ORIGINAL

IN THE SUPREME COURT OF OHIO

OHIO NEIGHBORHOOD FINANCE, INC. D/B/A CASHLAND, Appellant, vs. RODNEY SCOTT, Appellee.	CASE NO. 2013-0103 On Appeal from the Ninth Judicial District Court of Appeals, Case No. 11CA010030

MERIT BRIEF OF AMICI CURIAE THE LEGAL AID SOCIETY OF CLEVELAND, THE LEGAL AID SOCIETY OF COLUMBUS, COMMUNITY LEGAL AID SERVICES, INC., SOUTHEASTERN OHIO LEGAL SERVICES, THE LEGAL AID SOCIETY OF SOUTHWEST OHIO, LLC, ADVOCATES FOR BASIC LEGAL EQUALITY, INC., LEGAL AID OF WESTERN OHIO, INC., THE OHIO POVERTY LAW CENTER, PRO SENIORS, INC., THE COALITION ON HOMELESSNESS AND HOUSING IN OHIO, AND THE CATHOLIC CONFERENCE OF OHIO IN SUPPORT OF APPELLEE RODNEY SCOTT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES vi

STATEMENT OF INTEREST OF AMICI CURIAE 1

INTRODUCTION 2

STATEMENT OF FACTS 5

I. STATEMENT OF THE CASE 5

II. RELEVANT HISTORY OF PAYDAY LOANS IN OHIO, THE SHORT-TERM LOAN ACT, AND THE LOAN CASHLAND MADE TO RODNEY SCOTT 6

A. Prior to the Short-Term Loan Act 6

B. Enactment of the Short-Term Loan Act 8

C. Payday Loan Industry Response to the STLA and the 2008 Referendum 10

D. Cashland's Loan to Rodney Scott 14

ARGUMENT 15

I. PAYDAY LOANS MUST BE ISSUED PURSUANT TO THE SHORT-TERM LOAN ACT—NOT THE OHIO MORTGAGE LOAN ACT 15

A. The Elyria Municipal Court and Ninth District Court of Appeals Decided this Case Correctly, and the Court Should Affirm Those Decisions 15

B. Applying the Codified Principles of Statutory Construction Results in the Conclusion that the STLA Governs Payday Loans 17

1) Ohio Revised Code section 1.47 dictates that the STLA should govern payday loans 17

2) Analysis of the Short-Term Loan Act under Revised Code section 1.49 compels the conclusion that all payday lending in Ohio must comply with the STLA 18

TABLE OF CONTENTS (Cont'd.)

Page

3) Utilizing the rules of statutory construction contained in Ohio Revised Code sections 1.51 and 1.52, the Court must conclude that the STLA applies to payday loans 20

C. To Find that the Short-Term Loan Act Governs Payday Loans is Consistent with Common Law Principles of Statutory Construction 21

1) The OMLA and the STLA can be read in conjunction to give proper force and effect to each act, without conflict 21

2) Even if the OMLA and the STLA are found to be in conflict, common law analysis of legislative intent results in the conclusion that the STLA governs payday loans 23

II. THIS COURT SHOULD REJECT CASHLAND'S PROPOSITIONS OF LAW.. 23

A. The General Assembly's Failure to Amend the OMLA Does Not Support Cashland's Argument That Ohio Provides Optional Licensing Alternatives for Payday Lenders 24

B. The Discounted Small Loan Act Licensing Fees Offered to Payday Lenders in 2008 Do Not Prove that the General Assembly Intended Compliance with the Short-Term Loan Act To Be Optional. 26

C. This Court Should Not Defer to the Position Improperly Attributed to the Ohio Department of Commerce 30

D. This Court Should Not Sanction the Apparent Under-Enforcement of the STLA 33

E. Attorney General Opinion No. 2008-036 Does Not State That Payday Loans Can Be Issued Pursuant to the OMLA 34

F. Ohio's Other Courts of Appeals Have Not Addressed the Issue of Making Payday Loans under the OMLA 36

G. The Word "Notwithstanding" in the OMLA Is Not Determinative Here 38

H. Cashland's Recitation of the Single-installment Loans Permitted by the Department of Commerce is Inapposite 40

I. This Court Need Not Decide Whether the Rule of the Last Antecedent Applies Here 41

TABLE OF CONTENTS (Cont'd.)

Page

J. The Use of "Principal Balance Outstanding From Time to Time" in Loans Not Made Pursuant to the OMLA is of No Consequence Here 42

K. This Court Should Not Be Expected to Save Cashland From Illegal Business Operations that Constituted Subterfuge to Evade the Short-Term Loan Act 44

CONCLUSIONS OF LAW 45

I. CONCLUSIONS REGARDING CASHLAND'S PROPOSITION OF LAW I..... 45

II. CONCLUSIONS REGARDING CASHLAND'S PROPOSITION OF LAW II.... 46

CERTIFICATE OF SERVICE 48

APPENDIX 49

Ohio Governor's Message, June 2, 2008 ....A-1

TABLE OF AUTHORITIES

Page(s)

Cases

Berry v. Branner, 245 Or. 307, 421 P.2d 996 (1966) 26

Brown v. Martinelli, 66 Ohio St.2d 45, 419 N.E.2d 1081 (1981) 23

Buckeye Boxes, Inc. v. Franklin Cty. Bd. of Revision, 78 Ohio App.3d 634, 605 N.E.2d 992 (10th Dist.1992)... 17

Chamberlain v. Reddy Ice Holdings, Inc., 757 F.Supp.2d 683 (E.D.Mich.2010)...... 11, 13

Chambers v. St. Mary's School, 82 Ohio St.3d 563, 697 N.E.2d 198 (1998) 31

Christensen v. Harris Cty., 529 U.S. 576, 120 S.Ct. 1655 (2000).................................. 30

Cisneros v. Alpine Ridge Group, 508 U.S. 10, 113 S.Ct. 1898 (1993)............................ 40

D.A.B.E., Inc. v. Toledo-Lucas Cty. Bd. of Health, 96 Ohio St.3d 250, 2002-Ohio-4172, 773 N.E.2d 536.. 31

Daiquiri Club, Inc. v. Peck, 159 Ohio St. 52, 110 N.E.2d 705 (1953)............................ 17

Dann v. Ohio Elections Comm., 164 Ohio Misc.2d 39, 2011-Ohio-3945, 952 N.E.2d 588 .... 32, 34

Elder v. Fischer, 129 Ohio App.3d 209, 717 N.E.2d 730 (1st Dist.1998) 34

Gary Comer, Inc. v. Wallace, N.D.Ill. No. 98 C 4554, 2001 WL 1173498 (Oct. 4, 2001) 43

Highlands Ind. Bank v. Pages-Morales, S.D.Fl. No. 2:11-cv-14157, 2012 WL 1802364 (May 16, 2012) 43

Hil-Roc Condo. Unit Owners Assoc., Inc. v. HWC Realty, Inc., 8th Dist. No. 87344, 2006-Ohio-4770.. 41

Humphrys v. Winous Co., 165 Ohio St. 45, 78 N.E.2d 370 (1956) 23

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In re Staley, D.S.C.Bankr. Nos. 99-04622-W, 99-80383-W, 2000 WL 33709684 (July 12, 2000)... 43

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Page(s)

Cases (Cont'd.)

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Johnson v. Ohio Dept. of Youth Serv., 96 Ohio St.3d 161, 772 N.E.2d 1157 (2002)....... 30

Maloof v. C.I.R., 456 F.3d 645 (6th Cir.2006)........ 43

McFee v. Nursing Care Mgmt. of Am., Inc., 126 Ohio St.3d 183, 2010-Ohio-2744, 931 N.E.2d 1069........ 31

McKenzie v. Davies, 2d Dist. No. 22932, 2009-Ohio-1960........ 11

Morning View Care Ctr.-Fulton v. Ohio Dept. of Human Servs., 148 Ohio App.3d 518, 2002-Ohio-2878, 774 N.E.2d 300........ 32

Ohio Neighborhood Fin., Inc. v. Hill, Franklin M.C. No. 2010CVF010114 (July 30, 2010)........ 39

Ohio Neighborhood Fin., Inc. v. Adkins, 7th Dist. No. 09-CO-38, 2010-Ohio-3164....... 37

Ohio Neighborhood Fin., Inc. v. Brothers, 2d Dist. No. 23654, 2010-Ohio-5746........ 36

Ohio Neighborhood Fin., Inc. v. Christie, 8th Dist. No. 94821, 2010-Ohio-5017........ 37

Ohio Neighborhood Fin., Inc. v. Dotson, 4th Dist. No. 09CA27, 2010-Ohio-3366........ 36

Ohio Neighborhood Fin., Inc. v. Douglas, 191 Ohio App.3d 322, 2010-Ohio-6092, 945 N.E.2d 1128........ 36

Ohio Neighborhood Fin., Inc. v. Farley, 2d Dist. No. 23939, 2010-Ohio-6097........ 36

Ohio Neighborhood Fin., Inc. v. Header, 2d Dist. No. 23675, 2010-Ohio-6095........ 36

Ohio Neighborhood Fin., Inc. v. Marsh, 7th Dist. No. 09MA164, 2010-Ohio-3163....... 37

Ohio Neighborhood Fin., Inc. v. Massey, 10th Dist. Nos. 10AP-1020, 10AP-1121, 2011-Ohio-2165........ 37

Ohio Neighborhood Fin., Inc. v. Powell, 6th Dist. No. L-09-1258, 2010-Ohio-1706..... 37

Ohio Neighborhood Fin., Inc. v. Wilkinson, 5th Dist. No. 09CA000033, 2010-Ohio-796........ 37

TABLE OF AUTHORITIES (Cont'd.)

Page(s)

Cases (Cont'd.)

Ohio St. Assn. of United Assn. of Journeymen v. Johnson Controls, Inc., 123 Ohio App.3d 190, 703 N.E.2d 861 (8th Dist.1997) 11

Oliver v. Kaiser Cmty. Health Found., 5 Ohio St.3d 111, 449 N.E.2d 438 (1983) 26

Rice v. CertainTeed Corp., 84 Ohio St.3d 417, 704 N.E.2d 1217 (1999) 23

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Smith v. Town North Bank, Tx.App. No. 05-11-00520-CV, 2012 WL 5499406 (Dec. 13, 2012) 43

State ex rel. Besser v. Ohio State Univ., 87 Ohio St.3d 535, 721 N.E.2d 1044 (2000) 17

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State ex rel. Carmean v. Bd. of Ed. of Hardin Cty., 170 Ohio St. 415 (1960) 40

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State ex rel. Motor Carrier Serv., Inc. v. Rankin, 135 Ohio St.3d 395, 2013-Ohio-1505, 987 N.E.2d 670 21

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State v. Hollenbacher, 101 Ohio St. 478, 129 N.E. 702 (1920) 25

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Page(s)

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White v. Murtis M. Taylor Multi-Serv. Ctr., 188 Ohio App.3d 409, 2010-Ohio-2602, 935 N.E.2d 873 30

Statutes and Legislative Bills

15 U.S.C. 1601 7
15 U.S.C. 1638 7
1995 Am.Sub.H.B. No. 313 7
2008 Am.Sub.H.B. No. 545 .... passim
Former R.C. 1315.36 7
Former R.C. 1315.39 2
Former R.C. 1315.40 2
G.C. 8624-70 6
Proposed Am.H.B. No. 209 25
R.C. 1.47 17
R.C. 1.49 .... 17, 18, 19
R.C. 1.51 .... 17, 20
R.C. 1.52 .... 17, 20
R.C. 1315.35-1315.44 .... 4, 7
R.C. 1321.01 6
R.C. 1321.03 26
R.C. 1321.20 26
R.C. 1321.35-1321.48 .... 8, 24
R.C. 1321.36 32
R.C. 1321.39 4
R.C. 1321.39-1321.41 10
R.C. 1321.40 4
R.C. 1321.41 44
R.C. 1321.47 18
R.C. 1321.51 .... 23, 41, 42
R.C. 1321.51-1321.60 13
R.C. 1321.57 .... passim
R.C. 1321.571 .... 38, 39
R.C. 1343.03 36

Page(s)

Other Authorities

2008 Ohio Atty.Gen.Ops. No. 2008-036 .... 34, 35

77 Ohio Report No. 153, Gongwer News Serv. (Aug. 7, 2008) 9, 19

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Ohio Governor's Message (June 2, 2008) 9, 19

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TABLE OF AUTHORITIES (Cont'd.)

