richard Torrens, an Australian, invented and implemented a system of title registration in his country. [McCormack 72] Sir Robert based his system on the English method of registering ships. The practice was to assign each ship a page in a central registry on which the name and description of the ship appeared, along with the name of the owners and a statement of the liens and encumbrances against it. The owner received a duplicate of the page as a certificate of title and proof of ownership. [Id.] Upon sale of the ship, the instrument of transfer and the certificate were sent to the registry office and a new page was prepared to show the transfer of ownership. Sir Robert reasoned that a similar system could be used to register ownership of real estate and drafted legislation to accomplish that result. [Id.]

In 1857, the first Torrens legislation was enacted in South Australia. Enactment of similar legislation in other British territories soon followed. Torrens is a title registration

system, in contrast to the *title recording* system prevalent in the American states. Indeed, it is often said that the main difference between a recording system and a Torrens system is that under Torrens, the title itself is registered, while under recording the evidences of title are recorded. [McCormack 83] Once an initial registration becomes final, it has about the same effect as a final judgment in a quiet title action. Aside from the important exceptions of “off-certificate” risks and “overriding interests,” see Section C.4 below, the registration is binding against the whole world. [Id.]

Torrens is one of five general title registration systems used in the world and is the only type that has been tried in the United States. [McCormack 72] The first state to try it was Illinois. [Id.] The Torrens office in Cook County, Illinois, opened in 1899 and operated continuously operation until it was abolished by the state legislature in 1992. [Id. 73 n.39]

Within a few decades after Illinois adopted Torrens land title registration, nineteen other states adopted it. Since then, nine of those states have repealed Torrens land title registration or allowed it to lapse. [Id. 73] As of McCormack’s survey in 1992, the Torrens system was used to a substantial extent in only five states: Hawaii, Illinois, Massachusetts, Minnesota, and Ohio. [Id.] In Ohio, it is used in Hamilton County, with minimal registrations elsewhere. [McCormack 73] McCormack found that in no state or locality are a majority of parcels registered under Torrens, the highest incidence of use being probably in Hawaii, where nearly 45 percent of all parcels are registered. [Id.] The reasons the Torrens system failed to catch on in America are discussed in Sections C.4 and C.5.

### **3. How The Torrens Title Registration System Works.**

Under the Torrens system, original certificates of title are maintained by the administrator of the system, normally called the “registrar of titles.” The certificate names the owner,

describes the property and the estate owned, and contains a list of the liens or encumbrances on the property. [McCormack 80] Where these liens or encumbrances are created by registered instruments, the original or a copy of the instrument can be retrieved from the document vault or other storage facility for examination. Upon initial registration or a transfer of ownership, the transferee receives a duplicate certificate of title. [Id.]

The owner's duplicate normally *is not* kept up to date. Rather, subsequent claims, liens or other encumbrances are registered on the original. [McCormack 80-81] To register a transfer of ownership, the owner's duplicate, with the deed of conveyance, must be presented. [McCormack 80] When an interest is transferred, the former certificate showing the transferor as owner is canceled, and a new certificate is issued showing the transferee as the new owner. Active liens or encumbrances on the old certificate are carried forward to the new one. [Id.]

The "title assurance" or "title indemnity" fund is an important component of the Torrens system. [McCormack 81] In a title recording system, the recorder's acceptance of instruments – deeds, mortgages, releases, liens, etc. – for recording does not subject government to liability from an erroneous evaluation, in part because the recorder usually makes no evaluation or representation concerning the quality of recorded instruments. [McCormack 99] Under Torrens, however, registration results in a governmental affirmance of the quality of title. The purpose of a title assurance or indemnity fund is to compensate those who suffer losses because of errors made by the Torrens registration office and to pay those who wrongfully lose interests in real estate as a result. Participants in transactions usually pay for the fund. [Id. 81-82]

#### **4. Problems With The Torrens System And Government "Guarantees" Of Quality Of Title.**

The major problem with the Torrens system is complexity: Initial registration of title is difficult. As noted above, once an initial registration becomes final, it has about the same effect

as a final judgment in a quiet title action. [McCormack 83] Since initial registration usually involves a binding determination of the rights in the title being registered, possible claimants must be given constitutional due process – notice and the opportunity for a hearing on their claims. [Id.] This requires title searches and examinations and the possible expense of preparing and conducting hearings. [Id.]

