

ORIGINAL

In the  
Supreme Court of Ohio

STATE OF OHIO,	:	Case No. 2012-0216
	:	
Plaintiff-Appellee,	:	On Appeal from the
	:	Summit County
v.	:	Court of Appeals,
	:	Ninth Appellate District
DAVID WILLAN,	:	
	:	Court of Appeals Case
Defendants-Appellants.	:	No. CA-24894

**AMICUS CURIAE OHIO DEPARTMENT OF COMMERCE'S  
MEMORANDUM IN SUPPORT OF JURISDICTION  
IN SUPPORT OF CROSS-APPELLANT STATE OF OHIO**

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## INTRODUCTION

Because of the significant, albeit distinct, roles that securities dealers and small-loan lenders play in the economic lives of Ohio's citizens, the General Assembly requires the Ohio Department of Commerce to license these financial actors and criminalizes certain dealing and lending activities conducted without a license. In addition, Ohio's securities laws criminalize misrepresentations made in the registration and sale of securities.

These laws—contained in the Ohio Securities Act and the Ohio Small Loan Act—are critical tools for regulating securities sales and small-loan lending, and for deterring dishonesty in the marketplace. They should not be lightly cast aside. But that is what happened in this case.

Following investigations by the Division of Securities and Division of Financial Institutions, units within the Ohio Department of Commerce, a jury convicted David Willan for 70 counts of securities and lending violations and related offenses arising from his purchase, renovation, and sale of houses and his arrangement of untraditional financing for his customers. In a divided opinion, the Ninth District reversed the jury's verdicts on all but six counts.

For three reasons, that ruling presents issues meriting review.

*First*, the Ninth District's decision seriously weakens the licensing requirements in the Ohio Securities Act and the Ohio Small Loan Act. On the securities front, the Ninth District eliminated licensing requirements for commissions-based securities sales—a class of sales the General Assembly intended to subject to licensure and monitoring under the Ohio Securities Act. And as to small-loan lending, the majority below imposed a higher burden for proving licensing violations than the Ohio Small Loan Act requires. “In addition to the elements explicitly set forth in the statute,” the Ninth District said, violations of the small-loan license requirements under R.C. 1321.02 “require[] proof that the offender acted recklessly with regard to whether he needed a small loan license.” *State v. Willan* (9th Dist.), \_\_ Ohio App. 3d \_\_, 2011-Ohio-6603,

¶ 55 (“App. Op.”). These two holdings undermine the public protections afforded by the General Assembly.

*Second*, the decision below brushes off false statements in securities registration and offering materials, thereby endangering the public and decriminalizing certain wrongdoing—acts of securities-registration fraud and securities sales-fraud—that the General Assembly sought to punish and deter.

*Third*, the Ninth District’s decision threatens the stability of Ohio’s economic marketplace and public confidence in investment and loan opportunities. The willingness of Ohio’s citizens to own business enterprises—that is, to buy securities—is inextricably tied to the credibility of the securities market, including the effectiveness of securities regulation. By obstructing Department of Commerce oversight of securities sales, the decision below corrodes the credibility of the securities arena. And by creating a heightened mental-state requirement—recklessness—for proving licensing violations under the Small Loan Act, the decision similarly compromises regulation of the small-loan market—a market that especially affects struggling (and often vulnerable) consumers.

For these reasons, the Court should accept review and reverse. And even if the Court declines to review the full slate of issues presented in the State of Ohio’s cross-appeal, at a minimum the Court should accept jurisdiction over the two propositions of law presented here, which address the most serious of the Ninth District’s errors and present only legal questions for which the underlying facts are undisputed.

#### **STATEMENT OF AMICUS INTEREST**

At stake in this case are critical statutes concerning securities sales and small-loan lending. The Ohio Department of Commerce, as the chief regulator in these arenas, has a compelling interest in protecting these statutes against erosion and misinterpretation. Because the Ninth

District's decision undermines vital licensing requirements and anti-fraud provisions, the Department of Commerce supports the prosecutor's cross-appeal and asks the Court to reverse the judgment below.