Page(s)

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Policy Matters Ohio, *The Continued Growth of Payday Lending in Ohio* (March 2008). 8

Policy Matters Ohio, *Trapped in Debt: The Growth of Payday Lending in Ohio* (Feb. 2007). 8

Rules

Evid.R. 201 .... 11, 13

STATEMENT OF INTEREST OF AMICI CURIAE

All of Ohio's 88 counties are served by one or more of the undersigned legal services programs. The Legal Aid Society of Cleveland, The Legal Aid Society of Columbus, Community Legal Aid Services, Inc., Southeastern Ohio Legal Services, The Legal Aid Society of Southwest Ohio LLC (an affiliate of the Legal Aid Society of Greater Cincinnati), Advocates for Basic Legal Equality, Inc., and Legal Aid of Western Ohio, Inc. share the goal of securing justice and resolving fundamental problems for those who are low income and vulnerable. To that end, the Ohio legal services community assists clients in addressing important problems that clients face concerning a number of legal issues, including small loan lending practices and debt collection.

The Ohio Poverty Law Center, a nonprofit limited liability corporation, provides assistance and consulting to the Ohio legal services community through project management, policy advocacy, litigation support, training, specialty assistance and consulting, task forces, publications, and other activities.

Pro Seniors, Inc. is a nonprofit civil legal service provider with the mission of providing legal assistance to seniors in southwestern Ohio, as well as legal advice to any senior statewide.

The Coalition on Homelessness and Housing in Ohio (COHHIO) pushes for systemic change to benefit all Ohioans, especially low-income and special needs populations. The organization's primary focus is on increasing affordable and supportive housing and reducing homelessness in the state. COHHIO also responds to legislation that could open consumers to predatory lending practices and products and cause additional harm to low-wage earners and disabled and fixed-income populations.

The Catholic Conference of Ohio is the official representative of the Catholic Church in public matters affecting the Church and the general welfare of the citizens of Ohio. The teachings of the Catholic faith provide many warnings about usury and exploitation of people. The Catholic Conference of Ohio has supported recent state initiatives that sought to protect the working poor and all Ohio consumers from the spiraling indebtedness caused by payday lending.

In connection with their missions, the undersigned organizations file amicus curiae briefs in cases, such as the instant appeal, where outcomes may affect important rights or obligations of Ohio consumers, providing input to jurists and government officials who are addressing decisions of great public interest that affect the economic security of the vulnerable and the poor.

INTRODUCTION

The Appellant, Ohio Neighborhood Finance, Inc. d/b/a Cashland (hereinafter "Cashland"), is in the business of making what are commonly known as payday loans: short-term, unsecured, single-installment, consumer loans for small dollar amounts at triple-digit annual percentage rates, that are usually due back on the borrower's next payday.

Ohio's former Check Cashing Lender Law, which enabled payday lending in 1995, permitted the features that typify payday loans. It allowed loan amounts of up to $500 and later $800, interest of 5% per month or partial month, additional fees of $5 for every $50 loaned, and check collection charges of $20. Former R.C. 1315.39(A)(1)-(2); 1315.39(B); 1315.40(A)-(B). On an average 14-day loan, these terms resulted in an annual percentage rate ("APR") of 391%. *See* former R.C. 1315.39(A)(4)(b). Because the repayment amount was often a significant portion of the borrower's next paycheck, borrowers would immediately have to take out another loan just to meet their household expenses.

In fact, numerous studies have found that the high cost, extremely short loan term, and lump-sum repayment requirement of payday loans tend to trap borrowers in a long-term, financially damaging cycle of debt. For example, after conducting an in-depth review, the federal Consumer Financial Protection Bureau (CFPB) found that payday lending frequently results in repeat borrowing: two-thirds of borrowers take out seven or more loans in a year, and most of those transactions occur "within 14 days of a previous loan being paid back—frequently, the same day as a previous loan was repaid." *Payday Loans and Deposit Advance Products*, at 43 (April 24, 2013).[1] Studies by the Pew Charitable Trusts have found that the payday lending business model depends on repeat borrowing, which increases lenders' profits but traps consumers in debt that is difficult to escape:

> Existing data show that, in at least two significant respects, the payday lending market does not function as advertised. First, payday loans are sold as two week credit products that provide fast cash, but borrowers actually are indebted for an average of five months per year. Second, despite its promise of "short-term" credit, the conventional payday loan business model requires heavy usage to be profitable—often, renewals by borrowers who are unable to repay upon their next payday.

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[1] Available at http://files.consumerfinance.gov/f/201304_cfpb_payday-dap-white paper.pdf (accessed July 9, 2013).

Payday Lending in America: Who Borrows, Where They Borrow, and Why, at 2 (July 2012).[2] These findings underscore the problematic nature of this financial product and support Ohio's 2008 decision to prohibit payday lending.

Effective in September 2008, the Ohio General Assembly repealed the 1995 Check Cashing Lender Law that had enabled payday loans and replaced it with the Short-Term Loan Act ("STLA"), R.C. 1315.35 to 1315.44, which restricts the most common and problematic features of payday loans—the high interest rate and fees, the short loan duration, and the single-installment repayment requirement. Under the STLA, the principal of a payday loan cannot exceed $500 (R.C. 1321.39(A)); the loan term must be 31 days or longer (R.C. 1321.39(B)); and the annual percentage rate—including all interest, fees, and charges—cannot be greater than 28% (R.C. 1321.40(A)). In addition, while the 1995 law permitted payday lenders to mandate repayment in a single, lump-sum installment, the STLA instructs those lenders to offer an extended payment plan option that expands the repayment period by at least 60 additional days (R.C. 1321.39(D)).

After the enactment of the STLA, the Appellant Cashland continued to issue payday loans, in blatant disregard of the law, using an Ohio Mortgage Loan Act license. In December 2008, Cashland made a payday loan to the Appellee Rodney Scott that exemplifies the loan features the STLA was designed to curtail. Cashland's loan to Mr. Scott was for $500 and had a 14-day term, with repayment due in a lump sum. Furthermore, the interest, fees, and charges amounted to an annual percentage rate of

[2] Available at http://www.pewstates.org/uploadedFiles/PCS_Assets/2012/Pew_Payday_Lending_Report.pdf (accessed July 17, 2013).

235.48%. In short, Cashland was making the same small, short-term, single-installment consumer loans at triple-digit APRs that the STLA had banned.

Cashland and other Ohio payday lenders cannot sidestep the requirements of the Short-Term Loan Act by merely relabeling the same payday loan product as being made under the Ohio Mortgage Loan Act. The Amici urge this Court to affirm the Ninth District Court of Appeals' ruling and uphold the clear intent of the legislature and the will of Ohio citizens by finding that payday loans, regardless of their label, must comply with the Short-Term Loan Act.

STATEMENT OF FACTS

I. STATEMENT OF THE CASE

Cashland brought this action against Rodney Scott in the Elyria Municipal Court in Lorain County, seeking to recover on the December 5, 2008, payday loan it had issued to Mr. Scott at an APR of 235.48%. Because Mr. Scott did not repay this loan, Cashland sued him, seeking a judgment that included interest of 25% under the Ohio Mortgage Loan Act. Mr. Scott did not answer or otherwise respond to Cashland's complaint.

After an evidentiary hearing, Magistrate Richard Schwartz of the Elyria Municipal Court issued Findings of Fact and Conclusions of Law ("Magistrate's Decision"), which found that Scott's Loan was governed not by the Ohio Mortgage Loan Act, but by the Short-Term Loan Act, and recommended that Cashland be granted a judgment of $465 plus 8% interest from the date of loan origination. Cashland filed objections to the Magistrate's Decision, arguing that it was entitled to additional fees and interest. Judge Lisa Locke Graves issued an Opinion affirming the Magistrate's Decision ("Opinion"), and Cashland appealed.

The Ninth District Court of Appeals affirmed the trial court's ruling ("Ninth Dist. Op."), holding that Scott's Loan was not permitted by the Ohio Mortgage Loan Act, and further holding that Cashland's interpretation of the law "would permit the registrants under the Ohio Mortgage Loan Act to issue the payday loans that Short-Term Lender Law seeks to regulate * * * The effect would be to nullify the very legislation that is designed to regulate payday-type loans—a result at odds with the intent of the General Assembly." Ninth Dist. Op. at ¶ 11.

In response to the Ninth District's ruling, Cashland filed an appeal to this Court. The undersigned Amici file this brief in support of Appellee Rodney Scott, and urge this Court to affirm the decision of the Ninth District Court of Appeals.

II. RELEVANT HISTORY OF PAYDAY LOANS IN OHIO, THE SHORT-TERM LOAN ACT, AND THE LOAN CASHLAND MADE TO RODNEY SCOTT

A. Prior to the Short-Term Loan Act

In the early 1900s, this Court identified the dangers of so-called "salary loans"—short-term loans based on borrowers' salaries or wages, the precursor to modern payday loans—and upheld municipal regulation of those loans as constitutional.[3] The Ohio General Assembly followed suit in 1943 by enacting the Small Loan Act to ban short-term, lump sum, paycheck-based loans, and replace them with longer-term, installment loans.[4] For half a century, between 1943 and 1995, short-term loans requiring repayment in a lump sum on a borrower's next payday were illegal in Ohio.

[3] *Sanning v. Cincinnati*, 81 Ohio St. 142, 156, 90 N.E. 125 (1909).

[4] G.C. 8624-70, eff. 7/16/43, now codified at R.C. 1321.01, *et seq.* The history of the Small Loan Act and other Ohio usury laws is described in detail in the Magistrate's Decision, which is attached to the Appellant's Brief, at 5-9.

In 1995, the Ohio General Assembly resurrected paycheck-based lending in Ohio. The law that legalized payday loans was commonly known as the Check Cashing Lender Law or the Payday Loan Act and was codified at R.C. 1315.35-1315.44 (now repealed) (hereinafter "Check Cashing Lender Law"). 121st General Assembly, 1995 Am.Sub.H.B. No. 313. It authorized licensed check-cashing businesses to make certain small loans, known as payday loans, if they obtained a separate "check-cashing loan" license from the Division of Financial Institutions of the Ohio Department of Commerce. *See* former R.C. 1315.36; *see* Legislative Service Commission, *Payday Lending in Ohio*, Members Only Brief, Vol. 130, Issue 1 (Jan. 23, 2013).[5] The Check Cashing Lender Law specifically exempted payday lenders from the usury laws that would otherwise apply to their loan product, allowing them to make loans for terms as short as one or two weeks and to charge interest and fees at APRs of approximately 391%.[6]

During the years that payday loans were legal in Ohio, thousands of Ohio borrowers found themselves trapped in a cycle of payday loan debt that was virtually impossible to escape. Cash-strapped customers typically took out eight loans per year and obtained new loans only to pay off old ones, in an endless cycle of repayment

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[5] Available at http://www.lsc.state.oh.us/membersonly/130paydaylending.pdf (accessed July 9, 2013).