Not surprisingly, another problem is the expense. Initial registration of a title is expensive and can be a disincentive to register. [McCormack 83-84] In addition to the contribution to the title assurance fund, the title must be examined to identify possible encumbrances or claimants, the property must be surveyed, court documents must be filed, notices must be published, and hearings may be held. [Id.] Attorneys and other experts may be required. Although advocates of title registration argue that cost of initial registration is justified societally by the allegedly lower title and transfer costs incurred by parties to subsequent transfers, this claim is disputable<sup>3</sup> and, moreover, the present owner must bear the costs of initial registration, while any savings will accrue to future transferees. [Id.]

Another problem is the existence of “off-certificate” interests, referenced above. As McCormack notes, the Torrens system appears initially to have an appealing simplicity compared with recording. Instead of having to examine the entire recorded legal history of a parcel, it appears that the title examiner simply has to examine the original certificate of title, which supposedly “conclusively establishes” the legal status of the parcel’s title, subject to some

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<sup>3</sup> There is no guarantee that subsequent registrants will not be subjected to high costs. In a Torrens system, instruments are examined each time they are presented for registration. If the examiner believes the instrument is irregular or defective in some respect, the examiner may refuse registration. To satisfy the registrar, another proceeding may be necessary. [McCormack 101] Examiners may also refuse to accept instruments that contain minor discrepancies in the description of the parties or the property, and to satisfy the registrar, an owner may have to resort to a court or administrative proceeding to correct the error. [Id.]

exceptions. [McCormack 89-90] These so-called “limited” exceptions are usually referred to as “off-certificate risks” or “overriding interests.” Unfortunately, these can be numerous, and they include, among others, “caveats,” or notices on certificates of possible claims or interests that are not technically registered; governmental interests, such as tax liens and pending eminent domain issues; private exceptions, such mechanics’ liens or judgment liens; and possessory interests, such as short-term leases or implied easements. [Id. 90-91] Generally, parties suffering losses from off-certificate risks are not entitled to indemnification from the Torrens assurance fund unless the registrar’s actions constituted misconduct. [Id. 90]

#### **5. Reasons The “Ideal” System Does Not Work Well.**

It is generally agreed that the high cost of initial registration was a primary reason Torrens registration never caught on in the United States. [McCormack 84] Opposition to the Torrens system came in large part from the very government agencies charged with administering the system. McCormack notes that because these agencies had a first-hand experience with the administrative difficulties and costs involved with Torrens, “it is not surprising that some of the most effective opposition to title registration came from local governments responsible for its implementation and not, contrary to conventional wisdom, from the title assurance industry.” [Id. 114]

The failure of Torrens in Cook County, Illinois, after nine decades of implementation, for example, is largely attributable to incompetent and unsatisfactory administration. [McCormack 114 & n.220] There were other problems as well. In California, confidence in the Torrens system was shaken in 1937 when the entire state assurance fund was wiped out by a single claim.

[McCormack 82-83] California ultimately abandoned the Torrens system in 1955 in large part to “grossly incompetent management.”<sup>4</sup> [McCormack n.220]

The chief distinction between the Torrens title registration system and the title recording system is the extent the government takes on the task of affirming the ownership interest and the legal effect of documents. [McCormack 121] Yet the attempt to make title registration a conclusive government statement of the condition of title is the very aspect of Torrens that caused it to fail in most U.S. jurisdictions where it was tried. [Id. 125]

## 6. How Does The Torrens System Rate?

Returning to the three fundamental principles listed above, how well does the Torrens system promote the objective of enabling real estate to move freely and easily in commerce?

