

ORIGINAL

IN THE SUPREME COURT OF OHIO

|                                  |   |                                |
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| OHIO NEIGHBORHOOD FINANCE, INC., | : |                                |
|                                  | : | Case No. 2013-0103             |
| Plaintiff-Appellant,             | : |                                |
|                                  | : | Appeal from the Ninth Judicial |
| vs.                              | : | District Court of Appeals      |
|                                  | : | Case No. 11CA010030            |
| RODNEY SCOTT,                    | : |                                |
|                                  | : |                                |
| Defendant-Appellee.              | : |                                |

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**REPLY BRIEF OF PLAINTIFF-APPELLANT  
OHIO NEIGHBORHOOD FINANCE, INC.**

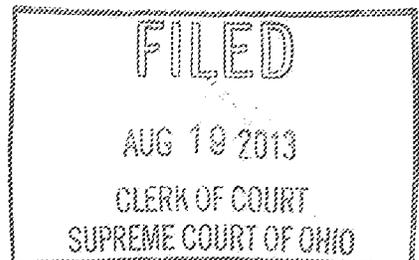
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## INTRODUCTION

*“[T]his court does not sit as a superlegislature to amend Acts of the General Assembly. Courts do not have the authority to ignore, in the guise of statutory interpretation, the plain and unambiguous language in a statute.... The remedy desired ... from this court must be obtained from ... the General Assembly.”*

*[Board of Edn. of Pikedelta-York School Dist. v. Fulton Cty. Budget Comm., 41 Ohio St.2d 147, 156 (1975)]*

But remarkably, that’s exactly what Amici Legal Aid Societies and Center of Responsible Lending ask this Court to do – **to act as a superlegislature to rewrite both the Short Term Loan Act (“STLA”) and the Mortgage Loan Act (“MLA”)** in order to comport with Amici’s misguided view of the STLA’s “intent.” Amici request the Court to add an exclusivity provision to the STLA for all “payday” loans and to craft a new legislative definition of “payday” loans found nowhere in the statute. Then, based on the judicially rewritten STLA, Amici ask the Court to create a special carve-out in the MLA precluding “payday” loans that also doesn’t exist.

Amici’s request for this Court to rewrite the law is as bold as it is inappropriate:

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 ... 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....

[Legal Aid Brief at 45 (emphasis in original)]

In other words, Amici are asking this Court to do what the **General Assembly chose not to do** when it enacted H.B. 545, when it expressly permitted short-term lenders to make loans under lender licensing statutes other than the STLA in Section 4(B) of H.B. 545, when it rejected

the Department of Commerce's proposed language to add to H.B. 545 that would have prohibited short-term loans under the MLA, when it rejected H.B. 209's proposed amendment to curtail short-term MLA loans in 2009, and when it has continued for years to acquiesce in the Department's well-known, longstanding policy of approving single installment loans of short duration under the MLA.

In short, Amici are asking this Court to emasculate the fundamental separation of powers between branches of government and to become a superlegislature. Amici can only do so by asking the Court to:

- Ignore the plain language of both the MLA and STLA. In fact, Amici do not even defend the Ninth District's ruling below that R.C. 1321.51(F)'s definition of an "interest-bearing loan" somehow does not permit single installment loans. [Legal Aid Brief at 40-41, 45-46]
- Ignore basic rules of grammar and statutory construction, such as the Rule of the Last Antecedent. Indeed, Amici expressly ask the Court to "not decide" this issue – undoubtedly because it exposes the court of appeals' fundamental misreading of the MLA. [Legal Aid Brief at 41-42]
- Ignore the true legislative history of H.B. 545, which shows the STLA was **not** intended to be the exclusive lending authority for single installment loans of short duration made by lenders previously licensed under the Check Cashing Lender Act. *See* Section II below at page 10.
- Ignore the Department of Commerce's longstanding policy of permitting single installment loans of short duration under the MLA, buttressed by the General Assembly's knowing acquiescence in the Department's position.