[6] An APR measures the total cost of a loan, including both interest and fees, and takes into account the length of the repayment period. A typical 14-day payday loan under the Check Cashing Lender Law had an APR of 391%. The loan that Cashland made to Rodney Scott under the guise of the Ohio Mortgage Loan Act had an APR of 235.48%. Customer Agreement, Ex. 2 to Appendix of Plaintiff's Motion to Set Aside Magistrate's Decision, at 1. The federal Truth in Lending Act (TILA) requires creditors accurately to disclose the APR for each and every extension of consumer credit. 15 U.S.C. 1638(a)(4). The TILA is intended to "assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit." 15 U.S.C. 1601(a).

followed by more debt. Policy Matters Ohio, *The Continued Growth of Payday Lending in Ohio*, at 9 (March 2008).[7] Due to this repeat borrowing or "churning" of loans,[8] the payday loan industry in Ohio boomed. In 1996, there were only 107 payday lending locations in Ohio. *Id.* at 1. By 2006, the number of payday lending stores in Ohio had risen to 1,562, outstripping the total number of McDonald's, Burger King, and Wendy's restaurants combined. Policy Matters Ohio, *Trapped in Debt: The Growth of Payday Lending in Ohio*, at 3 (Feb. 2007).[9]

B. Enactment of the Short-Term Loan Act

After 13 years of legalized payday lending, the Ohio General Assembly in 2008 decided to more strictly regulate this loan product. Pursuant to 2008 Am.Sub.H.B. No. 545 ("H.B. 545"), the Ohio legislature repealed the Check Cashing Lender Law that had enabled payday lending and replaced it with the Short-Term Loan Act ("STLA"), R.C. 1321.35-1321.48, a law intended to regulate and restrict payday lending. Ohio Legislative Service Commission, *Final Analysis of 2008 Sub. H.B. 545* (Sept. 1, 2008).[10]

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[7] Available at http://www.thehousingcenter.org/wp-content/uploads/2013/02/TheContinued-Growth-of-Payday-Lending-in-Ohio1.pdf (accessed July 17, 2013).

[8] According to studies by the Center for Responsible Lending, the "churning" of payday loans accounts for three-fourths of all payday loan volume or "59 million unnecessary loans" costing borrowers an extra $3.5 billion in fees per year. Center for Responsible Lending, *Phantom Demand: Short-term due date generates need for repeat payday loans, accounting for 76% of total volume*, at 13 (July 9, 2009), available at http://www.responsiblelending.org/payday-lending/research-analysis/phantom-demand-final.pdf (accessed July 21, 2013).

[9] Available at http://www.policymattersohio.org/wp-content/uploads/2011/09/TrappedInDebt2007.pdf (accessed July 22, 2013).

[10] Available at http://www.lsc.state.oh.us/analyses127/08-hb545-127.pdf (accessed July 17, 2013).

It was clear to all involved in the 2008 legislative effort that the Short-Term Loan Act was not a general lending law providing lenders with an alternative to the existing lending options in Ohio, but rather a bill specifically targeting and restricting the unique financial product known as "payday loans" and directly replacing the Check Cashing Lender Law that had permitted payday loans. In the words of Ohio's Governor, the Short Term Loan Act was "bipartisan legislation" intended as a "major step toward protecting Ohio consumers who are already struggling with debt by strictly regulating payday lenders * * *." Ohio Governor's Message (June 2, 2008) (App. at A-1) (emphasis added). Representatives Robert Hagan (D), Matt Lundy (D), and Tyrone Yates (D) stated that the bill would "protect [consumers] from the outrageous fees and interest rates payday lenders have lived on, unchecked, for years." 77 Ohio Report No. 83, Gongwer News Serv., at 1 (Apr. 29, 2008) (emphasis added). While speaking to reporters, Representative Chris Widener (R) stated, "It's obvious that we will, with this bill, eliminate check cash lending from Ohio law." 77 Ohio Report No. 84, Gongwer News Serv., at 1 (Apr. 30, 2008) (emphasis added). Further, Speaker of the House Jon Husted (R) stated: "We did not ban small consumer loans. Rather we capped the interest rate at a level that created a reasonable expectation that the borrower can pay it back * * * We didn't ban small loans. We banned a defective product." 77 Ohio Report No. 153, Gongwer News Serv., at 2 (Aug. 7, 2008) (emphasis added). In short, the express purpose of the STLA was to restrict—or even "eliminate" or "ban"— payday loans in Ohio.

The Ohio legislature spent months reviewing the issues surrounding payday lending prior to enacting the Short-Term Loan Act. The House committee, to which three different versions of reform bills were assigned, spent nearly five months reviewing the issues and heard testimony from approximately 50 witnesses on three different approaches to regulating the payday loan industry, which makes 6.4 million loans worth $3.3 billion per year in Ohio. Representative Chris Widener (R), chair of the House Financial Institutions Committee and H.B. 545's main sponsor, said, "We have taken the time to understand this issue very deeply." 77 Ohio Report No. 84, Gongwer News Serv., at 1 (Apr. 30, 2008).

In replacing the Check Cashing Lender Law, the Short-Term Loan Act restricted payday loan terms in several significant ways. The Short-Term Loan Act reduced the permissible annual percentage rate ("APR") on payday loans from the approximately 391% that was allowed under the Check Cashing Lender Law to a significantly lower 28%. R.C. 1321.40(A); *see* R.C. 1321.35. It also sets a minimum loan term of 31 days; forbids short-term lenders from indebting a borrower in an amount greater than 25% of the borrower's gross monthly income; prohibits the issuance of short-term loans that merely pay off existing short-term loans; and contains other requirements designed to minimize financial detriment to borrowers. R.C. 1321.39 to 1321.41; Ohio Legislative Service Commission, *Final Analysis of 2008 Sub. H.B. 545* (Sept. 1, 2008).[11]

C. <u>Payday Loan Industry Response to the STLA and the 2008 Referendum</u>

Payday lenders' response to the June 2008 passage of the Short-Term Loan Act was aggressive. The payday loan industry spent millions of dollars attempting to overturn the new law by organizing a voter referendum, known as Ballot Issue 5, for

[11] Available at http://www.lsc.state.oh.us/analyses127/08-hb545-127.pdf (accessed July 17, 2013).

Ohio's November 2008 election. Cash America, the parent company of Appellant Cashland, spent \$4.2 million on the referendum effort, according to its filings with the Securities and Exchange Commission (public records of which this Court may take judicial notice).[12] Cash America, 2009 Form 10-K Annual Report, at 60 (Feb. 26, 2010).[13]

Just as in the original legislative effort to enact the Short-Term Loan Act, the language used throughout the ballot referendum process demonstrated that payday loans were the specific focus and target of the effort. The referendum was entitled "Referendum on Legislation Making Changes to <u>Check Cashing Lending, Sometimes Known as 'Payday Lending,'</u> Fees, Interest Rates and Practices." Ohio Secretary of State, *Ohio Issues Report: State Ballot Information for the November 4, 2008 General Election,* at 17 (emphasis added).[14] The ballot asked voters to decide whether the Short-

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[12] This Court can take judicial notice of a fact as long as the fact is not "subject to reasonable dispute" and is either "generally known within the territorial jurisdiction" of the court or "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Evid.R. 201. This Court can take judicial notice of the following: public records (*McKenzie v. Davies*, 2d Dist. No. 22932, 2009-Ohio-1960, ¶ 24); facts that receive widespread media attention (*Ohio St. Assn. of United Assn. of Journeymen v. Johnson Controls, Inc.*, 123 Ohio App.3d 190, 196, 703 N.E.2d 861 (8th Dist.1997)); and publicly available documents including press releases and documents filed with the Securities and Exchange Commission (*Chamberlain v. Reddy Ice Holdings, Inc.*, 757 F.Supp.2d 683, 698-699 (E.D.Mich.2010)).

[13] Available at http://ir.10kwizard.com/filing.php?ipage=6791540&DSEQ=1&SEQ=&SQDESC=SECTION_BODY&exp=&source=1570&fg=24&yr=2010 (accessed July 17, 2013).

[14] Available at http://www.sos.state.oh.us/sos/upload/publications/election/Issues_08.pdf (accessed July 17, 2013).

Term Loan Act should replace "the old provisions of the law regulating check cashing lenders, sometimes known as 'payday lenders.'" *Id.* (emphasis added).[15]

Ohio voters overwhelmingly decided to approve the Short-Term Loan Act, with 63.6% of voters casting a "YES" vote in favor of the Short-Term Loan Act. Ohio Secretary of State, *Amendment and Legislation: Proposed Constitutional Amendments, Initiated Legislation, and Laws Challenged by Referendum, Submitted to the Electors,* at 24-25 (updated 12/19/11).[16]

Immediately following this defeat at the polls, on November 5, 2008, Cash America issued a press release announcing that the company would have to close several locations because "the [Short-Term Loan Act] calls for an annual rate cap of 28 percent, which isn't economically feasible for store front providers of small short-term loans to customers." Cash America, *Cash America: Election Results Force Cash America to Make Tough Decisions*, at 1 (Nov. 5, 2008).[17]

However, Cash America also stated that "we will soon launch an alternative short-term loan product under the Ohio Mortgage Loan Act in our Ohio lending

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[15] The ballot described the differences in loan amounts, loan terms, and APRs permitted under each regulatory scheme, and gave voters the following choice:

> A "YES" vote means you approve of Section 3 of H.B. 545, and want to limit the interest rate for short term loans to 28% APR and change short term lending laws.
>
> A "NO" vote means you disapprove of Section 3 of H.B. 545 and want to permit check cashing lenders to continue to be able to offer short term loans as currently permitted.

Id..

[16] Available at http://www.sos.state.oh.us/sos/upload/elections/historical/issuehist.pdf (accessed July 17, 2013).

[17] Available at http://www.cashamerica.com/Files/NewsReleases/2008/PROhio%20 Defeat1108.pdf (accessed July 17, 2013).

locations." *Id.* at 2.[18] Cash America had similarly announced its plan to offer short-term loans under a statute other than the Short-Term Loan Act in a filing with the Securities and Exchange Commission. In a 2008 filing prior to the November 2008 election, Cash America had notified investors that it planned to "offer alternative products and services under other provisions in Ohio law * * * in the event the referendum * * * is unsuccessful." Cash America, 2008 Form 10-Q Fourth Quarter Quarterly Report, at 10 (Oct. 31, 2008).[19]

Indeed, after the Short-Term Loan Act became the regulatory scheme for all payday-style loans, despite the closure of some storefronts, Cashland did not stop making payday loans. Cashland also did not obtain the required STLA license, nor did it modify its payday loans to comply with the STLA. Instead, Cashland registered under the Ohio Mortgage Loan Act (hereinafter "OMLA"), R.C. 1321.51-1321.60, a statute that was never intended to regulate payday lenders.[20]

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[18] This Court can take judicial notice of the content of this press release pursuant to Evid.R. 201. *E.g. Chamberlain*, 757 F.Supp.2d at 698-699; *see also* footnote 12, supra.

[19] Available at http://ir.10kwizard.com/filing.php?ipage=5949444&DSEQ=1&SEQ=&SQDESC=SECTION_BODY&exp=&source=1570&fg=23&yr=2008 (accessed July 17, 2013).