- On the first principle, adequate security for land titles, the Torrens system does reasonably well – if done right. Once a property is registered, the record contains almost all facts relevant to title, ownership, and use, except for the “off-certificate” ones.
- Torrens fails on the second factor, speed. Initial registration takes too long, and subsequent registrations can bog down as well.
- Torrens also fails on the third factor, economy. The cost of initial registration is major hindrance, and not the only one.

Thus, the Torrens system is hardly the best of all possible worlds. While it does well on the all-important first factor of securing title, its showing on the other two factors have caused American jurisdictions to vote with their feet and sidestep Torrens. We next contrast Torrens with the prevalent American system of recording instruments affecting property title.

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<sup>4</sup> McCormack did not critique the workings of the Torrens registration system in Hamilton County, Ohio, and an examination of how the system has worked in Hamilton County is outside the scope of this Amicus Brief. The point here is that the Torrens system, while having many good points, has significant drawbacks that have prevented it from supplanting the recording systems that are in use in all fifty states.

**D. How Title Recording Systems Work.**

**1. Purpose Of Property Title Recording Systems.**

The American title recording system usually operates under state law at the county level of government. Under this system, documents that may affect title to real estate are presented to government offices for recordation. [McCormack 67] Recording generally perfects legal priority over conflicting interests, thereby protecting the holder of an instrument against the possible loss of ownership or priority.

The recording system was designed to protect a purchaser or a mortgagee of an interest in land. That individual has constructive knowledge of all that appears in the records, and he would be most foolish to invest his money without a careful check at the appropriate offices in the county courthouse.

[Cribbet & Johnson at 322]

Thus, anyone acquiring an interest in land -- be it the buyer, a mortgage lender, the grantee of an easement, the holder of a mechanic's lien or judgment lien, etc. -- would be foolish not to record that interest and, before investing, check to see who else has an interest. In the absence of such perfection of interests, title may be lost to a subsequent transferee who qualifies for the protection of the recording system, such as a BFP. [McCormack 67]

Recording is typically not a prerequisite to legal validity, as executed deeds and other instruments create interests in property even if not recorded. [Id.] And recording a void instrument does not normally make it effective, although recording may raise a presumption of validity. [Id.] Moreover, the acceptance of an instrument for recordation does not usually reflect a governmental judgment that the instrument is legally effective. [Id. at 67-68] Instead, the recorder's office functions as a repository of copies of instruments for parties wishing to evaluate

documents. In this respect, recording facilitates real estate transfers by giving prospective transferees information relevant to determining ownership. [Id. 68]

## **2. Conducting Searches Under Recording Systems Using The Grantor-Grantee Index.**

To use the example of a mortgage, to record a mortgage or an assignment of a mortgage, the mortgagee must generally deliver a copy of the document – often a copy executed in the presence of witnesses or a notary – to the recording office. The clerk time-stamps, indexes, and files the document. [Peterson 1365] Generally, recording systems use either a grantor-grantee index or, less commonly, tract indexes, to locate recorded documents. A grantor index alphabetically lists the name of every grantor who has recorded a document within a given time frame, and the grantee index lists the name of every grantee who has recorded a document within the same time frame. [Id.] The indexes and the underlying recorded documents are public records – just as documents concerning registration are public records in a Torrens systems.

Instruments in a grantor-grantee index are listed alphabetically according to the grantors' and grantees' surnames or an entity's name. The grantee index is used to reach back into time to establish the chain of owners. [McCormack 68] The grantor index is used to find adverse recorded conveyances made by or through each owner during the time that the owner was the apparent, actual, or record owner of the subject property. [Id.]

The grantor-grantee index is relatively easy and inexpensive for government to administer but difficult to use. [McCormack 68] Locating all relevant recorded documents by means of the grantor-grantee index is sometimes impossible without consulting additional sources, such as probate court records and tax records. [Id.; Cribbet & Johnson at 322-23] Searching a title can be physically cumbersome and time-consuming because a great number of index books may have to be consulted over and over again. [McCormack 68 n.22] In addition,

where a past transfer of title does not appear in the grantee index, the title searcher may have to make a guess as to how ownership may have passed to an owner and then try to confirm that by reaching further back in time to find additional transactions that might have been recorded. [Id.]