- Ignore the Attorney General’s 2008 Opinion No. 2008-036, which as Amici concede, “concluded that loans made pursuant to other licenses are not subject to the STLA...” [Legal Aid Brief at 35]

Amici are quick to point out that “[t]he General Assembly sets public policy” and “[t]he legislative process and accountability are the cornerstones of the democratic process which justify the General Assembly’s role as lawmaker.” [Legal Aid Brief at 31] But Amici’s request for this Court to create special statutory provisions and carve-outs for “payday” loans is fraught with legislative policy decisions. For example, how does a court define a “payday” loan – a term found nowhere in either the STLA or the MLA? If a court were to adopt Amici’s amorphous definition, what is considered “short term”? Appellant Ohio Neighborhood Finance, Inc. (“Cashland”) makes MLA loans having terms greater than 30 or 40 days. Are those “short term”? If so, does the newly defined “short-term loan” include tax refund loans or crop loans? Or, what is a “small dollar amount”? Is \$1,000 or \$1,250 a small dollar amount? And, which definition of “APRs” would a court adopt when ascertaining a loan’s “APR”? The MLA’s definition of APR in R.C. 1321.51(K) (which does not include statutorily permissible fees)? Or, the much different federal Truth in Lending Act’s definition of APR, which is what Amici refer to? And is a 20-day unsecured consumer loan of \$200 a “payday” loan if it is repayable in more than one installment?

These public policy decisions are for the General Assembly, not the Court. As this Court itself holds: “[W]e may not add such requirements to [the statute] under the guise of statutory interpretation, for as we [have previously] stated ... **‘[t]his court is not now, nor has it ever been, a judicial legislature.’** *Davis v. Davis*, 115 Ohio St.3d 180, 2007-Ohio-5049, ¶ 20 (emphasis added).

## ARGUMENT

### I. Amici's Bias Causes Them To Distort – And Even Misrepresent – The Facts

Amici's obvious disdain for what they dub the "payday" lending industry not only causes them to lose sight of basic principles of law. Their bias also leads them to try to stir the emotions of the Court's members with policy vilifications and unreliable articles against "payday" lenders that have no place in a court of law and do not apply to Cashland.

Amici even let emotions get in the way of the facts and the true legislative history of 2008 Am.Sub.H.B. 545. Amici's points are not only unpersuasive, they are not true. Let's look at Amici's most glaring misstatements.

#### A. The Intent Of H.B. 545 Was Not To "Eliminate" Single Installment Loans Of Short Duration In Ohio

Amici state: "After [H.B. 545's] passage, the bill's sponsor, Rep. Chris Widener, stated, 'It's obvious that we will, with this bill, eliminate check cash lending from Ohio law.'" [Ctr. for Responsible Lending Brief at 1 (emphasis added)] But the truth is that Rep. Widener made this statement two weeks **before** H.B. 545 was amended on May 14, 2008 by the Senate Committee on Finance and Financial Institutions to make it clear that the STLA is not the exclusive lending authority for lenders of single installment loans of short duration formerly licensed under the Check Cashing Lender Act ("CCLA"). *See* Section 4(B) of H.B. 545.

After the Senate's compromise amendment was approved by the General Assembly, Rep. Widener changed his tune. In fact, when H.B. 545 was passed, Rep. Widener actually encouraged short term lenders to consider options other than the STLA – like the Small Loan Act:

Our message to [former CCLA lenders] is to try again. Try again, because there is an origination fee, there is interest, there is other sorts of things available under the Small Loan Act. . . . **When we took a look at**

**it, it seemed to provide a pretty good framework for short-term-type lending.**

[77 Ohio Report No. 106, Gongwer News Serv.  
(June 2, 2008) (emphasis added)]

In other words, the very sponsor of H.B. 545 openly acknowledged that the amended bill was **not** intended to be the exclusive authority for lenders formerly licensed under the CCLA to make “short-term-type lending” products. This directly contradicts Amici’s position (and the court of appeals’ decision below) about the intent of the STLA. Perhaps that is why Amici make no mention of this critical public statement by H.B. 545’s sponsor upon its passage and instead misstate to this Court that “[a]fter [H.B. 545’s] passage, the bill’s sponsor, Rep. Chris Widener, stated, ‘It’s obvious that we will, with this bill, eliminate check cash lending from Ohio law.’”

