STATE OF MINNESOTA
IN SUPREME COURT

Jewelean Jackson, Ethylon and William Brown, Brenda Doane, and David Williams, on behalf of themselves and all others similarly situated, Plaintiffs, v. Mortgage Electronic Recording Systems, Inc., and Richard W. Stanek in his official capacity as Sherriff of Hennepin County Defendants.	Civil Action No. A08-397 **BRIEF OF AMICUS CURIAE**

Brief of *Amicus Curiae* Civil Rights Scholars and Advocates In Support of Plaintiffs

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Interest of *Amici Curiae*[1]

Housing discrimination did not end with the passage of the Fair Housing Act. Discrimination against racial minorities seeking to rent, buy, and insure houses continues to be an endemic problem across the United States. Pair testing studies continue to show racial steering by realtors in home buying and discrimination in home lending. Margery Austin Turner and Steven Ross, Urban Institute, *Discrimination in Metropolitan housing Markets* (2003); Margery Austin Turner et. al., Urban Inst., *ALL OTHER THINGS BEING EQUAL: A PAIRED TESTING STUDY OF MORTGAGE LENDING INSTITUTIONS* (2002).While overt redlining, the complete denial of credit to minority neighborhoods, seems to be less prevalent than it was forty years ago, research shows that racial minorities receive home loans on worse terms and at a higher cost than similarly situated white mortgagors. Anthony Pennington-Cross et. al, *Credit Risk and Mortgage Lending*, Research Institute for Housing America Working Paper, (2000). Because predatory home loans are extremely likely to lead to foreclosure, racially targeted predatory lending has led to a foreclosure crisis in minority neighborhoods across the country. Roberto Quercia et. al., *The Impact of Predatory Loan Terms on Subprime Foreclosures*, 25, 27 (Working Paper, Jan. 2005).[2] Racially targeted predatory lending, also referred to as "reverse redlining," is the extension of loans on grossly unfavorable terms that target or disparately impact

[1] Pursuant to Minn. R. Civ. App. P. 129.03, *amici* certify that this brief was not authored in whole or in part by counsel for either party to this appeal, and that no other person or entity made a monetary contribution to the preparation or submission of this brief.
[2] Subprime loans with predatory terms, such as ballooning interest rates or prepayment penalties are 20 to 50 times more likely to result in foreclosure than prime loans are. *Id.*

racial minorities.[3] *Mathews v. New Century Mortg. Corp.*, 185 F.Supp.2d. 874, 886-87 (D. Ohio 2002); *Hargraves v. Capital City Mortgage Corp.*, 140 F. Supp.2d 7, 20-2 (D. D.C. 2000); Associates Home Equity Services, Inc. v. Troup, 778 A.2d 529, 536 (N.J. 2001); *S. Rep. No.* 103-169, *U.S. Code Cong. & Admin. News* 1994, 1881 at 1905. Research conducted by *amici* suggests that lending discrimination exists in the Twin Cities and that racially targeted predatory lending is a central part of this lending discrimination.

Amici, housing discrimination researchers and scholars, have an interest in ending housing and lending discrimination, particularly in ending racially targeted predatory lending. In order to effectively identify lending patterns that indicate predatory lending and to identify predatory lenders, *amici* have an interest in protecting the accuracy of records of mortgage assignments in public land records. *Amici's* interest is the public interest in maintaining complete and accurate records of mortgage encumbrances on properties in foreclosure in order to root out lending discrimination and enforce fair lending laws. For this reason, *amici* urge this Court to hold that the Mortgage Electronic Recording System (MERS) is required to file assignments of the ownership of mortgage loans prior to foreclosure by advertisement under Minnesota Statute 580.02.

Summary of Argument

Mortgage Electronic Registration Systems (MERS) has become the de facto privatizer of Minnesota's system of property lien records. MERS' failure to record

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[3] Predatory lending is different from subprime lending. While nearly all predatory loans are subprime, many subprime loans are not predatory.

assignments of mortgage loans prior to foreclosure has removed lending information from public scrutiny which reveals the connections between mortgage brokers, banks, and secondary market participants. While the privatization of public information has, arguably, streamlined the securitization of mortgages, particularly in the subprime or nonconforming market, it has unnecessarily prevented accurate research of lending discrimination. In this era of securitized lending, evaluating the presence of discriminatory lending requires conducting accurate research into the lending practices and patterns of all of the participants in mortgage transactions, especially in transactions that lead to foreclosure.