### **STATEMENT OF THE CASE AND FACTS**

As the Ninth District repeatedly observed, the relevant facts here are undisputed. App. Op. at ¶¶ 17, 21, 30, 37-38, 46, 57, 61. Between 2002 and 2007, David Willan ran a business called Evergreen Homes, LLC, buying, renovating, and reselling houses. Because many potential buyers were unable to secure traditional financing, Willan and his company helped them secure a first mortgage for 80% of the purchase price. The company then secured its entitlement to the 20% balance by retaining a second mortgage on each of the properties.

To raise capital for purchasing and renovating more homes, Willan formed a separate company, Evergreen Investment Corporation, to buy and hold the second mortgages through the sale of debt securities. Evergreen Investment registered each securities offering with the Division of Securities of the Ohio Department of Commerce, and although Willan told the Division that no commissions would be paid on the securities sales, commissions were paid. Willan hired Daniel Mohler to manage the securities sales and each sale yielded a commission. Neither Willan nor Mohler were ever licensed to sell securities.

When the Division of Securities investigated Willan's companies in 2006, it learned that the securities were being sold for commissions. The Division then admonished Willan that such commission-based securities could only be sold with a license.

Around the same time, the Summit County sheriff's department learned that many of the homes sold by Willan were in foreclosure, and that Willan had withdrawn large sums from his companies. The Summit County prosecutor eventually charged Willan and others with various

securities, lending, and related violations. The case was bifurcated into two trials and a jury convicted Willan of 68 counts in the first trial, and two counts in the second trial.

Among these convictions, the jury found Willan guilty of violating the Ohio Securities Act: (1) by making commission-based sales without a securities license, in violation of R.C. 1707.44(A)(1); (2) by making false statements (concerning the payment of commissions) for the purpose of registering securities, in violation of R.C. 1707.44(B)(1); and (3) by making false statements (concerning the payment of commissions) for the purpose of selling securities, in violation of R.C. 1707.44(G). Additionally, Willan was convicted of violating the Ohio Small Loan Act, R.C. 1321.02, for making usurious small loans without a proper license.

Willan appealed, and in a 2-1 decision, the Ninth District reversed all but six of the 70 counts of conviction. Willan has now appealed to this Court, and the State has cross-appealed.

### **THIS CASE IS OF PUBLIC AND GREAT GENERAL INTEREST**

#### **A. The Ninth District's decision undermines important state licensing requirements.**

The decision below deals heavy blows to the licensing requirements in the Ohio Securities Act and the Ohio Small Loan Act. Licensing is not a bureaucratic technicality. Securities brokers and small-loan lenders play a financially-sensitive role in the lives of Ohio's citizens. Accordingly, the General Assembly imposed licensing requirements on these individuals to subject them to professional standards, regulatory oversight, and discipline. The Ninth District's decision acutely weakens these protections in two key ways.

First, the decision below abolishes licensing requirements for an entire class of securities sales—commission-based sales—that the General Assembly intended to regulate. The Ohio Securities Act prohibits a “dealer” from selling securities without a license or an exemption from licensure. R.C. 1707.14, 1707.44(A)(1). A “dealer” is defined in the Act, along with certain exceptions. R.C. 1707.01(E)(1). In freeing Willan from the dealer licensing requirements, the

majority below invoked the “issuer” exception in R.C. 1707.01(E)(1)(a), which provides that certain “issuers” are not “dealers,” and therefore not subject to licensure. App. Op. ¶¶ 18-36. By its own terms, however, this exception applies only when no commissions have been paid for the securities sales. R.C. 1707.01(E)(1)(a).