**B. The Referendum Vote Did Not Approve The Short Term Loan Act; The Vote Was Solely About The Repeal Of The Check Cashing Lender Act**

The primary theme throughout both Amici briefs supporting Appellee Rodney Scott is that in the 2008 referendum vote, Ohio voters spoke in a “clear voice in favor of imposing the stringent restrictions set forth in the STLA upon payday lenders like Cashland.” [Ctr. for Responsible Lending Brief at 10] Amici repeatedly tell this Court that the Referendum overwhelmingly “approve[d] the Short Term Loan Act” and imposed its limits on all “payday” lenders. [Legal Aid Brief at 12, 33] [Ctr. for Responsible Lending Brief at 2, 9-10, 25-28]

But the undeniable truth is that the 2008 referendum did not even seek approval or disapproval of the STLA – part of Section 1 of H.B. 545. Instead, the sole issue for the referendum was whether the General Assembly’s repeal of the **Check Cashing Lender Act** in Section 3 of H.B. 545 should be approved or disapproved. The one and only question on the referendum ballot was simply: “**Shall Section 3 of H.B. 545 be approved?** ○ Yes ○ No” [Ohio

Secretary of State, *Ohio Issues Report: State Ballot Information for the November 4, 2008 General Election*, at 17 (emphasis added)]<sup>1</sup> And, the full text of Section 3 of H.B. 545 is:

That sections 1315.35, 1315.36, 1315.37, 1315.38, 1315.39, 1315.40, 1315.41, 1315.42, 1315.43, and 1315.44 of the Revised Code [the CCLA] are hereby repealed. [Apx. A-58]

So, contrary to what Amici have misrepresented to this Court, the 2008 referendum vote did nothing more than approve H.B. 545’s repeal of the CCLA. The vote sheds no light on the intent behind the STLA’s enactment because the referendum vote had nothing to do with that statute.

For the same reason, Amici’s claim that Cashland and other lenders organized the referendum “seeking to undo the STLA” is pure bluster. [Ctr. for Responsible Lending Brief at 9] Lenders cared about the repeal of the CCLA because they stood to lose significant revenues compared to those available under alternatives like the MLA and Small Loan Act. Lenders didn’t need to “undo the STLA” as part of the referendum because the plain language of the MLA and STLA, Section 4(B) of H.B. 545, and the Department made it clear that the STLA was just one of three alternative licensing statutes for single installment loans of short duration.

Indeed, even the proponents of the CCLA’s repeal acknowledged this. The official explanation and argument in favor of upholding the repeal of the CCLA in the 2008 referendum stated that approval of the CCLA’s repeal would not mean the loss of jobs in the lending industry because “[m]ost of Ohio’s payday lenders already have applied for new state licenses to offer other types of loans in Ohio. . . .” [Ohio Secretary of State, *Ohio Issues Report: State Ballot Information for the November 4, 2008 General Election*, at 18 (emphasis added)] This, of course, was referring to lenders’ growing number of license applications under the MLA and

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<sup>1</sup> Available at [http://www.sos.state.oh.us/sos/upload/publications/election/Issues\\_08.pdf](http://www.sos.state.oh.us/sos/upload/publications/election/Issues_08.pdf) (accessed July 31, 2013).

Small Loan Act, which had been widely publicized for several months before the 2008 general election. *See, e.g.*, 77 Ohio Report No. 106, Gongwer News Serv. (June 2, 2008).

**C. Cashland Is Not Making The Same Loans That Were Previously Made Under The CCLA**

Amici contend that Cashland is “evading” the law and rendering H.B. 545 “meaningless” because it is making the “same” loans that were made under the now-repealed CCLA. [Legal Aid Brief at 5, 14-15, 19-20] But this is simply not true. A MLA loan is a different loan product than the loans previously made under the CCLA, which typically had significantly more generous fees and interest. *Compare* former CCLA’s R.C. 1315.39(B) and R.C. 1315.40(A) with MLA’s R.C. 1321.57(H)(1)(c), R.C. 1321.57(J), and R.C. 1321.571.

Indeed, the evidence is undisputed that Cashland’s “fees are less” under the MLA than those that were charged under the CCLA. [Tr. at 42] The interest and fees allowed by the MLA are **40% lower** for Appellee Scott’s loan at issue in this case than the fees and interest permitted under the prior CCLA. In fact, H.B. 545’s adoption cut back short-term lenders’ revenues so much that they closed approximately 40% of their total Ohio locations. Cashland itself closed 43 Ohio stores as a direct result of H.B. 545’s passage – they simply became uneconomic given the reduced fees and interest available under the MLA.

An MLA loan is not at all the same as a CCLA loan.