MERS' failure to record the assignment of mortgage loans prior to foreclosure has prevented research organizations and advocacy groups from identifying mortgage market participants whose predatory lending practices may violate civil rights laws. MERS' failure to record assignments means that public records of foreclosed properties do not accurately list all of the owners of the mortgage. In cases where a broker issues a mortgage in its name and then immediately sells the mortgage to a lender that has agreed to fund the loan, even the name of the primary market participant who provided the initial funding for the loan is unavailable. In all cases, the names of the parties that buy and benefit from the mortgage on the secondary market are unavailable to the public.

MERS' failure to record assignments prior to foreclosure is especially troubling in the context of predatory lending. Brokers and lenders have targeted racial minorities for high cost loans that strip equity out of minority communities and often lead to foreclosure. Mortgage market participants are well aware their Home Mortgage

Disclosure Act (HMDA) lending patterns and are obligated to avoid unfair and racially predatory lending practices. The absence of a public record of the institutions that brokered, originated, and securitized a foreclosed property effectively means that civil rights laws prohibiting racial discrimination in lending cannot be enforced.

Argument

Home mortgages in the post-securitization era are not a simple transaction between a mortgagor and a lender/mortgagee, but rather involve a complex set of overlapping transactions that transform mortgage loans into products that can be sold on Wall Street's bond markets. Many minority borrowers obtain their mortgage loan through a mortgage broker, who secure funding from a lender who makes credit-worthiness decisions and originates the loan. The lender provides the terms of the loan and the terms of the broker's cut of the loan's profit. The loan originator then sells the loan to an entity that bundles the loans into a pool and resells the loan on the secondary market. Secondary market purchasers of predatory loans have encouraged predatory lending by purchasing loans with the knowledge or willful blindness to violations of fair lending laws, spinning off subsidiaries that engaged in racially targeted predatory lending practices, and underwriting loans in ways that encouraged racially targeted predatory lending. *See Bryant v. Mortg. Capital Resource Corp.*, 197 F. Supp.2d 1357 (D. Ga. 2002); Complaint, *Rodriguez v. Bear Stearns*, CV 1816 (D. Conn. Dec. 4, 2007); Comptroller of the Currency, U.S. Dep't of the Treasury, Advisory Letter 2003-3, *Avoiding Predatory and Abusive Lending Practices in Brokered and Purchased Loans,* 2 (2003).

The public has an interest in holding secondary market participants liable for predatory lending because predatory loan originators and brokers are frequently out of business before they can be held responsible for their lending behavior and because secondary markets actors are better equipped than borrowers to detect bad lenders and bad loans. Roundtable: Vendors on New Prevention Tools, New Scams, *Am. Banker*, 11 Dec. 9, 2005; Lisa Keyfetz, *The Home Ownership and Equity Protection Act of 1994*, 18 *Consumer L. Rev*. 151, 168-69 (2005).

When a loan originator is a MERS client, the mortgage document provided to the mortgagor will have the name of the mortgage broker or original lender and the name of MERS, as nominee.[4] In the case of a loan issued through a mortgage broker, neither the document provided to the mortgagee nor the lien entry made on the title in county property records contains the name of the loan originator. When MERS forecloses on a property, it makes no record of the parties that had ownership of the mortgage loan and influenced the terms of the loan. *See* Sharon McGann Horstkamp, *Ready, Set...MERS*, 78 *Title News* 1999.[5]

In order to show how MERS' failure to record mortgage assignments prior to foreclosure prevents accurate research into racially motivated predatory lending, this brief first describes how MERS' presence affects the ability of researchers, advocates,

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[4] The Real Estate Settlement Procedures Act (RESPA) guarantees that mortgagors are entitled to know the name of their servicer, but does not require servicers to inform mortgagors of name of the entity that holds a lien on their property. 12 U.S.C. §§ 2601-2617 (2000).

[5] The author of this article in the American Land Title Association's (ATLA) newsletter is a lawyer for MERS. According to ATLA's website, "ALTA has funded the development of the Mortgage Electronic Registrations System (MERS) to help mortgage lenders eliminate the need for recording mortgage loan assignments when ownership rights change in secondary market transactions." *See* www.alta.org/technology/mers.cfm.

and homeowners to trace the true ownership of the mortgage loan against properties in foreclosure. It shows why allowing MERS to avoid record assignments prior to foreclosure makes public records inaccurate and incomplete, and discusses how mortgage market participants that are not named in county property records can violate civil rights laws. Next, the brief shows why scholars and researchers are concerned about the presence of racially motivated predatory lending in the Twin Cities area. Research shows strong evidence of racially disparate lending in the Twin Cities. Finally, this brief discusses how MERS' failure to record assignments prior to foreclosure prevents researchers and advocates from conducting thorough and accurate research on mortgage market discrimination in the Twin Cities and from accurately linking mortgage market participant's potentially discriminatory behavior with the financial consequences of racially predatory lending, foreclosure.