Here, it is undisputed that Willan engaged in commission-based securities sales. And contrary to the Ninth District’s reasoning, it is irrelevant that the commissions went to Willan’s employee, Mohler, rather than to Willan directly, as the definition of dealer covers both “direct and indirect[]” securities sales. R.C. 1707.01(E)(1).

Under the Ninth District’s approach, then, unscrupulous dealers now have a roadmap for the unregulated sale of securities. Commission-based sales—which, owing to the incentive for commissions, are most prone to unscrupulous sales tactics—are no longer subject to securities licensing requirements. Such a departure from the General Assembly’s intent—and such a gaping loophole in this regulatory field—deserves this Court’s attention.

Second, review is needed to resolve the standard for proving violations of the licensing requirements for small-loan lenders under the Ohio Small Loan Act. The Ninth District created a heightened mental-state requirement for violations of R.C. 1321.02: “[I]n addition to the elements explicitly set forth in the statute,” the Ninth District said, “R.C. 1321.02 requires proof that the offender acted recklessly with regard to whether he needed a small loan license.” App. Op. ¶ 55. Like nearly all professional-licensing violations, however, small-loan licensing violations are strict liability offenses. Willan even conceded this at trial and on appeal. App. Op. ¶ 126 (Carr, J., dissenting). The Ninth District had no basis for judicially creating a recklessness requirement where the text of the small-loan licensing statute says nothing of the sort.

By exempting an entire category of sales from the Ohio Security Act's licensing requirements, and by exculpating most small-loan licensing violations under the Small Loan Act the Ninth District's decision undercuts public protections afforded by the General Assembly, removes vital oversight by the Department of Commerce, creates an unregulated sanctuary for the unscrupulous, and deals them a competitive advantage over those who abide by the licensing laws. Because these results defeat the purposes of these important licensing schemes, the Court should grant review.

**B. The Ninth District's decision upsets settled standards for securities fraud.**

The decision below also rewrites the standards for securities-registration fraud and securities-sales fraud, and in ways that thwart the protective goals of these criminal provisions. Here too, there are no factual disputes, only issues of law. Willan concedes that he falsified information in his offering circulars, falsely stating that no commissions would be paid for the securities sales. He then submitted the circulars to the Division of Securities along with his securities-registration application, and he also used the circulars to promote the sale of these securities to investors.

For both categories of fraud claims—securities-registration fraud under R.C. 1707.44(B)(1), and securities-sales fraud under R.C. 1707.44(G)—the Ninth District held that the State must prove reliance, and specific intent for securities-sales fraud. According to the appeals court, the State had to prove that the Division of Securities relied on these misrepresentations in registering the securities, that investors relied on the false statements in buying them, and that Willan specifically intended for the misstatements to induce sales. App. Op. ¶¶ 57-71 (discussing registration fraud), ¶¶ 72-81 (discussing sales fraud).

Those rulings are wrong. Nothing in these fraud statutes requires reliance or specific intent. That misreading alone warrants review. But additionally, the decision below blurs the

distinction between civil common-law fraud and criminal fraud, thereby diminishing the distinct and vital protections afforded by these criminal statutes.

To be sure, reliance often is an element of common-law fraud claims. And that makes sense. In civil fraud cases, a plaintiff seeks compensation for damages incurred *in reliance* on fraudulent acts. But the criminal securities-fraud laws serve a different function—to deter dishonest behavior and to protect the public more broadly. The point of criminal liability is not that a specific victim was duped by deceptive securities information, but that the public be protected against such efforts to deceive. These laws reflect the General Assembly’s judgment that those who falsify information in registering or selling securities deserve punishment, even if their deceptions manage not to visit harm on the intended audience. The Ninth District’s decision therefore decriminalizes certain wrongdoing that the General Assembly sought to deter and punish through criminal sanctions.

In short, the securities-fraud statutes are written broadly to protect the public and this Court should grant review to ensure that they are enforced according to their terms.