**D. The MLA Does Not Permit A “Cycle Of Renewing High Fee Loans”**

Amici repeatedly make the unfounded accusation that “the payday lending industry only profits when borrowers fall into a cycle of renewing the high-fee loans, one after another.” [Ctr. for Responsible Lending Brief at 28-29] Amici even claim that “the payday loan business model fundamentally relies” on the “additional high fees and little or no payment of principal” for these refinancings “for its profitability.” [*Id.* at 29-30] [Legal Aid Brief at 3]

But this is verifiably untrue for a MLA loan – the sole subject of this case. Amici fail to apprise the Court that the MLA expressly prohibits the very cycle of charging high fees for refinanced unpaid loans that Amici complain about. **R.C. 1321.57(J)(2) prohibits a MLA registrant from charging any origination fees on the unpaid principal amount of a loan that is refinanced “within ninety days after the date of the refinanced loan.”** And, R.C. 1321.59(B) adds an extra consumer protection by prohibiting a MLA registrant from entering into more than one loan with a person “at the same time for the purpose or with the result of obtaining greater charges” than those otherwise permitted by the MLA.

Amici’s suggestion that Cashland’s business model is based on customer defaults is nonsense. Cashland’s default rates in Ohio are consistently less than 5% every year. No one’s business model is based upon defaults because lenders lose money when a customer defaults. That is why Cashland works so hard to avoid them. For instance, Cashland offers an Extended Payment Plan to all customers – just as it did to Scott. Under this plan, if a customer informs Cashland that she is not able to repay the loan when it becomes due, Cashland extends the due date by four months and permits the customer to repay the loan in four monthly installments – **without charging any extra interest or fees.** [Appellant’s Supp. at 2, 12-14]

**E. Cashland Does Not “Threaten Criminal Prosecution”**

Amici next make the groundless assertion that when a customer has insufficient funds to repay a loan of short duration, the lender “typically” “reports that person to the local prosecutor for criminal prosecution” for writing bad checks. [Ctr. for Responsible Lending Brief at 5, 22, 31] Amici go so far as to claim that borrowers’ “fear of criminal prosecution” is a “key component of the payday lending business model.” [*Id.* at 29] This is an outright fabrication. Cashland has never authorized a criminal prosecution, and is not aware of a single situation in

which it has threatened a customer with criminal prosecution, for simply defaulting on a loan. Nor can Amici cite to a single example because it does not exist.

In fact, Amici neglect to apprise the Court that the MLA strictly prohibits its registrants from engaging in the type of unwarranted threats of criminal prosecution that Amici speak of. R.C. 1321.591 of the MLA requires its registrants to comply with the federal Fair Debt Collections Practices Act (“FDCPA”), which, in turn, prohibits a debt collector from representing or implying that “nonpayment of any debt will result in the arrest or imprisonment” of any person. 15 U.S.C. 1692e(4). So, if a MLA lender were really engaging in the type of conduct that Amici would have this Court believe is regularly occurring, the lender would risk losing its MLA license. For Amici to suggest that the MLA does not provide these protections is quite troubling.

**F. Cashland Does Not Charge Anything Remotely Close To 680% APR**

Amici paint Cashland as a villain for supposedly charging “680% APR” on a “typical \$100” MLA loan. [Ctr. for Responsible Lending Brief at 2-3, 24] But Amici are again presenting falsehoods as facts. Cashland has never charged anything remotely close to 680% APR under the MLA, and Amici have no evidence to the contrary. And 97% of Cashland’s loans are for a financed amount greater than \$100 – so a loan of just \$100 is hardly “typical.”

Amici also suggest that Cashland “charge[s] Ohioans higher APR’s than the 391% available under the [former CCLA].” [*Id.* at 3, 22] But the reality is that Cashland’s MLA’s fees and interest for a typical loan are substantially lower than those that were permitted under the now-repealed CCLA. The **facts** before the Court are undisputed: for a \$500 loan, Scott agreed to pay a total of \$45.16 of interest and fees, consisting of \$5.16 of interest (if he didn’t prepay), a \$10 credit investigation fee, and a \$30 origination fee. These fees and interest are not only

normal for any similar financial transactions, they are **40% lower** than those previously permitted by the CCLA.

In sum, Amici's distortion and misrepresentations of the facts undermine the legitimacy of their position in this case. Cashland welcomes the opportunity to fully vet the facts and legal issues. But that can't happen unless Amici present them in a responsible and truthful manner.