[20] The Elyria Magistrate's Decision provides a detailed history of the Ohio Mortgage Loan Act, explaining that it was originally enacted to regulate lenders of non-first lien home mortgages and was later expanded to govern first mortgage loans and certain unsecured loans. Magistrate's Decision at 11-12. The Magistrate's Decision makes clear that, even though the OMLA has become more inclusive over the years, attempts to fit payday loans into the OMLA framework are like pushing a square peg into a round hole. As the Magistrate points out, "Cashland surely cannot be arguing that the [O]MLA was intended or can be conceivably interpreted to allow its lenders to write loans secured by home mortgages to be repayable in full in a matter of days by lump sum." *Id.* at 1.

Under the guise of the OMLA, Cashland continued to make the same payday loans it had previously made as a licensed payday lender: small, single payment, short-term, unsecured loans due back in less than 31 days (usually the borrower's next payday), with annual percentage rates well above the 28% limit imposed by the STLA.[21] Notwithstanding the fact that Ohio's legislature and voters had rendered these loans illegal, Cashland failed to comply with the STLA and instead took deliberate actions to evade the STLA's requirements.

D. Cashland's Loan to Rodney Scott

On December 5, 2008, Cashland issued a payday loan to Rodney Scott (hereinafter "Loan"). Pursuant to the Loan agreement, Scott received $500.00 from Cashland and was required to pay back $545.16 to Cashland fourteen days later, on December 19, 2008. The transaction included $45.16 in finance charges, consisting of a $30.00 fee for "loan origination" and a $10.00 "credit investigation" fee, as well as 25% interest. The Loan contained only one scheduled payment of $545.16, due back in fourteen days, on December 19, 2008. Based on these terms, the APR for the Loan was 235.48%. The Loan agreement further authorized Cashland to electronically debit the funds from Scott's bank account. The agreement also provided for a late fee of the

[21] There may be small differences in the fees and procedures between Cashland's current short-term, single installment loans and those offered prior to November 2008. April 1, 2010 Hearing Transcript, 41:12-43:23, Ex. 1 to Appendix of Plaintiff's Motion to Set Aside Magistrate's Decision. However, the payday loan Cashland made to Scott—and the loans it has continued to make under the guise of an OMLA license—epitomize the type of loans that the Short-Term Loan Act was designed to regulate: short-term, unsecured loans with triple-digit APRs, due in a lump sum less than 31 days after loan origination. *Id.* A study by Policy Matters Ohio, published almost a year after the STLA was approved by Ohio voters, found that "[d]espite having one of the best-crafted payday lending laws in the nation, Ohioans are still paying triple-digit interest rates on payday loans." *New Law, Same Old Loans: Payday Lenders Sidestep Ohio Law*, at Executive Summary (Sept. 2009), available at http://www.policymattersohio.org/new-law-same-old-loans-payday-lenders-sidestep-ohio-law (accessed July 22, 2013).

greater of $15.00 or 5% of the total scheduled payment, as well as a $20.00 "check collection" fee. *See generally* Customer Agreement, Ex. 2 to Appendix of Plaintiff's Motion to Set Aside Magistrate's Decision (hereinafter "Customer Agreement").

Scott did not repay the Loan in full before the scheduled due date, though he subsequently made a $35.00 payment on the account. *See* Affidavit of Tara Mapes, Ex. 6 to Appendix of Plaintiff's Motion to Set Aside Magistrate's Decision. On May 28, 2009, Cashland filed a lawsuit seeking judgment against Scott in the sum of $570.16 plus 25% interest.

ARGUMENT

The Amici urge this Court (1) to reach a narrowly tailored conclusion that gives effect to the Short-Term Loan Act by requiring payday lenders' compliance with that law and (2) to find that the Short-Term Loan Act is the exclusive licensing authority governing payday loans, for the reasons addressed in detail below.

I. PAYDAY LOANS MUST BE ISSUED PURSUANT TO THE SHORT-TERM LOAN ACT—NOT THE OHIO MORTGAGE LOAN ACT

A. <u>The Elyria Municipal Court and Ninth District Court of Appeals Decided this Case Correctly, and the Court Should Affirm Those Decisions</u>

The Elyria Municipal Court and the Ninth District Court of Appeals both correctly held (1) that Cashland's loan to Rodney Scott was a payday loan and (2) that payday loans are governed by the Short-Term Loan Act and must comply with the limitations of the STLA.

The Elyria Municipal Court magistrate found that "Cashland's witness admits that it still basically operates as when licensed as a 'payday' lender." Magistrate's Decision at 1. The judge likewise determined that Cashland's loan to Mr. Scott "looks like a payday loan under [the former Check Cashing Lender Law] and the witness testified as much," and noted that this was "baffling," given the "recent public battle to ban these loans." Opinion at 2. Similarly, the Ninth District Court of Appeals recognized that payday loans are the central issue in this case. Ninth Dist. Op. at ¶ 12.

Furthermore, as both the trial and appellate courts found, allowing lenders such as Cashland to make payday loans under the Ohio Mortgage Loan Act not only defies the will of the Ohio legislature and voters, but has the impermissible consequence of rendering the Short-Term Loan Act meaningless. In the words of the trial court magistrate, "[t]o hold the [O]MLA covers this type of loan would ignore the clear history of legislative regulation of the 'payday loan' industry, * * * and outright undermine the Short-Term Lending Loan [sic] recently enacted to specifically cover loans like this." Magistrate's Decision at 6. Likewise, the trial court judge held that allowing payday loans under the OMLA "would make enactment and repeal of the Payday Loan Act superfluous and no one would ever have reason to be licensed under the Short Term Loan Law." Opinion at 2. In affirming this ruling, the Ninth District Court of Appeals held that allowing payday lending under the OMLA "would permit the registrants under the Ohio Mortgage Loan Act to issue the payday loans that Short-Term Lender Law seeks to regulate * * * [P]ayday-loan lenders would be allowed to issue loans in greater amounts and shorter durations than allowed by the Short-Term Lender Law, all the while charging fees prohibited under the Short-Term Lender law * * *. The effect would be to nullify the very legislation that is designed to regulate payday-type loans—a result at odds with the intent of the General Assembly." Ninth Dist. Op. at ¶ 11.

For the reasons set forth in detail below, this Court should affirm these rulings.

B. <u>Applying the Codified Principles of Statutory Construction Results in the Conclusion that the STLA Governs Payday Loans</u>

Ohio Revised Code sections 1.47, 1.49, 1.51, and 1.52 codify Ohio's principles of statutory construction. Applying those principles here results in the conclusion that the Short-Term Loan Act governs payday loans in Ohio.

1) Ohio Revised Code section 1.47 dictates that the STLA should govern payday loans

Revised Code section 1.47 provides that, "[i]n enacting a statute, it is presumed that: The entire statute is intended to be effective; * * * A just and reasonable result is intended; [and] * * * A result feasible of execution is intended." Consistent with section 1.47, this Court has found that it has a duty "to construe statutes to avoid unreasonable or absurd results." *State ex rel. Boggs v. Springfield Local School Dist. Bd. of Ed.*, 93 Ohio St.3d 558, 562, 757 N.E.2d 339 (2001) (*citing State ex rel. Besser v. Ohio State Univ.*, 87 Ohio St.3d 535, 540, 721 N.E.2d 1044 (2000)). This Court has recognized that it should not adopt a reading of a statute that would "result in circumventing the evident purpose of the enactment." *State ex rel. Cincinnati Post v. Cincinnati*, 76 Ohio St.3d 540, 543, 668 N.E.2d 903 (1996) (quoting *Daiquiri Club, Inc. v. Peck*, 159 Ohio St. 52, 55, 110 N.E.2d 705 (1953)). Allowing the intended target of a statute to evade the statute creates an unjust and unreasonable result, in contravention of section 1.47(C). *See Buckeye Boxes, Inc. v. Franklin Cty. Bd. of Revision*, 78 Ohio App.3d 634, 639, 605 N.E.2d 992 (10th Dist.1992).

Applying the statutory construction rules set forth in section 1.47 and upheld by subsequent Ohio court decisions, this Court should not permit Cashland to circumvent the "evident purpose" of the STLA. On its face, the Short-Term Loan Act applies not only to businesses licensed under the statute, but also to businesses that <u>should</u> be licensed under the statute. R.C. 1321.47(A) ("A person licensed, <u>and any person required to be licensed</u> under sections 1321.35 to 1321.48 of the Revised Code, in addition to duties imposed by other statutes or common law, shall do all of the following * * * .") (emphasis added). Thus, in order to make payday loans in Ohio, Cashland must obtain STLA licensing and comply with the STLA's terms.

The express statements of Ohio's legislators and Governor made clear in 2008 that the General Assembly enacted the Short-Term Loan Act to outlaw the payday loans being made under the Check Cashing Lender Law. If this Court accepts Cashland's theory of this case, it would completely nullify the will of the General Assembly and Ohio voters, a result that fails the requirements of section 1.47.

2) Analysis of the Short-Term Loan Act under Revised Code section 1.49 compels the conclusion that all payday lending in Ohio must comply with the STLA

Ohio Revised Code section 1.49 presumes that Ohio courts will "determin[e] the intention of the legislature" whenever a statute is "ambiguous." While the STLA is not ambiguous, even if it were, section 1.49 sets out a framework for courts to use, specifically authorizing courts to consider the following aspects of a statute "in determining the intent of the legislature":

> (A) The object sought to be attained;
> (B) The circumstances under which the statute was enacted;
> (C) The legislative history;
> (D) The common law or former statutory provisions, including laws upon the same or similar subjects;
> (E) The consequences of a particular construction; [and]
> (F) The administrative construction of the statute.

R.C. 1.49. Applying this list of factors to the present case, as described in detail in the Statement of Facts above, the legislative history of the STLA is replete with clear and express statements that the General Assembly intended the STLA to regulate all payday loans made in Ohio. The "object sought to be attained" was, in the words of the Governor and the Speaker of the House, respectively, to "strictly regulat[e] payday lenders" and to "ban[...] a defective product." Ohio Governor's Message (June 2, 2008), App. at A-1; 77 Ohio Report No. 153, Gongwer News Serv., at 2 (Aug. 7, 2008). The circumstances of enactment included an explicit repeal of the former law governing payday loans, combined with express statements that the STLA would directly replace the former law. Consistent with this clear legislative intent, the subsequent referendum on the law was titled, "Referendum on Legislation Making Changes to Check Cashing Lending, Sometimes Known as 'Payday Lending,' Fees, Interest Rates and Practices." Analysis of the STLA using the established principles in section 1.49 compels the conclusion that even if the OMLA and the STLA were somehow found to be in conflict, the legislature's intent is clear: the STLA was deliberately designed to regulate and restrict all payday lending in Ohio.

Moreover, the factor identified in Revised Code section 1.49(E)—the "consequences of a particular construction"—is of paramount importance here. Cashland has asked this Court to construe the STLA in a manner that would lead to absurd and improper consequences, directly defying the legislature's intent and rendering the STLA meaningless. The "consequences" of Cashland's tortured construction of the STLA are already being evidenced in Ohio: neither Cashland nor any other payday lender has obtained the required STLA license, and Cashland has continued to make the same payday loans it was making prior to 2008, in defiance of the will of the legislature and voters.

The Amici urge this Court to uphold the proper construction of the STLA, which will result in the proper "consequences" designed by the General Assembly and supported by Ohio voters. This Court should find that the payday loan Cashland made to Rodney Scott—and any other payday loan like it—is a "defective product" that was banned in 2008 by the legislature and voters, is currently illegal in Ohio, and cannot continue to be made in a manner that violates the STLA.