Thus, to continue the example of a mortgage, when a mortgage lender – which, like a buyer, is a “purchaser” under property law – contemplates offering a loan secured by the land, it can use these indexes to verify that the debtor actually owns clear title to the land in question. [Peterson 1365] Like a buyer of any other interest in the land, the lender wants to know whether the prospective borrower has already sold the land or granted a mortgage to someone else. [Id.] Historically, the lender begins this search by looking for the borrower’s name in the grantee index in reverse chronological order. The lender searches under the borrower’s name until it finds a record showing the name of the individual or business that sold or gave the property to the borrower. This process is repeated for the borrower’s grantor, and in turn the grantor’s grantor, creating a chain of title all the way back to the “root of title.” [Id.] Next, the lender searches the grantor index in chronological order for each past owner to discover whether the land has been sold or mortgaged to anyone not yet discovered. [Peterson 1365-66] The lender will be looking for a release showing that any mortgages granted by the present owner or any past owner to another lender have been satisfied. After a thorough search, the recording system can reassure prospective purchasers of the safety of their investment. [Peterson 1365]

### **3. Tract Indexes: More Useful But Less Common.**

Tract indexes, referenced above, are easier to use but more difficult and expensive to maintain. [McCormack 68] Tract indexes organize instruments according to each parcel of property. Instruments affecting a parcel are indexed on a page or set of pages for that parcel. Once the proper portion of the index has been located, searching title is relatively simple. [Id. 69]

For this type of index to work, recording office employees must be able to identify the proper parcel of the index in which to reference instruments, usually from the legal descriptions appearing on each instrument. This process is time-consuming, costs more, and requires a higher level of expertise than is the case with a grantor-grantee index – so perhaps it is no surprise that tract indexes are found in relatively few states. [Id. n.23]

#### 4. **Comparison Between Title Recording Systems And The Torrens Title Registration System.**

Three major differences between title recording systems and the Torrens title registration system stand out. *First*, in the recording system, government does not make evaluations of the quality of title. The recorder's acceptance of instruments for recording therefore does not subject government to liability from an erroneous evaluation or give anyone any assurance about the legal validity of an instrument simply because it was recorded. [McCormack 99] Under a recording system, users make their own evaluations of title instruments as they deem necessary, and these evaluations do not control whether additional information is added to the record. [Id.] In contrast, Torrens title registration, once initial registration is completed, "operates as a piecemeal, continuing, quiet title action, albeit without all of the due process requirements applicable to initial registration." [McCormack 99] The registrar makes the evaluations one at a time, and they usually are conclusive. The acceptance of registration includes a governmental judgment that the instrument was effective to create, transfer, modify, or cancel the interest referred to in the instrument. [Id.] Consequently, the government may be liable for erroneous or wrongful evaluations, and there is an insurance fund paid for by parties to the transactions. [Id.]

*Second*, there is a vast difference in the government's cost. It is clear from experience that Torrens or any other true title registration system is more costly and difficult for government to administer than a recording system is. [McCormack 113] This higher cost is inherent,

because much of the data consolidation, evaluation, and management done by private parties under recording is done by government employees or their agents under registration. In a recording system, by contrast, few public resources are expended to close transactions because government does not substantively review the documents before recording them. [Id.]

*Third*, the recording system is much speedier. In jurisdictions using the recording system, no time is wasted because of delayed closings due to governmental objections, which can and do occur under the Torrens system. [McCormack 123] This does not mean that title searches themselves are speedy, but as explained in Section E below, private companies, including the Relators, provide a service that significantly reduces the time a search takes.

#### 5. **Disadvantages Of The Title Recording System.**

To summarize, the advantages of title recording systems over title registration systems are that (1) government faces less risk because it does not guarantee title, (2) government saves money, and (3) the recording process does not delay transactions. That said, there are disadvantages, in addition to the cumbersome grantor-grantee search process.