**II. The Short Term Loan Act Does Not Prohibit MLA Registrants From Making Single Installment Loans Of Short Duration Authorized By The MLA**

**A. The STLA's Purpose Was To Replace The CCLA, One Of Three Licensing Alternatives For Single Installment Loans Of Short Duration – Not To Eliminate Single Installment Loans Under The Two Alternative Statutes**

The foundation for Amici's position is their assertion that "[t]he statutory purpose of the STLA" was that "any lender wishing to make payday loans in Ohio must obtain STLA licensing and comply with STLA requirements." [Legal Aid Brief at 33] But nothing supports Amici's (and the court of appeals') misguided notion of the intent behind the enactment of the STLA. The General Assembly knew how to enact such a statute, but it did not do so.

As the case cited by Amici holds, legislative intent is first determined from "the statutory language, reading words and phrases in context and construing them according to the rules of grammar and common usage." *State ex rel. Steele v. Morrissey*, 103 Ohio St.3d 355, 2004-Ohio-4960, ¶ 21. **And, not a word of the STLA limits, let alone prohibits, a single installment loan of short duration authorized by the MLA.** They are simply two alternative licensing statutes – as further confirmed by the Department's consistent application of the two statutes.

Amici try a play on the words of the statute by asserting the "Short Term Loan Act" was obviously intended to be the exclusive lending authority for all "short-term loans." A publisher's editorial title of an Act, however, cannot override the clear language of the statute. Amici rely on R.C. 1321.36(A)'s prohibition against making "short-term loans" without a STLA license.

[Legal Aid Brief at 32] [Ctr. for Responsible Lending Brief at 9] But Amici fail to mention that under the STLA, a “short-term loan” is **not** any loan of short duration, as Amici suggest. Instead, the STLA has a more limited definition for “short-term loan”: a loan “made pursuant to Sections 1321.35 to 1321.48 of the Revised Code [the STLA].” R.C. 1321.35(A). In other words, the STLA applies only to loans made by STLA licensees or those required to be licensed under the STLA because they are purporting to make a loan pursuant to the STLA’s lending authority. The STLA simply does not apply to loans made by MLA registrants and authorized by the MLA.

The plain language of H.B. 545 – the bill that enacted the STLA – and the bill’s legislative history support this plain reading of the statute. Section 4(B) of H.B. 545 made it clear that the General Assembly did **not** intend the STLA to be the exclusive lending authority for all single installment loans of short duration, by allowing former CCLA lenders to become licensed under a lending statute **other than** the STLA. If the General Assembly had really intended the STLA to be the exclusive lending authority for lenders previously licensed under the CCLA, the General Assembly would not have expressly permitted those lenders to become licensed under a **different** lending statute. Indeed, Amici admit as much when they concede:

**“[T]he legislative history indicates that Section 4 [of H.B. 545] was added by the Senate Finance and Financial Institutions Committee ... in May 2008 to enable payday lenders to switch to other loan products.”**

[Legal Aid Brief at 27-28 (emphasis added)]

Consistent with this purpose, that’s exactly what some of the lenders formerly licensed under the CCLA did. They obtained from the Department alternative licenses under the MLA and Small Loan Act and, in good faith reliance on the Department’s approval, offered more restricted loan products authorized by those statutes – like the Scott loan in this case.

Amici's reliance on statements made by former Governor Strickland and Rep. Widener about protecting Ohioans from a "dangerous product" are red herrings because those statements are obviously about the repeal of the more expensive loans under the now-repealed CCLA. In fact, Amici neglect to mention that on the day Governor Strickland signed H.B. 545, he responded to a question about the bill's impact on consumers who need emergency cash by stating that his "hope is that this legislation will result in alternatives becoming available." 77 Ohio Report No. 106, Gongwer News Serv. (June 2, 2008) (emphasis added). Those "alternatives" are the regulated loans under the MLA and Small Loan Act. In fact, the same Gongwer Ohio Report that reported the Governor's statements upon his signing of H.B. 545 noted the Department had already received "199 applications from check cashing lenders for Small Loan Act licenses and 52 for Mortgage Loan Act licenses." [*Id.*]

Amici next assert that "Section 4 [of H.B. 545] 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." [Legal Aid Brief at 28 (emphasis added)] But Amici's reliance on the Small Loan Act gets them nowhere for two reasons. First, by conceding that the Small Loan Act is a lending alternative for former CCLA lenders, Amici contradict their own position that the STLA was intended to be the **exclusive** regulation for all single installment loans of short duration. Amici now admit that's not true. Second, Amici's focus on the Small Loan Act is a distinction without a difference because they cannot deny that the provisions of the Small Loan Act that allow short-term, single installment loans **are identical to the MLA's provisions at issue in this case**. Compare R.C. 1321.01(A)(6) and 1321.13(A) with R.C. 1321.51(F) and 1321.57(A).