3) Utilizing the rules of statutory construction contained in Ohio Revised Code sections 1.51 and 1.52, the Court must conclude that the STLA applies to payday loans

Ohio Revised Code sections 1.51 and 1.52 provide that narrower statutes enacted later in time prevail over broader provisions enacted earlier. Specifically, Revised Code section 1.51 states as follows:

> If a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both. If the conflict between the provisions is irreconcilable, the special or local provision prevails as an exception to the general provision, unless the general provision is the later adoption and the manifest intent is that the general provision prevail.

Further, in relevant part, Revised Code section 1.52 states:

> (A) If statutes enacted at the same or different sessions of the legislature are irreconcilable, the statute latest in date of enactment prevails.

Regarding sections 1.51 and 1.52, this Court has held: "It is a well-settled rule of statutory interpretation that statutory provisions be construed together and the Revised Code be read as an interrelated body of law. * * * Utilizing the rules of statutory construction contained in R.C. * * * 1.51, and 1.52, a specific statute, enacted later in time than a preexisting general statute, will control where a conflict between the two arises." *Summerville v. Forest Park,* 128 Ohio St.3d 221, 2010-Ohio-6280, 943 N.E.2d 522, ¶ 26; *see also State ex rel. Motor Carrier Serv., Inc. v. Rankin*, 135 Ohio St.3d 395, 2013-Ohio-1505, 987 N.E.2d 670, ¶ 26 (finding that R.C. 1.51 codifies "[a] well settled principle of Ohio law * * * that when two statutes, one general and one specific, cover the same subject matter, the specific provision is to be construed as an exception to the general statute that might otherwise apply * * * .").

Applying these principles to this case, the OMLA is a more general statute than the STLA because the OMLA applies to a variety of loan types, such as mortgage loans and unsecured installment loans. In contrast, the STLA is a more specific statute designed to regulate only payday loans. Further, the OMLA already existed and was amended to allow for unsecured loans in 1981, whereas the STLA was enacted much later in time, in 2008. Therefore, if the statutes are read to be in conflict, this Court should find that the STLA applies because the STLA is a more specific statute that was enacted later in time.

C. To Find that the Short-Term Loan Act Governs Payday Loans is Consistent with Common Law Principles of Statutory Construction

The established common law canons of statutory construction, including the doctrine of in pari materia, compel this Court to give effect to the Short-Term Loan Act by finding that the STLA governs payday loans.

1) The OMLA and the STLA can be read in conjunction to give proper force and effect to each act, without conflict

This Court has held that all statutes relating to the same general subject matter must be read in pari materia. *United Tel. Co. v. Limbach*, 71 Ohio St.3d 369, 372, 643 N.E.2d 1129 (1994). The doctrine of in pari materia dictates that when reading related statutes in conjunction, courts must be guided by legislative intent and "give such a reasonable construction as to give the proper force and effect to each and all such statutes." *Id.* The "interpretation and application" of statutes "must be viewed in a manner to carry out the legislative intent," and courts "must harmonize and give full application to all such statutes unless they are irreconcilable and in hopeless conflict." *Id.*

Here, the OMLA and the STLA must be construed in pari materia because both acts relate to the same general subject matter—namely, loans. Furthermore, the OMLA and the STLA can easily be reconciled because, at the most basic level, the OMLA was designed to regulate various kinds of installment loans, while the STLA is more narrowly focused on payday loans. In this respect, the STLA is identical to its precursor statute—the Check Cashing Lender Law—which applied specifically to payday lending. When the STLA replaced the Check Cashing Lender Law, it obtained the same scope of authority over this specific loan product.

From 1995 to 2008, the Check Cashing Lender Law was never viewed as contradicting or infringing upon the regulatory territory of the OMLA. By Cashland's own admission, all payday lenders in Ohio operated under the Check Cashing Lender Law during this time, without finding the OMLA or any other lending law to be an obstacle or hindrance. Appellant's Brief at 8. Likewise, the STLA does not contradict or infringe upon the regulatory territory of the OMLA. Although both the OMLA and the STLA govern loans, they govern different types of loans and are not in conflict.

Therefore, the two acts can be construed so as to give proper force and effect to both statutes.

2) Even if the OMLA and the STLA are found to be in conflict, common law analysis of legislative intent results in the conclusion that the STLA governs payday loans

When engaging in a statutory analysis of conflicting statutes, the "paramount concern" of this Court "is the legislative intent in enacting the statute[s]." *State ex rel. Steele v. Morrissey*, 103 Ohio St.3d 355, 2004-Ohio-1445, 815 N.E.2d 1107, ¶ 21; *see also, e.g.*, *State ex rel. Solomon v. Police & Firemen's Disability & Pension Fund Bd. of Trustees*, 72 Ohio St.3d 62, 65, 647 N.E.2d 486 (1995). To determine intent, courts should look to both the language of the statute and the purpose to be accomplished by the enactment of such a law. *See Rice v. CertainTeed Corp.*, 84 Ohio St.3d 417, 419, 704 N.E.2d 1217 (1999); *see also, e.g.*, *State v. S.R.*, 63 Ohio St.3d 590, 594-595, 589 N.E.2d 1319 (1992). In other words, "[i]n determining [the legislature's] intention, a court should consider the language used and the apparent purpose to be accomplished, and then such a construction should be adopted which permits the statute and its various parts to be construed as a whole and gives effect to the paramount object to be attained." *Brown v. Martinelli*, 66 Ohio St.2d 45, 49, 419 N.E.2d 1081 (1981) (quoting *Humphrys v. Winous Co.*, 165 Ohio St. 45, 49, 78 N.E.2d 370 (1956)).

As described in detail supra, the legislature's intent in enacting the STLA was eminently clear. The STLA was designed to regulate all payday lending in Ohio, and should be construed to give effect to that purpose.

II. THIS COURT SHOULD REJECT CASHLAND'S PROPOSITIONS OF LAW

Cashland presents two Propositions of Law in its Brief: (1) "The plain and unambiguous language of Sections 1321.51(F) and 1321.57 of the Ohio Mortgage Loan Act permits MLA registrants to make single installment, interest-bearing loans"; and (2)

"The Short Term Loan Act, R.C. 1321.35 to R.C. 1321.48, does not prohibit MLA registrants from making single installment loans of short duration permitted by the express terms of the MLA, R.C. 1321.57." This Court should reject both of Cashland's Propositions of Law, for the following reasons.

A. The General Assembly's Failure to Amend the OMLA Does Not Support Cashland's Argument That Ohio Provides Optional Licensing Alternatives for Payday Lenders

The Appellant Cashland and the amicus Richard F. Keck[22] argue that the Short-Term Loan Act, the Small Loan Act, and Ohio Mortgage Loan Act are three parallel, "optional" licensing regimes. Appellant's Brief at 5-12. Cashland's stated position is that payday lenders such as Cashland can simply "choose" which regime to use, based on which yields the highest profit margins, regardless of the General Assembly's 2008 prohibition of payday loans. Appellant's Brief at 8-10. Cashland and Mr. Keck assert that the General Assembly has tacitly approved this view by not accepting certain suggested amendments before passage of the Short-Term Loan Act and not amending the law afterward. Such reliance on prior suggested amendments and subsequently introduced bills is misplaced.

The purported amendments Mr. Keck references in the Appendix to his amicus brief may very well have been suggested to the General Assembly by the Ohio Department of Commerce (hereinafter "Commerce"). Undoubtedly, many interested parties, including lending industry representatives and consumer advocates, made

[22] Amicus curiae Richard F. Keck presents a similar argument and claims to be speaking on behalf of the Department of Commerce (hereinafter "Commerce"). However, Mr. Keck is no longer employed by Commerce; fails to disclose the circumstances under which his employment there ended; and as a non-employee, lacks authority to speak for Commerce in this case. Therefore, this Court should not give weight to Mr. Keck's arguments.

multiple suggestions for amendments to H.B. 545. Payday lending reform was the subject of intense debate in the 127th General Assembly. Nevertheless, a review of the amendments actually accepted by Senate committee reveals that the amendments Mr. Keck claims came from Commerce were never specifically included in any versions of H.B. 545, and therefore were never accepted or rejected by the General Assembly. 127th General Assembly, 2008 Am.Sub.H.B. No. 545.[23] Consequently, no expression of public policy or legislative intent can be inferred from the failure of these alleged suggestions to be incorporated into the General Assembly's final legislative enactment. In *State v. Toney*, this Court wrote that a law "receives its vigor and force as law by reason of its <u>enactment</u> by the General Assembly, no matter from what source the inspiration came." 81 Ohio St. 130, 140, 90 N.E. 142 (1909) (emphasis added); *accord State v. Hollenbacher*, 101 Ohio St. 478, 485, 129 N.E. 702 (1920).

Likewise, public policy cannot be inferred from the failure of the General Assembly to pass proposed Am.H.B. No. 209 ("H.B. 209") (attached to Appellant's Brief at A-62) or any other subsequent legislation proposing to amend the Small Loan Act or the Ohio Mortgage Loan Act. This Court has previously discredited efforts to determine legislative intent from legislative inaction, as follows:

> The fallacy in this argument is that no one knows why the legislature did not pass the proposed measures. * * * Did the legislature fail to pass the measures because it was satisfied with the * * * [prior court] interpretations of the statute or because it was not in favor of * * * [the] overall limitation, or because it disliked the length of the overall limitation? The practicalities of the legislative process furnish many reasons for the lack of success of a measure other than legislative dislike for the principle involved in the legislation. Legislative inaction is a weak reed upon which to lean in determining legislative intent.

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[23] Available at http://www.legislature.state.oh.us/bills.cfm?ID=127_HB_545 (accessed July 11, 2013).

Oliver v. Kaiser Cnty. Health Found., 5 Ohio St.3d 111, 115, 449 N.E.2d 438 (1983) (quoting *Berry v. Branner*, 245 Or. 307, 311, 421 P.2d 996 (1966)).

This Court should reject Cashland's contention that the General Assembly has tacitly approved Cashland's continued making of payday loans pursuant to the OMLA, merely by not enacting certain proposed amendments to that law. As this Court recognized in *Oliver*, legislative inaction is always based on "many reasons" and should not be overly imbued with meaning or misinterpreted as a permanent expression of public policy.

B. The Discounted Small Loan Act Licensing Fees Offered to Payday Lenders in 2008 Do Not Prove that the General Assembly Intended Compliance with the Short-Term Loan Act To Be Optional.

For all lenders licensed under Ohio Revised Code Chapter 1321 (which includes the Ohio Mortgage Loan Act, the Small Loan Act, and the Short-Term Loan Act), section 1321.20 requires the Superintendent of Financial Institutions annually to determine, on or about April 15 of each year, the annual licensing fee amounts for the succeeding fiscal year. The Superintendent must notify lenders of those amounts by June 1 of each year, and the lenders must pay the fees by June 30 of each year, in order to obtain or retain their licenses. Section 1321.03 further sets forth the licensing fee requirements for Small Loan Act lenders.

Cashland argues that the "alternative" or "optional" nature of the Short-Term Loan Act is evidenced by language in Section 4 of H.B. 545 that permitted payday lenders who were licensed under the Check Cashing Lender Law in 2008 to apply for Small Loan Act licenses and pay "only one-half of the license fee" required by section

1321.03. Cashland quotes only Section 4(B) in its Brief, but both 4(A) and 4(B) are relevant to the analysis here. Section 4 in its entirety provides as follows:

> (A) All licenses issued pursuant to sections 1315.35 to 1315.44 of the Revised Code, and in effect on the date this section becomes effective, shall remain in effect, unless suspended or revoked by the superintendent of financial institutions, until such time as the license would be subject to renewal pursuant to sections 1315.35 to 1315.44 of the Revised Code as those sections existed prior to the effective date of this act. <u>The superintendent shall recognize any such license holder as a valid license holder under sections 1321.35 to 1321.48 of the Revised Code as enacted by this act, and such license holder thereafter is subject to all provisions of sections 1321.35 to 1321.48 of the Revised Code.</u>
>
> (B) If any person licensed under sections 1315.35 to 1315.44 of the Revised Code on the effective date of this section applies for a license to operate under sections 1321.01 to 1321.19 of the Revised Code for the 2008 licensing period ending June 30, 2009, that person shall pay only one-half of the license fee provided for under section 1321.03 of the Revised Code.