Most of the *disadvantages* and risks created by the recording system are borne by private parties, not the government. A key disadvantage is that recording systems do not ensure that the actual state of ownership and the record of ownership are the same or even similar. [McCormack 69] To give just a few examples, a recorded transaction may appear valid but actually be void or defective. For example, unrecorded interests that are discoverable by physical inspections or inquiries may be valid under the doctrines of constructive notice from possession and inquiry notice. [Id.] Furthermore, some unrecorded interests may be valid even if they are not discoverable by such inspections or inquiries. [Id.] The recording system also

does not protect a transferee who fails to receive an interest because it is based on a previously recorded but void or defective instrument or transaction. [McCormack 69 n. 26]

## 6. How Does The Recording System Rate?

Returning to the three principles, how well do recording systems promote the objective of enabling interests in real estate to move freely and easily in commerce?

- On the first principle, adequate security for land titles, recording systems provide a central location for title documents, which serves a vital notice function, protecting BFPs. But recording systems, standing alone, do not provide security of title. Parties are on their own when it comes to finding defects in the chain of title and verifying the validity of instruments.
- Recording systems can promote the second factor, speed, in that government accepts the documents and records them without examination. As noted, however, the cumbersome grantor-grantee indexes can make title searches slow.
- The system of recording documents and compiling a grantor-grantee index is relatively economical from the government's perspective. Of course, the real costs are paid by private parties.

Thus, it appears title recording does not do a complete job under any of the three key principles. But what makes it a very good system – perhaps even the best possible system from a practical standpoint – is the combination of the public recording system with services provided by companies such as the Relators, Data Trace and Property Insight.

### **E. Combining The Best Of Both Worlds – Government Title Recording With Private Data Services And Title Insurance.**

Combining the recording system with the services provided by Data Trace, Property Insight, and similar companies may be the closest we can get to the best of all possible worlds. It is analogous to privatizing many of the best aspects of the Torrens system but taking advantage of the speed and economy of the recording system as enhanced by the data-management capabilities of these companies. Computerization of title records began in Cuyahoga County in 1999, according to Relator Michael Stutzman, manager of Data Trace's Cleveland office. [See

Stutzman aff'd, Relators' evidence at Vol. 3, tab 14] Under that process, the county records deeds and other instruments by scanning the originals to create digital images that the county stores in its computer system. [Stutzman aff'd ¶ 11]

Writing in 1992, seven years before Cuyahoga County made the switch, McCormack predicted that computerization of title records would fundamentally change the debate between the Torrens and recording systems. [McCormack 121] Computerization of recording, he wrote, “can eliminate redundancies and eliminate many other deficiencies of the recording system by providing rapid access to relevant data ... .” [Id.] McCormack noted that computerization of title recording offices helps provide some of the advantages of Torrens-style title registration. Torrens is clearly superior to recording from the title examiner’s perspective in its consolidation of most relevant information in a certificate or title register. [McCormack 66] Thus, computerizing recording systems can do much to improve their data-management capability by replacing slow and cumbersome manual methods of assembling relevant title data with rapid electronic means. [Id.] Given that the best system would provide great security of title with low governmental and user costs, McCormack opined that, “[f]or most of the United States, the appropriate choice would be a computerized recording system, with privately or publicly supplied title insurance,” thus incorporating the advantages of a title registration system with those of a recording system.

McCormack did not quite foresee that the electronic organization and search capabilities – the essential labor-saving tools – would be perfected by private enterprise, as opposed to government recording offices. Otherwise, this prediction of what computerization would accomplish has proven accurate and is almost exactly what companies such as Data Trace do when they combine their services with those of a title insurer. Data Trace, for example, stores

and organizes information obtained from deeds, mortgages, leases, liens, and other instruments that county recorders' offices record, and it stores and organizes digital images of those same recorded instruments. [Stutzman aff'd ¶¶ 6,7] Data Trace does not evaluate the quality of title to land; rather, it provides access to its database and searching capabilities.<sup>5</sup> [Id. ¶ 62]