I. Strong Public Policy Interests in Complete and Accurate Public Records Support Recording Assignments of the Real Ownership of Mortgages in County Land Records Prior to Foreclosure

Mortgage liens are publically recorded and available to the public in county land records. Minn. Stat. 13.03 (2007). Public record of encumbrances of title obviously serves the interest of future creditors and purchasers, but the value of public records of property title and encumbrances of the title goes beyond the private parties who make their money from land sales. Public records of land title and encumbrances on the title allow researchers to look for patterns of property ownership and mortgage lending. Minnesota statute recognizes the value of public records being available for scholarly research and demands that researchers have "full access" to public records so that they can carry out "extensive research." Minn. Stat. 13.03 (2007).

Accurate research on land records is impossible if the county does not keep accurate and complete records of title to land and the encumbrances on the title. County property records registered by mortgage lenders who are not affiliated with MERS reflect the entire chain of encumbrances. From the county record, a scholar or advocate can identify the mortgage broker, the loan originator, secondary market participants which pooled and securitized the mortgage loan, as well as the party that procured the title after foreclosure.

MERS' failure to record the ownership of a mortgage prior to foreclosure denies researchers and advocates access to accurate and complete public records. MERS' failure to record the assignment of the true ownership mortgage loans makes county land records incomplete because the land records no longer reflect the parties' ownership and control of the loan or even the name of the financial institution that actually decided to extend credit to the mortgagor. MERS' failure to record the assignment of the real ownership of a mortgage loan makes county land records inaccurate because the nominee of record, MERS, has no actual ownership interest in the property and has no say over the terms of the loan or the decision to foreclose. *Mtg. Elec. Reg. Sys., Inc. v. Neb. Dep't of Banking & Finance*, 704 N.W.2d 754, 756-87 (Neb. 2005). Current research on mortgagees in country property records produces inaccurate results. For example, a 2007 Housing Link and Housing Preservation Project study of mortgages in zip codes 55411 and 55421 (North Minneapolis) found that MERS was the top mortgagee of foreclosed properties in the area. Housing Link & Housing Preservation Project, *Analysis of Detailed Sherriff's Sale Data*, March 6, 2008. Because MERS fails to record mortgage assignments prior to foreclosure, as analysis of property records produces inaccurate results, preventing the public from identifying lenders and secondary market actors that may have been involved in predatory lending in North Minneapolis.

A. Effective Enforcement of Civil Rights Laws Requires a Complete and Accurate Record of Assignments of the Real Ownership of Mortgages

Researchers, advocates, and the citizens of Minnesota have an interest in a clear record of the real ownership of the assignments of mortgage liens on the property title because this information is necessary to evaluate mortgage lending patterns that violate civil rights laws. *Amici* study lending patterns to understand the affect of the law and require accurate and complete public records to help prevent racial discrimination in housing and lending. *Amici* need to have data that is unavailable from MERS to monitor disparate impacts in lending that may violate civil rights laws including the Fair Housing Act, the Equal Credit Opportunity Act, Sections 1981 and 1982 of the Civil Rights Act, and the Community Reinvestment Act. 42 U.S.C. §§ 3601-3619 (2006); 15 U.S.C. § 1691 (2006); 42 U.S.C. § 1981 (2006); 42 U.S.C. § 1982 (2006); 42 U.S.C. § 1983 (2006); 12 U.S.C. §§ 2901-2908; *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 413 (1968) (holding §1982 applies to nongovernmental discrimination).

Mortgage lenders violate the Fair Housing Act, the Equal Credit Opportunity Act, and Sections 1981 and 1982 of the Civil Rights Acts when their actions make housing, credit, or contract rights unavailable because of the plaintiff's protected class. 42 U.S.C.

§§ 3601-3619 (2006); 15 U.S.C. § 1691 (2006); 42 U.S.C. § 1981 (2006); 42 U.S.C. § 1982 (2006); 42 U.S.C. § 1983 (2006); 12 U.S.C. §§ 2901-2908; *See* Robert G. Schemm, *Introduction to Mortgage Lending Discrimination Law*, 28 *J. Marshall L. Rev.* 317, 325.