2008 Am.Sub.H.B. No. 545, Sec. 4 (emphasis added).

Cashland's position is that Section 4 "unequivocally allows short-term, single-installment lending under the provisions of the Small Loan Act, which are identical to the MLA's provisions at issue in this case." Appellant's Brief at 9. Cashland interprets Section 4 to mean that the General Assembly "laid out a roadmap" for payday lenders to avoid the STLA and even "encouraged them to do so by offering a license fee discount." *Id.* at 26. However, Cashland's interpretation of Section 4 is simply not supported by the plain language of that section, nor by the legislative history.

First, nowhere does Section 4 state that payday lenders could—or should—obtain Small Loan Act licensing in order to make <u>payday</u> loans. In fact, the legislative history indicates that Section 4 was added by the Senate Finance and Financial Institutions Committee (hereinafter the "Committee") in May 2008 to enable payday lenders to switch to <u>other</u> loan products. While H.B. 545 was under review, Senate President Bill Harris (R) made clear that the Committee would not remove certain proposed restrictions on payday loans, such as the 28% rate cap, but "may amend the bill * * * to provide some sort of assistance to <u>help lenders transition to a new loan product</u> * * * The language is designed to help retain jobs that the industry said would be lost under the bill." 77 Ohio Report No. 93, Gongwer News Serv., at 5 (May 13, 2008) (emphasis added). Consistent with these statements, the Senate Committee added Section 4 as an amendment. Legislative Service Commission, *Synopsis of Committee Amendments* (May 19, 2008).[24] Thus, it is reasonable to conclude that Section 4 permitted and even encouraged lenders formerly licensed under the Check Cashing Lender Law to change their products and become Small Loan Act lenders, rather than going out of business. It is <u>not</u> reasonable to conclude, as Cashland does, that Section 4 means the General Assembly wanted payday lenders to continue making payday loans under the Small Loan Act, while it simultaneously banned those same loans under the Short-Term Loan Act. Such an interpretation not only contradicts the legislative history and is unsupported by the plain language of Section 4, but it also makes no logical sense.

Second, the dates provided in Section 4, coupled with the timing of the STLA's enactment, indicate that the "license fee discount" was offered because the Small Loan Act license at issue would cover less than a whole year. As described above, lenders operating under Chapter 1321 normally pay annual license fees in June. However, H.B. 545 did not take effect until September 1, 2008. Therefore, those payday lenders who applied for new Small Loan Act licenses "on the effective date of [Section 4 of H.B. 545]

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[24] Available at http://www.legislature.state.oh.us/synopsis.cfm?ID=127_HB_545&ACT=As%20Enrolled&hf=synopsis127/h0545-127.htm (accessed on July 16, 2013).

* * * for the 2008 licensing period ending June 30, 2009," would receive less than a full year's worth of licensing. 2008 Am.Sub.H.B. No. 545, Sec. 4. Thus, the significance Cashland tries to attribute to the "discount" is not justified, and its view that the General Assembly simultaneously encouraged and eliminated payday loans defies common sense.

Third, given that Cashland has not utilized the Small Loan Act for its continued payday lending business, its arguments regarding Section 4 ring hollow. Even if Cashland were correct in asserting that the purpose of Section 4 was to allow payday lending under the Small Loan Act, Cashland still has not shown that the General Assembly authorized payday lending under the Ohio Mortgage Loan Act. In fact, Section 4(A) expressly required those payday lenders who were operating under Check Cashing Lender Law licenses on the effective date of the STLA (September 1, 2008) to begin complying with the STLA—not to evade the STLA—when those licenses expired. Section 4(A) provides that old Check Cashing Lender Law licenses would "remain in effect * * * until such time as the license would be subject to renewal." At that time, the Superintendent of Financial Institutions "<u>shall</u> recognize any such license holder as a valid license holder under [the Short-Term Loan Act], and <u>such license holder thereafter is subject to all provisions of [the Short Term Loan Act]</u>." 2008 Am.Sub.H.B. No. 545, Sec. 4 (emphasis added). Therefore, far from authorizing payday lending under the OMLA, Section 4 of H.B. 545 subjected former payday lenders to the STLA and required the Superintendent of Financial Institutions to treat them as lenders holding STLA licenses.

C. **This Court Should Not Defer to the Position Improperly Attributed to the Ohio Department of Commerce**

Cashland argues that this Court should give deference to the Ohio Department of Commerce. Cashland cites "well-settled rule that courts, when interpreting statutes, must give due deference to an administrative interpretation formulated by an agency that has accumulated substantial expertise, and to which the General Assembly has delegated the responsibility of implementing the legislative command." *Swallow v. Indus. Comm. of Ohio,* 36 Ohio St.3d 55, 57, 521 N.E.2d 778 (1988). There are several flaws in Cashland's position.

First, there is no administrative interpretation to which to give deference. The Department of Commerce has issued no rule on the effect of the STLA on short-term, high-interest, single-payment loans. There has been no hearing decision, no policy letter, no amicus curiae brief, nothing that might have even persuasive authority in connection with this question. *See White v. Murtis M. Taylor Multi-Serv. Ctr.,* 188 Ohio App.3d 409, 2010-Ohio-2602, 935 N.E.2d 873, ¶ 43 (*citing Christensen v. Harris Cty.,* 529 U.S. 576, 586-587, 120 S. Ct. 1655 (2000) and *Johnson v. Ohio Dept. of Youth Serv.,* 96 Ohio St.3d 161, 772 N.E.2d 1157 (2002)).

Second, although amicus curiae Richard F. Keck claims to speak on behalf of the Department of Commerce, Commerce is not a party to this litigation, nor has it submitted an amicus brief. In addition, Mr. Keck is not currently employed by Commerce, does not explain why he was separated from employment at Commerce, and fails to disclose the nature of his employment since his departure. In short, Mr. Keck has no authority to present arguments on Commerce's behalf, and his assertions cannot be credited as the official position of the Department of Commerce. At best, the Court has been presented with a lack of enforcement actions by the Department of Commerce combined with the memories and opinions of a former agency employee, neither of which can be considered an "administrative interpretation" of the STLA.

Third, Cashland fails to recognize the significance of the word "implementing" in the "well-settled" deference rule cited above, a word that reveals the essential difference between the General Assembly and an administrative agency such as Commerce. Namely, the legislature is the body that establishes the state's public policy and an agency merely administers—or implements—that policy. *McFee v. Nursing Care Mgmt. of Am., Inc.*, 126 Ohio St.3d 183, 2010-Ohio-2744, 931 N.E.2d 1069, ¶ 25 ("The General Assembly sets public policy, and administrative agencies * * * 'develop and administer' those policies."). Administrative regulations "cannot dictate public policy but rather can only develop and administer policy already established by the General Assembly." *D.A.B.E., Inc. v. Toledo-Lucas Cty. Bd. of Health*, 96 Ohio St.3d 250, 2002-Ohio-4172, 773 N.E.2d 536, ¶ 41 (*citing Chambers v. St. Mary's School*, 82 Ohio St.3d 563, 567, 697 N.E.2d 198 (1998)). As this Court has stated,

> [l]egislative authority is vested with the General Assembly * * * The legislative process and accountability are the cornerstones of the democratic process which justify the General Assembly's role as lawmaker. In contrast, administrative rules do not dictate public policy, but rather expound upon public policy already established by the General Assembly in the Revised Code.

Chambers, 82 Ohio St.3d at 566-567. Therefore, the role of the Department of Commerce is to put into practice the public policy established by the legislature, not to determine or dictate that policy. Here, the legislature repealed the Check Cashing Lender Law and replaced it with the Short-Term Loan Act, clearly directing that payday lenders must now offer payday loans only under the STLA. Commerce cannot change that policy, but can—and should—implement it.

Fourth, even if there were an administrative interpretation by Commerce, "[a]n agency's interpretation of a statute that governs its action should be given deference so long as the interpretation is not irrational, unreasonable, or inconsistent with the statutory purpose." *Dann v. Ohio Elections Comm.*, 164 Ohio Misc.2d 39, 2011-Ohio-3945, 952 N.E.2d 588, ¶ 16 (quoting *Morning View Care Ctr.-Fulton v. Ohio Dept. of Human Servs.*, 148 Ohio App.3d 518, 2002-Ohio-2878, 774 N.E.2d 300, ¶¶ 47-48) (emphasis added). Here, the interpretation improperly attributed to Commerce is blatantly inconsistent with the statutory purpose of the STLA, which is to mandate that all short-term, payday-style loans in Ohio comply with the STLA. The Ohio General Assembly did not exclude any payday loan products from the STLA's regulation, but rather made the comprehensive determination that "[n]o person shall engage in the business of making short-term loans to a borrower in Ohio, or, in whole or in part, make, offer, or broker a loan, or assist a borrower in Ohio to obtain such a loan, without first having obtained a license from the superintendent of financial institutions under [the STLA]." R.C. 1321.36(A); *see also* Ohio Legislative Service Commission, *Final Analysis of 2008 Sub. H.B. 545*, at 3 (Sept. 1, 2008).[25]

Far from being uncertain about the scope of the STLA at the time of its enactment in June 2008, Cashland demonstrated a keen awareness that the STLA would govern all short-term, payday-style loans and would therefore eliminate its lucrative payday loan product. Cashland's parent company, Cash America, launched a swift and aggressive

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[25] Available at http://www.lsc.state.oh.us/analyses127/08-hb545-127.pdf (accessed July 16, 2013).

campaign to put the STLA on the November 2008 ballot, spending $4.2 million to overturn the law. However, Ohioans voted by a large majority to approve the General Assembly's enactment of the STLA. The statutory purpose of the STLA was obvious to the Ohio General Assembly, voters, and Cashland itself, and that statutory purpose remains clear today: any lender wishing to make payday loans in Ohio must obtain STLA licensing and comply with STLA requirements. Because the statutory interpretation improperly attributed to Commerce directly contradicts the express provisions of the STLA, this Court owes no deference to the Department of Commerce's alleged interpretation.

D. <u>This Court Should Not Sanction the Apparent Under-Enforcement of the STLA</u>

To the extent that the Department of Commerce has been under-enforcing the STLA by (1) failing to require payday lenders, such as Cashland, to be licensed pursuant to the STLA and (2) failing to bring enforcement action against lenders who offer these loans without an STLA license, this under-enforcement is not agency action entitled to deference. Under-enforcement by administrative agencies has been recognized as particularly problematic where the individuals who would be protected by enforcement are members of a vulnerable population. As the First District Court of Appeals has stated,

> [u]nder-enforcement by an administrative agency may be even more likely where, as in this case, the regulated party is a relatively powerful business entity while the class protected by the regulation tends to consist of low-income persons with scant resources, lack of knowledge about their rights, inexperience in the regulated area, and insufficient understanding of the prohibited practice.

Elder v. Fischer, 129 Ohio App.3d 209, 218, 717 N.E.2d 730 (1st Dist.1998). Deferring to under-enforcement of the STLA would harm consumers throughout Ohio and be tantamount to the unlawful nullification by this Court of the public policy established by the legislature.