**C. The decision below threatens the stability of Ohio’s economic marketplace and significantly complicates State oversight of securities sales and small-loan lending.**

By eroding the State’s regulation of securities sales and small-loan lending, the Ninth District’s decision also threatens the stability of Ohio’s economic marketplace and public confidence in investment and loan opportunities.

Participation by Ohio citizens in the ownership of business enterprises—or more simply, the buying of securities—is a centerpiece of economic life. But the willingness of people to purchase securities is inextricably tied to their perception of the securities market, including the effectiveness of securities regulation. By abolishing licensing requirements for commission-based sales, and by brushing off false statements in securities registration and offering materials,

the decision below corrodes the credibility of the securities system. It also undercuts the Division of Securities' ability to ensure the basic competence of securities-market participants, verify the solvency of those participants, and monitor compliance with securities regulations, especially anti-fraud measures.

The decision similarly destabilizes regulation of the small-loan market—a market that especially affects struggling (and often vulnerable) consumers. By creating a heightened mental-state requirement—recklessness—to prove a licensing violation under R.C. 1321.02, it will be harder for the Division of Financial Institutions to stop unlicensed small-loan lending. And consumers will be harmed while the Division is forced to gather the evidence needed to prove that an unlicensed lender is “reckless” about its licensing duties—a profoundly pointless delay given that the law strictly forbids such unlicensed lending. Not only that, but if the unlicensed lender disclaims any “reckless” intent, the lender will be able to collect and retain the money contracted for in its loan agreements, even if the interest rate exceeds both the 8% statutory usury cap and the 28% statutory interest-rate cap. Those outcomes undercut the Division's enforcement authority, negate the consumer protections in the Small Loan Act, and allow unlicensed lenders to rake in—and keep—huge profits at the expense of borrowers and at the expense of licensees who do play by the rules.

Neither the securities marketplace in Ohio nor the lending arena should be transformed in such consequential ways without this Court's review.

## ARGUMENT

### **Proposition of Law No. 1:**

*The Ohio Securities Act prohibits commission-based sales without a license, and imposes criminal fraud liability on anyone who makes false statements for purposes of registering or selling securities.*

The Ninth District misread the Ohio Securities Act in two key ways—first, with respect to securities licensing, and second, with respect to criminal securities fraud.

*Licensing:* The court reversed 20 of Willan's securities convictions under R.C. 1707.44(A)(1), based on the conclusion that commission-earning issuers may sell securities in Ohio without a license. App. Op. at ¶¶ 18-36. That is wrong. The plain language of the Ohio Securities Act prohibits commission-based sales without a license. Section 1707.44(A)(1) states that "[n]o person shall engage in any act or practice that violates division (A), (B), or (C) of Section 1707.14 of the Revised Code," which in turn requires a securities "dealer" to be licensed. The Act defines "dealer" in relevant part as any person who engages "directly or indirectly, either in the business of the sale of securities for the person's own account, or in the business of the purchase or sale of securities for the account of others." R.C. 1707.01(E)(1).

That provision's application to this case is straightforward, as the relevant facts are undisputed: Willan sold debt securities to the public for his own account and for Evergreen Investment Corporation, in order to raise capital for Evergreen Homes. It is true that Willan sold these securities indirectly, through Mohler, his employee at Evergreen homes and duly-appointed agent for the Evergreen Investment Corporation. But contrary to the Ninth District's reasoning, the definition of "dealer" fits Willan all the same, as it expressly covers sales made "*directly or indirectly.*" R.C. 1707.01(E)(1) (emphasis added). In short, the plain language of the Ohio Securities Act confirms that commission-based securities sales require a license.

*Securities fraud:* The Ninth District also mangled the Act's registration-fraud and sales-fraud provisions, holding that the State needed to prove various common-law elements of fraud in order to sustain these violations under R.C. 1707.44(B)(1) (securities-registration fraud) and R.C. 1707.44(G) (securities-sales fraud). App. Op. ¶¶ 62-63, 76-77. That too was wrong.