**B. The STLA's Status As One Of Three Alternative Lending Authorities For Single Installment Loans Is Buttressed By The General Assembly's Rejection Of Amendments That Would Have Prohibited Such Loans Under The MLA**

Significantly, Amici do not deny that while H.B. 545 was being considered by the Senate in May 2008:

- The Department notified state senators that if the STLA was enacted, lenders previously licensed under the CCLA would begin making loans under the MLA and the Small Loan Act.
- The Department, on May 8, 2008, submitted language to the General Assembly that would amend the not-yet-adopted H.B. 545 to prohibit short-term, single installment loans under the MLA and the Small Loan Act.
- The General Assembly never adopted the Department's proposed language. [Legal Aid Brief at 24] Quite the opposite – armed with the knowledge that the MLA and Small Loan Act provided alternative lending authority for single installment, short-term loans, the General Assembly added Section 4(B) to H.B. 545 to make it clear that the STLA was not the exclusive lending authority for lenders formerly licensed under the CCLA.

Amici also do not dispute that a year after H.B. 545 was enacted, the General Assembly again rejected another proposed statutory amendment that would have effectively eliminated single installment, short-term loans under the MLA. 2009 H.B. 209. As Amici put it, that bill never made it out of committee.

Amici cite a thirty-year-old case to discredit the importance of what they call this “legislative inaction.” [Legal Aid Brief at 25] But just three months ago, this Court, in *Anderson v. Barclay's Capital Real Estate, Inc.*, 136 Ohio St.3d 31, 2013-Ohio-1933, held that the General

Assembly’s rejection of an amendment to include mortgage servicers within the ambit of the Consumer Sales Practices Act (“CSPA”) supported the Court’s conclusion that mortgage servicers are not covered by the CSPA. *Id.* at ¶¶ 23-25. The logic here is no different: The General Assembly’s rejection of two amendments to prohibit single installment loans under the MLA supports the conclusion that the General Assembly intends for those loans to still be permitted under the MLA.

Amici are left with literally nothing to support their fundamental position that the STLA was intended to be the exclusive lending authority for all single installment loans of short duration – because it wasn’t.

### **III. The Plain Language Of The Mortgage Loan Act Permits Its Registrants To Make Single Installment, Interest-Bearing Loans**

#### **A. Amici Either Concede Or Don’t Respond To Most Of Cashland’s Points**

Amici’s briefs are more significant for what they don’t say than for what they do say. Amici either concede or do not dispute many of the points Cashland made in its opening brief that compel the conclusion that the MLA authorizes its interest-bearing loan to Scott:

- R.C. 1321.57(A) of the MLA broadly authorizes its registrants to make “interest-bearing” loans without requiring a minimum limit on the loan term or the number of installments by the borrower. An “interest-bearing loan,” like the one made to Scott in this case, is simply “a loan in which the debt is expressed as the principal amount and interest is computed, charged, and collected on unpaid principal balances outstanding from time to time.” R.C. 1321.51(F).
- As Amici concede, when the General Assembly amended the MLA in 1979 to allow MLA registrants to make “interest-bearing” loans, “it **deleted** the then-existing language

(under the prior R.C. 1321.57(A)) that all MLA loans must be ‘repayable in substantially equal installments.’”<sup>2</sup> [Ctr. for Responsible Lending Brief at 12 (emphasis added)]

- Contrary to the Ninth District’s decision, Amici now concede that “the MLA no longer requires all loans to be repaid in ‘substantially equal installments.’” [Ctr. for Responsible Lending Brief at 12 (emphasis added)]

- Since the 1979 amendment to the MLA, its registrants have been making many different types of single installment loans with the Department’s approval.

- The Department reviewed and approved Cashland’s form for single installment loans under the MLA.

- The Ninth District’s misreading of the MLA’s standard definition of an “interest-bearing loan” makes Ohio an aberrational outlier in the world of finance and reverses thirty years of MLA interpretation and enforcement by the Department.

- The court of appeals found an ambiguity in R.C. 1321.51(F) only because it disregarded the well-settled Rule of the Last Antecedent, which this Court has adopted as a basic rule of grammar in statutory construction cases. *Hedges v. Nationwide Mut. Ins. Co.*, 109 Ohio St.3d 70, 2006-Ohio-1926, ¶ 24.