Deference to an administrative agency's statutory interpretation and implementation is only appropriate where the agency interpretation, rules, and regulations are rational, reasonable, and consistent with the statutory purpose. *Dann*, 2011-Ohio-3945 at ¶ 16. Here, the interpretation of the STLA attributed to Commerce is unquestionably inconsistent with the stated purpose of the STLA. In addition, Commerce's apparent under-enforcement of the STLA has further jeopardized the financial situation of an already vulnerable population of cash-strapped borrowers. For these reasons, this Court should not legitimize the Department of Commerce's apparent failure to enforce the Short-Term Loan Act, but should instead uphold the intent of the legislature and the voters by finding that Cashland's payday loans are subject to the STLA.

E. Attorney General Opinion No. 2008-036 Does Not State That Payday Loans Can Be Issued Pursuant to the OMLA

Cashland cites to Ohio Attorney General Opinion No. 2008-036 (hereinafter "AG Opinion"),[26] claiming that it supports Cashland's position that payday lenders can avoid the STLA by issuing loans under the OMLA. First, opinions issued by the Attorney General's Office are not binding on this Court. Second, even if this Court were to consider the AG Opinion, Cashland mischaracterizes the AG Opinion by implying that it

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[26] Available at http://www.ohioattorneygeneral.gov/OhioAttorneyGeneral/files/6f/6fbbbb78-4424-4f36-90dd-6ffb5dab450a.pdf (accessed July 15, 2013).

examined and answered the question of whether payday loans could be made under the OMLA. In fact, the AG Opinion does not mention the OMLA. The issue addressed by the AG Opinion was the narrow question of whether payday lenders in 2008 could temporarily continue lending under the Check Cashing Lender Law while the referendum on the Short-Term Loan Act was pending prior to the November 2008 election. Specifically, the Ohio Attorney General was asked to determine "whether a person licensed under the Short Term Loan Act is permitted, while acting under a Check-Cashing Lender Law license, to make a loan that is authorized under the Check-Cashing Lender Law but does not meet the conditions set forth in R.C. 1321.39 [the STLA]." 2008 Ohio Atty.Gen.Ops. No. 2008-036, at 6-7. At the time, the Check Cashing Lender Law was still in effect because section 3 of H.B. 545 was under referendum. Since other provisions of the STLA were not under referendum, it was possible that a lender could temporarily be holding licenses under both laws.

While the Attorney General concluded that loans made pursuant to other licenses are not subject to the STLA, the Attorney General did not address whether payday loans are allowable under the OMLA or any other lending law. The Attorney General simply determined that the plain language of the STLA did not prohibit temporary dual licensing under the STLA and the now repealed Check Cashing Lender Law.

The AG Opinion is limited in scope and was issued during a unique time when both the STLA and the Check Cashing Lender Law were in effect. The conclusions in the AG Opinion should not be applied to the very different set of circumstances and lending laws at issue here.

F. <u>Ohio's Other Courts of Appeals Have Not Addressed the Issue of Making Payday Loans under the OMLA</u>

Contrary to Cashland's assertion that other Ohio Courts of Appeals have "consistently upheld judgments for Cashland on single installment loans under the [O]MLA," no other Ohio Court of Appeals has addressed the issue of whether the OMLA can be used to make payday loans. *See* Appellant's Brief at 22. Notably, the present case was accepted by this Court on a jurisdictional appeal, rather than a certified conflict between the Ninth District and the seven other District Courts of Appeals which Cashland inaccurately claims have approved the OMLA as a vehicle for making payday loans.

The Second District Court of Appeals has decided four cases involving Cashland.[27] The language of all four opinions is virtually identical, save the recitation of case-specific facts. In each of these cases, the court held that the interest rate of a written loan agreement should be applied to the judgment if permitted by Revised Code section 1343.03(A), but did not address the appropriateness of Cashland's making payday loans under the OMLA.

In *Ohio Neighborhood Finance, Inc. v. Dotson*, the Fourth District Court of Appeals held that contractual interest not exceeding the amount allowed in Ohio's usury statute should be reflected in the judgment. 4th Dist. No. 09CA27, 2010-Ohio-3366, ¶ 6.

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[27] *Ohio Neighborhood Fin., Inc. v. Douglas*, 191 Ohio App.3d 322, 2010-Ohio-6092, 945 N.E.2d 1128, ¶¶ 9-13; *Ohio Neighborhood Fin., Inc. v. Header*, 2d Dist. No. 23675, 2010-Ohio-6095, ¶¶ 9-13; *Ohio Neighborhood Fin., Inc. v. Brothers*, 2d Dist. No. 23654, 2010-Ohio-5746, ¶¶ 9-13; *Ohio Neighborhood Fin., Inc. v. Farley*, 2d Dist. No. 23939, 2010-Ohio-6097, ¶¶ 9-13.

Again, the court did not address whether Cashland was permitted to make payday loans under the OMLA.

Similarly, the Fifth,[28] Sixth,[29] and Seventh[30] District Courts of Appeals have held that contractual interest does not violate the usury statute and should be incorporated into the judgment. As with the other cases, these courts also did not address or consider the legality of the OMLA as a vehicle for payday loans.

Finally, while the Eighth[31] and Tenth[32] District Courts of Appeals have noted that Cashland is registered under the OMLA, which permits alternate interest rate agreements up to twenty-five percent, those courts held that under Ohio's usury statute, the interest rate in the agreements should have been enforced by the trial courts. The Eighth and Tenth Districts found that Ohio's usury statute does not prohibit a contractual twenty-five percent interest rate, but also did not consider whether it is proper for Cashland to be issuing payday loans under the OMLA.

Consequently, there is no conflict between the Ninth District and the seven other District Courts of Appeals referenced by Cashland. None of those courts considered or

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[28] *Ohio Neighborhood Fin., Inc. v. Wilkinson*, 5th Dist. No. 09CA000033, 2010-Ohio-796, ¶ 11.

[29] *Ohio Neighborhood Fin., Inc. v. Powell*, 6th Dist. No. L-09-1258, 2010-Ohio-1706, ¶ 8.

[30] *Ohio Neighborhood Fin., Inc. v. Marsh*, 7th Dist. No. 09MA164, 2010-Ohio-3163, ¶¶ 10-11; *Ohio Neighborhood Fin., Inc. v. Adkins*, 7th Dist. No. 09-CO-38, 2010-Ohio-3164, ¶ 12

[31] *Ohio Neighborhood Fin., Inc. v. Christie*, 8th Dist. No. 94821, 2010-Ohio-5017, ¶¶ 7-9.

[32] *Ohio Neighborhood Fin., Inc. v. Massey*, 10th Dist. Nos. 10AP-1020, 10AP-1121, 2011-Ohio-2165, ¶ 17.

addressed whether payday loans are permitted under the OMLA. Therefore, those cases do not provide support for Cashland's assertion that numerous other Districts have approved payday lending under the Ohio Mortgage Loan Act, or that the Ninth District's decision is an "aberration." *See* Appellant's Brief at 23.

G. The Word "Notwithstanding" in the OMLA Is Not Determinative Here

Cashland argues that the phrase "notwithstanding any other provision of the Revised Code" in Revised Code section 1321.57(A) means that "loans conforming to the MLA are permitted" (Appellant's Brief at 29) and that OMLA registrants "may contract for interest-bearing loans" even if the STLA appears to prohibit "a two-week, single-installment loan made by a MLA registrant." Appellant's Brief at 30. These arguments are flawed for several reasons.

First, the actual language of Revised Code section 1321.57(A) provides that OMLA loans can be interest-bearing or precomputed and that OMLA registrants may contract for interest rates not exceeding 21%, as follows:

> Notwithstanding any other provisions of the Revised Code, a registrant may contract for and receive interest, calculated according to the actuarial method, <u>at a rate or rates not exceeding twenty-one per cent per year on the unpaid principal balances of the loan</u>. Loans may be interest-bearing or precomputed.

R.C. 1321.57(A) (emphasis added). Nowhere does section 1321.57(A) "permit" the type of loan Cashland made to Rodney Scott—with an interest rate of 25% and an APR of 235.48%.

Second, despite its arguments that the word "notwithstanding" preempts all other Revised Code provisions, Cashland itself uses another Revised Code provision—section 1321.571—to justify its charging of 25% interest on its own loans. Section 1321.571

provides that, "[a]s an alternative to the interest permitted in division (A) of section 1321.57 * * * a registrant may contract for and receive interest at any rate or rates agreed upon or consented to by the parties * * * but not exceeding an annual percentage rate of twenty-five per cent." R.C. 1321.571 (emphasis added). While Cashland is quick to rely on the "notwithstanding" language to trump the entire STLA, it conveniently fails to explain how the same "notwithstanding" language does not trump the "alternative" 25% rate in section 1321.571. If Cashland's position were applied consistently, the "notwithstanding" clause would prohibit Cashland from using any interest rate higher than 21%.

Further, the trial court in this case correctly called into question Cashland's charging of 25% interest under the OMLA, based on analysis of sections 1321.57(A) and 1321.571:

> After the meaning of "annual percentage rate" in [the OMLA] was changed to become nearly identical with "interest rate," §1321.571 no longer was an "alternative" to §1321.57(A), but its implicit repeal. The later reenactments of the 21% cap on interest at §1321.57(A), each with a "notwithstanding" clause, resurrected §1321.57(A) and repealed by implication the then patently inconsistent §1321.571 * * * The courts that cite §1321.571 to authorize 25% as an "interest rate" do not consider the mandatory preemptive effect of "notwithstanding" clauses, the legislative history of these sections, and the important difference between "interest rate" and "annual percentage rate" under the law and behind the enactment of §1321.571.

Opinion at 3; *see also* Magistrate's Decision at 12-13 (quoting *Ohio Neighborhood Fin. Inc. v. Hill*, Franklin M.C. No. 2010CVF010114 (July 30, 2010)).

Not only does the trial court's analysis delegitimize Cashland's interpretation and use of section 1321.571, it also highlights one of the most critical features of statutory "notwithstanding" clauses, which is that they implicitly repeal contradictory statutes already in existence, but do not bar all future legislation on a topic. Hence, the "notwithstanding" phrase was added to section 1321.57(A) to preempt the "alternative" rate already existing in section 1321.571. A clear example can be found in *State ex rel. Carmean v. Bd. of Ed. of Hardin Cty.*, cited by Cashland, where this Court found that a "notwithstanding" clause in one statute preempted proceedings "previously instituted" under other statutes. 170 Ohio St. 415, 422 (1960) (emphasis added). Similarly, the other cases cited by Cashland to support its "notwithstanding" arguments concern preemption of existing statutory or contract language. *Cisneros v. Alpine Ridge Group*, 508 U.S. 10, 18, 113 S.Ct. 1898 (1993); *In re Eubanks*, 219 B.R. 468, 470, 40 Collier Bankr.Cas.2 18 (6th Cir. BAP 1998).

If Cashland's faulty argument were taken to it logical conclusion, any law enacted subsequent to the enactment of Revised Code section 1321.57(A) that arguably conflicts with that section—even laws attempting to repeal that very section—would be unenforceable because the "notwithstanding" language would permanently bar further legislation on that topic. This interpretation is obviously absurd and should be rejected by this Court.

H. Cashland's Recitation of the Single-installment Loans Permitted by the Department of Commerce is Inapposite

Cashland's recitation of the history of single-installment loans permitted by the Ohio Department of Commerce under the Ohio Mortgage Loan Act misses this point: the Ohio legislature banned the small dollar, short-term, single-installment, consumer loans made at triple-digit APRs that were previously issued under the Check Cashing Lender Law and are commonly known as payday loans. Cashland asserts that the OMLA permits lenders to make agricultural loans, tradesman loans, certificate of deposit loans, and investment loans, among others. Appellant's Brief at 7.[33] Even if true, that information is simply irrelevant to this case.