Here again, the underlying facts are undisputed. Willan concedes that he falsified information in his offering circulars, falsely stating that no commissions would be paid in connection with the securities sales. App. Op. at ¶¶ 57, 61. He then submitted the circulars to the Division of Securities with his securities-registration application, and he also used the circulars to promote the sale of these securities to investors. App. Op. ¶¶ 7, 9, 57-61, 76, 81.

As to the registration-fraud counts, R.C. 1707.44(B)(1) prohibits "any false statement concerning a material and relevant fact, in any . . . circular" for purposes of registering any securities or securities transactions. In overturning the two convictions under this statute, the Ninth District ruled that Willan's false statements were not made "for the purpose of registering the securities" and that the statements did not "ha[ve] any bearing on the Division's decision to approve or process the registration." App. Op. ¶ 63.

But the appeals court ignored critical aspects of Ohio securities law. First, there is no requirement that the Division rely on an issuer's false statements. A violation occurs whenever "material and relevant" false statements are made in connection with the registration of securities. R.C. 1707.44(B)(1). Second, the circulars unquestionably were submitted "for the purpose of registering the securities" and the false statements in it were material and relevant. Ohio securities regulations require issuers to submit their offering circulars with the Division of Securities *as part of the registration process*. See O.A.C. 1301:6-3-06(A)(2) and (A)(4) (directing that "[t]he registration by description shall be accompanied by . . . the following

exhibits,” including the offering circulars). Registrants must also disclose commissions in the offering circulars. *See* O.A.C. 1301:6-3-06(D)(2) and (D)(3). The Division of Securities then reviews these materials to verify the issuer’s eligibility for registration-by-description. And one of the requirements for this type of registration is that the issuer does not pay commissions to unlicensed dealers. *See* R.C. 1707.06(B). If commissions are to be paid, the issuer must disclose the identity of licensed dealers on the verified registration form. *See* R.C. 1707.08(B); O.A.C. 1301:6-3-06(A).<sup>1</sup> These false statements were therefore material: Had Willan not fraudulently concealed the payment of commissions, his registration would have been barred as ineligible for registration by description.

Likewise, the court below erred as to the securities-sales fraud count under R.C. 1707.44(G). The majority overturned that conviction on grounds that the State needed to prove that investors relied on the false statements about commissions in buying the securities, and that Willan made the false statements with specific intent to “depriv[e] investors of their money.” App. Op. ¶ 77.

But the text of R.C. 1707.44(G) states no reliance requirement. The statute says simply that “[n]o person in purchasing or selling securities shall knowingly engage in any act or practice that is, in this chapter, declared illegal, defined as fraudulent, or prohibited.” R.C. 1707.44(G). Long ago, the General Assembly abrogated all common law crimes and recognized that the definition of a criminal offense is entrusted to the statute. *See State v. Chappell*, 127 Ohio St.3d 376, 382 (2010). Nowhere does R.C. 1707.44(G) say that false statements are actionable only if relied on by investors. Accordingly, there is no reliance requirement.

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<sup>1</sup> The registration-by-description form is found at <http://com.ohio.gov/secu/docs/6a1.pdf>. Question 7, on the first page, requires the issuer to disclose the identity of licensed dealers if commissions are to be paid.

Nor does R.C. 1707.44(G) require specific intent to deprive investors of their money. Indeed, the absence of a specific intent requirement in R.C. 1707.44(G) is particularly telling because the General Assembly has enacted other securities fraud statutes that do contain a specific-intent-to-deceive requirement. *See, e.g.*, R.C. 1707.44(J) (issuing, “with purpose to deceive,” false statements or advertisements as to the value of securities); and R.C. 1707.44(K) (making “with purpose to deceive” any false report of any securities transaction). Because the legislature expressly included specific intent requirements in other securities-fraud statutes, the absence of such a term from the disputed provision here “speaks volumes.” *United States v. Shabani*, 513 U.S. 10, 14 (1994).