- When R.C. 1321.51(F) is read correctly, no ambiguity exists. A loan is interest-bearing where, as here, the debt is expressed as the principal amount, and interest is determined based on the then-existing principal balance. Such a loan is an “interest-bearing” loan authorized by the MLA regardless of the number of scheduled installments.

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<sup>2</sup> Contrary to Amici’s assertion about the alleged lack of short-term, single installment loans historically in Ohio, lenders could make such loans on an unregulated basis several years before the MLA began permitting its registrants to make them in 1979. *See* R.C. 1343.01(B)(5) (permitting unsecured loans payable in “one installment” since 1975).

- Despite the General Assembly’s knowledge of the Department’s consistent approval of single installment MLA loans of short duration for years, the General Assembly has not amended the MLA or the STLA to prohibit them. *Maitland v. Ford Motor Co.*, 103 Ohio St.3d 463, 2004-Ohio-5717, ¶¶ 25–26.

- Not only has the General Assembly left intact the Department’s consistent policy of allowing single installment MLA loans, it has affirmatively rejected efforts to overturn the Department’s regulatory position. **The General Assembly rejected amendments to the MLA in both 2008 and 2009 that would have prohibited single installment MLA loans of short duration.** *See* 2009 H.B. 209.

Amici’s concessions and lack of response to all of these points supporting the MLA’s authorization of Cashland’s loan to Appellee Scott are telling. Perhaps that is why Amici are forced to resort to out-of-place policy arguments and distortion of the facts.

**B. The MLA’s Authorization Of Interest-Bearing Loans “Notwithstanding” Any Other Statutes Means What It Says**

Amici cannot deal with the MLA’s express authorization of “interest-bearing” loans “notwithstanding any other provisions of the Revised Code.” R.C. 1321.57(A). So, Amici try to sidestep the “notwithstanding” clause by asserting it applies only to “statutes already in existence,” but not to any “future legislation” like the STLA. [Legal Aid Brief at 40]

This position not only contradicts the plain language of the MLA’s clause stating it applies “notwithstanding **any** other provisions,” it directly conflicts with this Court’s own precedent. In *State ex rel. PIA Psychiatric Hospitals, Inc. v. Ohio Certificate of Need Review Board*, 60 Ohio St.3d 11 (1991), this Court held that a pre-existing “notwithstanding” clause in a statute enacted in 1987 means what it says and trumped a statute enacted two years **later** in 1989.

*Id.* at 17-18. The Court explained that the earlier statute containing the “notwithstanding” clause has “unambiguous terms” and thus “needs no interpretation.” *Id.* at 18.

So too here. R.C. 1321.57(A)’s authorization of interest-bearing loans “notwithstanding any other provisions of the Revised Code” means the STLA does not prohibit interest-bearing MLA loans made by MLA registrants – particularly in view of the STLA’s lack of any reference to the MLA, much less an exclusivity clause that overrides loans authorized by the MLA.

**C. The MLA Provisions And Regulations Cited By Amici Are Red Herrings**

Amici contend the MLA requires multiple-installment loans because it contains “22 references” to “installment” or “installments.” [Ctr. for Responsible Lending Brief at 14] This is flat wrong for two reasons. First, as a matter of statutory construction, “the plural includes the singular.” R.C. 1.43(A). And, the word “installment” does not necessarily presuppose more than one payment. *See, e.g.*, R.C. 1343.01(B)(5) (loan payable in “one installment”). Second, Amici can’t come up with **any language** requiring more than one “installment” for “**interest-bearing**” loans. They cite to R.C. 1321.57(C)(1)(b)’s reference to a “succeeding installment,” [Ctr. for Responsible Lending Brief at 14], but Amici omit the part of this provision that expressly states it is a permissive “alternative” to the method for computing interest under Section 1321.57(C)(1)(a) – the one used by Cashland and consistently approved by the Department of Commerce.

Amici also claim that Ohio Adm.Code 1301:8-3-07(G)(2) “explicitly forbids” any 14-day single payment loan under the MLA. [Ctr. for Responsible Lending Brief at 15-16] But this is also not true. That regulation, on its face, is inapplicable here because it only applies to “non-amortized or partially amortized” loans, and the Scott loan is neither of these. A non-amortized loan is a loan for which a scheduled payment covers interest only, and all principal is paid in a

lump sum at maturity. See <http://thelawdictionary.org/non-amortized-loan/>. A partially amortized loan is where a scheduled payment covers interest and less than a fully amortized principal amount, so that a lump sum payment of remaining principal is due at the end. In contrast to a non-amortized or partially amortized loan, the scheduled payment for the Scott loan covered all interest and principal with no subsequent principal payment due. Ohio Adm.Code 1301:8-3-07(G)(2) is simply not applicable to single installment loans.