The General Assembly made clear by enacting H.B. 545 that payday loans would no longer be allowed in Ohio, and this case involves a payday loan. The Elyria Municipal Court correctly found in this case that "the legislature and voters * * * closed the door on payday loans and established a new law to exclusively regulate the business of short term lending in Ohio." Opinion at 4. The Ninth District Court of Appeals agreed, stating, "The General Assembly clearly intended the Short-Term Lender Law to proscribe the type of loan issued here, i.e. a loan that was to be repaid in full in two weeks." Ninth Dist. Op. at 5. If other types of single-installment loans are currently being made, or have historically been made, by OMLA registrants, those loans are not the subject of the specifically targeted Short-Term Loan Act, and are irrelevant to the issues before the Court.

I. This Court Need Not Decide Whether the Rule of the Last Antecedent Applies Here

Cashland argues that the grammatical Rule of the Last Antecedent[34] requires that the phrase "from time to time" modify "unpaid principal balances outstanding" in section 1321.51(F) of the OMLA and does not, therefore, create a requirement that OMLA loans

[33] One of the amicus briefs filed in support of Cashland in this case also lists a number of OMLA loan types that are not relevant to this case. *See* Brief of Amici Curiae the Ohio Chamber of Commerce, the Ohio Council of Retail Merchants, and the Ohio Automobile Dealers Association in Support of Appellant Ohio Neighborhood Finance, Inc., at 8 (discussing construction loans, student loans, farm operating loans, and other non-payday loans).

[34] "[A]ny qualifying words or phrases refer to the language immediately preceding the qualifier, unless common sense shows that it was meant to apply to something more distant or less obvious." *Hil-Roc Condo. Unit Owners Assoc., Inc. v. HWC Realty, Inc.*, 8th Dist. No. 87344, 2006-Ohio-4770, ¶ 35.

have multiple payments. This Court could find that when section 1321.51(F) is viewed in light of section 1321.57[35] and the history of the OMLA, common sense necessitates the conclusion that the OMLA requires multiple payment loans. However, this Court need not address Cashland's Rule of the Last Antecedent argument to decide (1) that the Short-Term Loan Act governs the payday loans Cashland continues to issue to Ohio consumers and (2) that Cashland's current lending practices violate the STLA. Again, whether or not the OMLA permits other, <u>non</u>-payday types of single-installment loans is not at issue here.

J. <u>The Use of "Principal Balance Outstanding From Time to Time" in Loans Not Made Pursuant to the OMLA is of No Consequence Here</u>

Cashland cites a number of cases—none of which are controlling authority in Ohio—where the term "principal balance outstanding from time to time" appears in various loan transactions. Cashland argues that because the phrase "outstanding from time to time" is commonly used in "the finance world" to modify "principal balances," it does so in the OMLA as well. Appellant's Brief at 20. While the phrases "principal balance" and "outstanding from time to time" do appear in the cases cited by Cashland, the mere appearance of these phrases sheds no light on the question here—namely, whether payday lenders can use the Ohio Mortgage Loan Act to issue short-term, single payment, payday loans in order to avoid being regulated by the Short-Term Loan Act.

Further, Cashland intimates that each of these examples involved a single payment loan. However, that is simply not the case. In *Smith v. Town North Bank* and *Highlands Ind. Bank v. Pages-Morales*, the Florida and Texas courts address "the

[35] The OMLA sections that address interest-bearing loans—sections 1321.57(C)(1)(a)-(b) and 1321.57(C)(1)(c)—use language that contemplates multiple payment loans.

principal amount outstanding from time to time and <u>at any one or more times.</u>" *Smith*, Tx.App. No. 05-11-00520-CV, 2012 WL 5499406, at *3 (Dec. 13, 2012); *Highlands*, S.D.Fl. No. 2:11-cv-14157, 2012 WL 1802364, at *3 (May 16, 2012). In *Stepping Stone Homes, Inc. v. Wisconsin Public Serv. Corp.*, the loan in question had monthly installment payments. Wis.App. No. 2010AP2202, 2011 WL 3300200, at *1-2 (Aug. 3, 2011). In addition, the loan in *In re Staley* had weekly installment payments. D.S.C.Bankr. Nos. 99-04622-W, 99-80383-W, 2000 WL 33709684, at *1, fn. 1 (July 12, 2000). The contract in *In re SW Boston Ventures, LLC* provides for "Loan Payments" rather than one single payment. 479 B.R. 210, 225, 57 Bankr.Ct.Dec. 24 (lst Cir.BAP 2012). In *Gary Comer, Inc. v. Wallace*, the loan agreement specifically provided for multiple interest payments and a final principal payment. N.D.Ill. No. 98 C 4554, 2001 WL 1173498, at *1 (Oct. 4, 2001). Finally, *Maloof v. C.I.R.* is silent as to the payment schedule contemplated by an "outstanding balance due from time to time." 456 F.3d 645, 649 (6th Cir.2006).

Not one of these cases demonstrates an instance in which "from time to time" was used to modify "outstanding balance due" to create a single payment, interest-bearing loan. To the contrary, in each instance where the loan payment structure was clear from the court's opinion, the phrase "outstanding balance due from time to time" referred to an interest-bearing loan with multiple periodic payments. Therefore, despite Cashland's assertions, the industry use of the phrase "outstanding balance due from time to time" occurs in loans with multiple payments and cannot be used to prove that the OMLA permits single-installment loans, much less the payday loans with triple-digit APRs that the General Assembly decided to eliminate by enacting the STLA.

K. <u>This Court Should Not Be Expected to Save Cashland From Illegal Business Operations that Constituted Subterfuge to Evade the Short-Term Loan Act</u>

Cashland ends its Brief with a warning to this Court not to "expose" Ohio's payday lending industry to "enormous liability for hundreds of thousands of transactions that occurred throughout Ohio for years." Appellant's Brief at 32. Cashland neglects to mention that lenders who issued payday loans in Ohio after November 2008—when the General Assembly and Ohio voters banned those loans—made a deliberate business decision to violate the law. This was a calculated business risk, in which Cashland gambled that it could circumvent the law with impunity. This Court should find that since 2008, Cashland and other Ohio payday lenders have conducted an illegal lending business—operating without the proper licenses, making illegal loans at triple-digit annual percentage rates, and trapping countless borrowers in debt.

The Short-Term Loan Act specifically prohibits lenders from engaging in "any device or subterfuge to evade the requirements of" the STLA. R.C. 1321.41(J). Yet since 2008, and as exemplified by Cashland's loan to Rodney Scott, Cashland has made high-cost, short-term, single-installment, payday loans in deliberate circumvention of the STLA.

Cashland has engaged in device and subterfuge to evade the STLA by scheming to obtain OMLA licensing and by issuing payday loans under the guise of the OMLA, in brazen disregard of the STLA. As set forth in the Statement of Facts above, Cash America's November 2008 press release and 2008 filing with the Securities and Exchange Commission reveal that Cashland began offering payday loans pursuant to the OMLA specifically to avoid the restrictions of the STLA. By its own admissions, Cashland has deliberately evaded the STLA's requirements. The trial court correctly found that "[u]sing an [O]MLA registration as a pretext to make these loans is an evasion of the Short Term Loan law." Magistrate's Decision at 3. This Court should reach the same conclusion.

CONCLUSIONS OF LAW

The heart of the issue in this case is whether payday loans can be made under the OMLA, when the Ohio General Assembly and voters have expressly restricted payday loans by enacting and upholding the Short-Term Loan Act. This Court cannot allow Cashland and the other members of the payday loan industry to continue evading the law of the state of Ohio and the clear policy expressed by the legislature and Ohio voters. To that end, the undersigned Amici request that this Court adopt the following conclusions of law:

I. CONCLUSIONS REGARDING CASHLAND'S PROPOSITION OF LAW I

This Court should find that all lenders of payday loans—short-term, unsecured, single-installment, consumer loans for small dollar amounts at triple-digit APRs—are required to obtain STLA licensing and comply with STLA limitations. Even if the Court were to agree with Cashland that the Ohio Mortgage Loan Act is a broad statute that generally permits registrants to make single-installment, interest-bearing loans, the Court should nevertheless find that payday loans cannot be made under the OMLA, because payday loans are specifically regulated by the STLA.

Although the Ninth District Court of Appeals reached the broad conclusion that the OMLA permits interest-bearing loans only where interest is "computed, charged, and collected from time to time" (Ninth Dist. Op. at ¶ 12), this Court can reach a more narrowly tailored conclusion that will uphold and give effect to the General Assembly's public policy decision to restrict payday loans, as clearly expressed in the Short-Term Loan Act.

II. CONCLUSIONS REGARDING CASHLAND'S PROPOSITION OF LAW II

The enactment of the Short-Term Loan Act reflects the Ohio legislature's public policy decision to limit payday loans, a legislative decision that should not be overturned by the judiciary. Moreover, Ohio voters' approval of the STLA should be recognized and affirmed by this Court. Cashland's second proposition of law is that the Short-Term Loan Act does not prohibit Ohio Mortgage Loan Act registrants from making short-term single-installment loans under the OMLA. Appellant's Brief at 24. As addressed in detail above, however, the STLA was enacted to regulate exactly the type of short-term, single-installment, payday loans that Cashland has been making under the guise of an OMLA license. In addition, the STLA was not designed to be one of several statutes regulating "single-installment" loans. Rather, the express purpose of the STLA was to be the statute that would strictly regulate—or, in the words of Ohio legislators, even "eliminate" or "ban"—payday loans in Ohio. This Court should uphold that legislative decision.

*　　　　　*　　　　　*

For all of the reasons set forth in this Brief, the undersigned Amici respectfully request that the Court affirm the decision of the Ninth District Court of Appeals.

Respectfully Submitted,

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as per telephone authorization
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CERTIFICATE OF SERVICE

I hereby certify that on July 29, 2013, a copy of this Brief was served by regular mail upon the following:

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APPENDIX

Ohio Governor's Message, June 2, 2008..A-1

OH Gov. Mess., 6/2/2008

Ohio Governor's Message, June 2, 2008

June 2, 2008
Governor of Ohio
2008

6.2.08 - Governor Signs House Bill 545

Columbus, Ohio - Governor Ted Strickland today signed House Bill 545, which establishes stricter regulations for short-term lending practices (payday lending) in Ohio.

"The bipartisan legislation signed today takes a major step toward protecting Ohio consumers who are already struggling with debt by strictly regulating payday lenders and lowering the maximum interest rate for short-term loans," Strickland said.

Sponsored by State Representative Chris Widener, HB 545 caps the interest rate for payday loans at 28 percent, reduced from the current annual interest rate of 391 percent.

The bill also sets a $500 borrowing limit for consumers and restricts borrowers to four loans per year. Additionally, the legislation extends loan terms to 31 days from 14 days.

Strickland today also signed several additional bills recently passed by the Ohio legislature:

Senate Bill 150

State Senator Tom Roberts sponsored SB 150, which allows individuals to use a military identification card as proof of the purchaser's age when buying alcohol. The legislation also revises other state liquor laws.

House Bill 405

State Representative Kevin Bacon sponsored HB 405, which eliminates the requirement that each county board of mental retardation and developmental disabilities maintain a service substitution list and long-term service planning registry. The bill also revises the law governing county boards' waiting lists.

House Bill 331

State Representative Mark Wagoner (now State Senator) sponsored HB 331, which revises the licensure and regulation of maternity homes and obstetric and newborn care facilities.

End of Document

A-1