The majority’s only conceivable rationale for reading a specific-intent requirement into R.C. 1707.44(G) is the presence of the term “knowingly.” App. Op. ¶¶ 63. But this Court foreclosed that interpretation more than 20 years ago, holding that “knowingly” connotes only that the person stated facts “different than he should have known them to be if he had exercised reasonable diligence.” *State v. Warner*, 55 Ohio St.3d 31, at syl. ¶ 4 (1990). In other words, “knowingly” connotes only a “negligence” standard in the securities context, not an express intent to deceive. *Id.* at 56-57. That was the General Assembly’s express meaning. *See* R.C. 1707.29 (“presumption of knowledge” governs securities prosecutions; “the accused shall be deemed to have had knowledge of any matter of fact, where in the exercise of reasonable diligence, he should, prior to the alleged commission of the offense in question, have secured such knowledge.”).

In short, the Ohio Securities Act imposes criminal fraud liability on anyone who makes false statements for purposes of registering or selling securities, regardless of reliance or specific intent.

**Proposition of Law No. 2:**

*A person who makes usurious small loans without a license is strictly liable for violating the licensing requirement of the Small Loan Act in R.C. 1321.02.*

The Ohio Small Loan Act is an exception to the 8% usury rate cap in R.C. 1343.01(A), but only if the lender first obtains a license from the Division of Financial Institutions. See R.C. 1321.02 (“No person shall engage in the business of lending money, credit, or choses in action in amounts of five thousand dollars or less...without first having obtained a license from the division of financial institutions under sections 1321.01 to 1321.19 of the Revised Code.”).

The Ninth District created a heightened mental-state requirement of recklessness for violations of the licensing mandate in R.C. 1321.02. “In addition to the elements explicitly set forth in the statute,” the majority said, “R.C. 1321.02 requires proof that the offender acted recklessly with regard to whether he needed a small loan license.” App. Op. at ¶ 55. Like nearly all professional licensing violations, however, small-loan licensing violations are strict liability offenses. Indeed, as the dissent below pointed out, even “Willan conceded at trial and on appeal” that the Small Loan Act’s licensing requirement “is a strict liability offense.” App. Op. at ¶ 126.

The absence of a mens rea requirement for criminal violations of R.C. 1321.02 is especially notable because the General Assembly did specify mens rea elements for other criminal violations under Chapter 1321. Compare R.C. 1321.99(A) (“Whoever violates section 1321.02 of the Revised Code is guilty of a felony of the fifth degree”) with R.C. 1321.99(D) (“Whoever willfully violates section 1321.57, 1321.58, division (A), (B), (C), or (D) of section 1321.59, 1321.591, or 1321.60 of the Revised Code is guilty of a minor misdemeanor and shall be fined not less than one nor more than five hundred dollars.”) (emphasis added).

Because the General Assembly included a mens rea element of “willfully” in R.C. 1321.99(D), the exclusion of a mens rea element in R.C. 1321.99(A) (governing the licensing requirements in 1321.02) “plainly indicates a purpose to impose strict criminal liability” for unlicensed small-loan lending. *State v. Wac*, 68 Ohio St.2d 84, 87 (1981).

In sum, if the General Assembly wants to take the dramatic step of immunizing all small-loan lenders from licensing violations—except those who have “recklessly” operated without a license—that carve-out should come from clear language, not a judicial innovation that finds no support in the statutory text.

### CONCLUSION

The Court should grant review and reverse the Ninth District’s decision with respect to the securities and small-loan lending counts discussed above.

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## CERTIFICATE OF SERVICE

I certify that a copy of the foregoing *Amicus Curiae* Ohio Department of Commerce's Memorandum in Support of Jurisdiction in Support of Cross-Appellant State of Ohio was served by U.S. mail this 7th day of March, 2012, upon the following counsel:

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