In sum, MLA undeniably authorizes any “interest-bearing” loan and contains not a single word requiring such a loan to have multiple installments.

**D. Amici’s Reliance On Judicial Estoppel Is Nonsense**

Amici next take the approach, “If you can’t beat them, try to estop them.” But Amici’s reliance on judicial estoppel fares no better than their other arguments. “[J]udicial estoppel must be applied with caution to avoid impinging on the truth-seeking function of the court.” *United States v. Hammon*, 277 Fed. Appx. 560, 566 (6th Cir. 2008). The doctrine therefore applies only in the rare situation where a party, through “cynical gamesmanship,” gains an unfair “advantage” through the “manipulative assertion” of inconsistent positions. *Advanced Analytics Labs., Inc. v. Kegler, Brown, Hill & Ritter*, 148 Ohio App.3d 440, 2002-Ohio-3328, ¶ 37 (10th Dist.); *Hammon*, 277 Fed. Appx. at 566.

Here, Amici have no basis to accuse Cashland of cynical gamesmanship or of gaining an unfair advantage by loosely using the word “precomputed” in prior cases that simply decided whether Cashland should receive post-judgment interest at the agreed contractual rate authorized by the MLA. In the current case, when the issue actually has been raised, Cashland consistently (and correctly) informed the court that the Scott loan is an “interest-bearing” loan under the MLA, not a “precomputed” loan for which the promise to repay the debt is always expressed as a

fixed amount of both principal and interest **regardless of prepayment**. R.C. 1321.51(G). [Tr. at 105] The type of MLA loan is a legal determination based on applicable statutory definitions and nothing else.

**E. Amici Improperly Ask The Court To Legislate From The Bench**

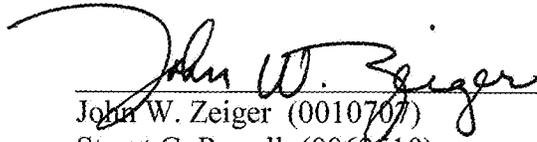
Significantly, the Legal Aid Amici do not dispute that the MLA permits – and has historically permitted – short-term, single installment “interest-bearing” loans. [Legal Aid Brief at 40-41, 45-46] They don’t even try to defend the Ninth District’s misreading of R.C. 1321.51(F)’s definition of an “interest-bearing” loan that would prohibit all types of single installment MLA loans. Instead, Amici ask the Court to do something most extraordinary and outside its judicial function: to legislate from the bench by carving out a special exception in the MLA for a vague new category of “payday” loans that exists nowhere in the statute.

**CONCLUSION**

The plain wording of the MLA, the STLA and Section 4(B) of H.B. 545, the Department’s longstanding administrative construction and enforcement of both statutes, the legislative history of H.B. 545, including the General Assembly’s rejection of the Department’s proposed amendment in 2008, the General Assembly’s rejection of H.B. 209 in 2009, and the Attorney General’s opinion in 2008 all compel the conclusion that Cashland’s interest-bearing loan to Scott is permitted by the MLA and not preempted by the STLA.

Cashland therefore requests the Court to: (i) hold that its loan agreement with Scott is enforceable under the MLA, (ii) reverse the court of appeals’ decision and vacate the judgment of the trial court, and (iii) enter judgment in Cashland’s favor in the amount of \$510.16 (the \$545.16 total amount owed as of December 19, 2008 less the \$35 Scott subsequently paid), which will dispense with the need for a remand and further proceedings.

Respectfully submitted,

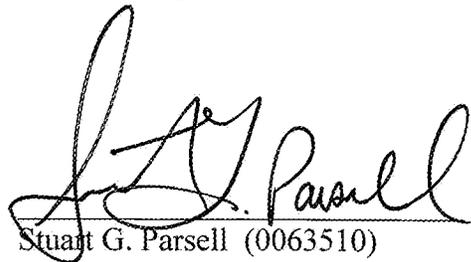


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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing was served via U.S. mail, postage prepaid, this 19th day of August, 2013 upon Appellee Rodney Scott, 250 13th Street, Elyria, Ohio 44035, and upon each Amici of record by service upon their counsel of record via e-mail.



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