Civil rights law prohibiting housing discrimination and unfair lending extends liability to secondary mortgage market participants. 42 U.S.C. §§ 3601-3619 (2006); 15 U.S.C. § 1691 (2006); 24 C.F.R. § 100.125(b) (2007); 12 C.F.R. § 202.2(l), Official Staff Commentary § 202.2(l). Secondary mortgage market participants can violate civil rights laws by condoning the racially discriminatory practices of primary market actors and with discriminatory loan purchase restrictions. *Id.*

B. Lenders with a Major Presence in Twin Cities Mortgage Lending have Been Accused of Racial Discrimination in Lending.

Plaintiffs across the United States have filed complaints of racially discriminatory lending practices against many of the Twin Cities' top prime and subprime lenders, including Countrywide Financial, Decision One Mortgage, Ameriquest Mortgage Company, Wells Fargo Bank, Option One Mortgage Company, Long Beach Mortgage Company, BNC Mortgage, Encore Credit Corporation, Accredited Home Lenders, GMAC, and Fieldstone Mortgage Company. Complaint, *Baltimore v. Wells Fargo Bank*, LO 08CV-062 (D. Mass., Jan. 8, 2008); Complaint, *Allen v. Decision One Mort.* Co., 07-11669 (D. Mass. Sept. 6, 2007); Complaint, *Jones v. Long Beach Mortgage*, CV 11-372 (D. Mass. July 26, 2007); Complaint, *Miller v. Countrywide Bank*, 11257-RGS (D. Mass. July, 12, 2007); Complaint, *NAACP v. Ameriquest Mortgage Co., et al.*, SAV07-0794 (D.

Cal. July 11, 2007); Complaint, *NCRC v. Novastar*, CV 00861 (D. D.C. May 9, 2007); Complaint, *Tribett v. BNC Mortgage*, CV 02-809 (D. Ill. May 18.2007).

Bear Stearns, the defunct investment bank, is accused of discriminating against minority borrowers through its secondary market participation. Complaint, *Rodriguez v. Bear Stearns*, CV 1816 (D. Conn. Dec. 4, 2007). Bear Stearns is accused of engaging in racially discriminatory predatory lending through its purchase of loans made by a subprime subsidiary, which had profit sharing methods that encouraged brokers to target racial minorities with predatory loan products. *Id.* Encore Credit, now Bear Sterns Residential Mortgage, is another subprime arm of the Bear Sterns investment bank and is a major subprime lender and refinancer in the Twin Cities area.

Numerous complaints and scholarly work allege that lenders have engaged in a two-tiered system of lending. Loans issued from bank storefronts were predominantly prime loans on good terms, issued primarily to white homebuyers and refinancers. Loans obtained from mortgage brokers are much more likely to be subprime and contain predatory terms, such as ballooning interest rates, prepayment penalties, and high loan origination costs. Brokers disproportionately make these loans to racial minorities. Banks encouraged brokers to engage in racially predatory lending behavior by sharing profits for high cost loans, encouraging brokers to sell subprime or predatory loans to applicants who were otherwise eligible for prime-rate loans. *See* Complaint, *Allen v. Decision One Mort. Co.*, No. 07-11669 (D. Mass. Sept. 6, 2007); *See also* Debbie Bocian et al., *Unfair Lending: The Effect of Race and Ethnicity on the Price of Subprime Mortgages*, Center for Responsible Lending (2006); National Fair Housing Alliance *2008 Fair Housing*

Trends Report, 23 (2008).

The Institute on Race and Poverty's research using HMDA data shows substantial lending disparities in the Twin Cities. Many allegations of racially discriminatory lending, however, involve lenders encouraging brokers to make racially predatory loans or involve secondary market participants. HMDA data shows an overall pattern of lending disparities, but it cannot link those disparities to brokers or secondary market influence. In order to address disparate lending, the subprime lending and underwriting practices of brokers, banks, and secondary market actors need to be linked with foreclosure data—an impossible task as long as MERS fails to record assignments of mortgages prior to foreclosure.

II. HMDA Data Shows Disparate Lending Patterns in the Twin Cities area

The most recent Home Mortgage Disclosure Act (HMDA) data reveals strong racial disparities in mortgage lending in the Twin Cities.[6] 28 U.S.C. §§ 2801-2810 (2000). A careful analysis of HMDA data shows the following: Prime lenders are substantially more likely to deny loans to racial minorities, regardless of income, and lenders are more likely to deny home loans in identifiably minority neighborhoods. Minorities, regardless of income, are disproportionately receive subprime loans. Further, minority applicants are more likely to submit loan applications to subprime lenders.

These lending disparities, coupled with disproportionate foreclosure rates in minority neighborhoods, suggest lending discrimination exists in the Twin Cities.