Its clients are companies that evaluate and insure the quality of title to land regardless of whether the land has been used for residential, commercial, or governmental purposes. [Id. ¶ 9] To evaluate a seller's title, the title company would place an order with Data Trace to gain access to Data Trace's data, indexing, and search capability. [Id. ¶ 65] The title company would perform the searches of Data Trace's information to evaluate the quality of title and pay a fee to Data Trace for access to the database and its search tools. [Id. ¶ 66-67]

Thus, while computerization of the recorder's office was a first step, transforming the documents on record from paper to electronic form, that alone did not much change the title search process. What ended the cumbersome process of consulting and re-consulting multiple grantor-grantee indexes was the type of computer programs that Data Trace and other companies have developed. Data Trace's computer system is so fast and its search so comprehensive, for example, that a party can have a tract of land and the grantor-grantee names checked an hour before closing just to make sure no one has recorded some eleventh-hour liens or deeded away an interest in the property to someone else. [Stutzman aff'd ¶ 60]

Thus, private enterprise has stepped in to bridge a gap so that government title recordation systems can be used to accomplish the first of the three essential goals, securing quality of title, while enhancing the two other goals of speed and economy. In short, the Relators

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<sup>5</sup> In this respect, companies such as Data Trace duplicate the advantages of tract indexes, referenced in Section D.3 above, which most counties do not have the resources or expertise to maintain. McCormack noted that because tract indexes are easier to use, in states without official tract indexes, private companies will maintain unofficial indexes. [McCormack 68-69]

and similar companies serve the public interest and provide a vital service that the community would not have with county recording offices alone.

**F. Why Mandamus Relief Is Necessary.**

That brings us to the reason we submit this Brief. For the first eleven years after the Cuyahoga County Recorder's Office went electronic, it has been charging \$50 each day to provide a compact disk containing digital images of all the deeds, liens, mortgages, and other instruments that the county recorded on that day. [Stutzman aff'd ¶ 13] While that is likely still well above the office's actual cost, it works out to a fairly manageable fee of \$1,100 for an average month's data, given twenty-two business days per month.

Cuyahoga County is now demanding that Data Trace pay a fee of \$2 for each page (or electronic image of a page), or more than \$208,500 to obtain CD copies of just two months' worth of documents. [Id. ¶ 94] Aside from the fact that this violates the cost provisions of the Public Records Act, the harmful effect on commerce is simple to predict: Data Trace and similar companies would have to dramatically raise the fees that they charge to their clients for accessing and searching databases. [Id. ¶ 95] These astronomical costs would essentially constitute a tax on real estate transactions that likely would prevent valuable transactions from even taking place. Recorders' offices were created to facilitate commerce by providing access to documents so parties can check titles. By charging a price that will drive up the cost of transactions and drive businesses out of the market, the Cuyahoga County Recorder's Office would undermine the very reason for its existence.

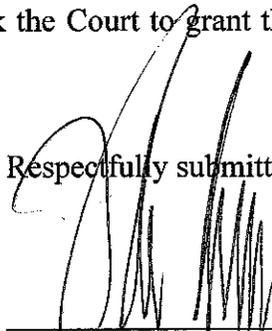
By awarding the mandamus relief sought in this action, the Court will not only appropriately enforce the Public Records Act, it will help preserve the public-private system of computer-enhanced property title assurance that advances the greater public good.

**IV.**

**CONCLUSION**

For all of these reasons, we respectfully ask the Court to grant the requested mandamus relief.

Respectfully submitted,



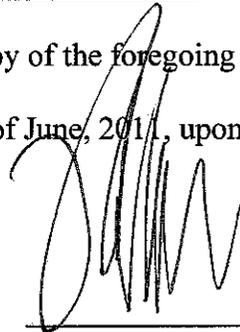
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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing has been served, via regular United States mail, postage prepaid, this 15<sup>th</sup> day of June, 2011, upon all counsel of record in this case.



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Marion H. Little, Jr. (0042679)