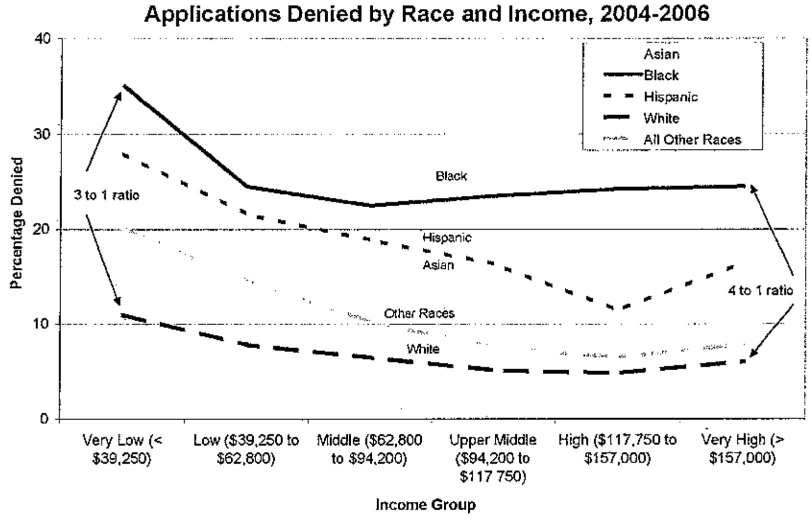
[6] In this data analysis the Institute on Race and Poverty (IRP) only analyzed records for first-lien, conventional, 1-4 unit owner-occupied properties for the years 2004-2006. The data IRP used in this analysis is available at http://www.ffiec.gov/hmda/online_rpts.htm.

Further, the fact that racial minorities overwhelmingly apply to subprime lenders, is strongly suggestive of racially targeted predatory lending.[7]

. **Racial Minorities are Disproportionately Denied Mortgage Loans**

Loan originators disproportionately deny minority loan applications, even when controlling for income. In fact, very high-income blacks, Asians, and Hispanics, making more than $157,000 a year, are much more likely to be denied mortgage loans than whites making less than $39,250. For example, the denial rate in Chart One for Blacks with incomes above $157,000 is 25%, while it is just 11% for Whites making $39,250. Extensive research on mortgage denials has shown that bank's objective use of risk assessment, such as credit scoring, does not account for lending disparities. Alicia H. Munnell, et. al., *Mortgage Lending in Boston,* 86 J. Am. Econ. Rev. 25-53 (1996); Jason

Chart 1: Twin Cities, Percentage of Home Purchase Loan Applications Denied by Race and Income, 2004-2006



[7] Historical pattern of discriminatory denial of credit to minorities and minority communities set the conditions for racially discriminatory predatory lending. Kathleen Engel and Patricia McCoy, *From Credit Denial to Predatory Lending* in *Segregation: The Rising Cost for America*, 81 (Carr and Kutty eds. 2008).

Dietrich, *Under-specified Models and Detection of Discrimination,* 31 J. *Real Estate Fin. & Econ.*, 83-105 (2005).

When the mortgage market is broken down into prime and subprime lenders, the source of higher denial rates is clear: Prime lenders disproportionately deny minority applicants loans, while subprime lenders have a greater parity in denial rates.[8] *See* table 1.

Table 1: Percentage of Home Purchase Applications that were Denied by Race and Lending Institution Types

	Percentage of Applications Denied by Lender Type				Ratio of Minority to White Denial Rates by Lender Type			
	All Lenders	Prime Lenders	Near Prime Lenders	Subprime Lenders	All Lenders	Prime Lenders	Near Prime Lenders	Subprime Lenders
Asian	16	7	24	28	2	2	2	1
Black	24	13	27	29	4	4	2	1
Hispanic	20	10	27	26	3	3	2	1
White	7	4	13	21				
Other Races	11	6	16	23	2	2	1	1
Total	9	4	16	24				

Note: Mortgage lending institutions in the table are categorized acccording to the percentage of loans they made that are subprime. Less than 10% of loans made by Prime Lenders were subprime, 10 to 50% of loans made by Near Prime lenders were subprime, and more than 50% of loans made by Subprime Lenders were subprime.

B. When Minorities Get Loans, the Loans are Disproportionately Subprime

Racial minority mortgagors are disproportionately likely to receive subprime loans. The disparities are actually the greatest at the highest incomes. For example, very high income black borrowers receive subprime loans six times more often than similarly situated whites do. *See* Chart 2. Moreover, subprime lending in the Twin Cities is concentrated in predominantly minority neighborhoods with high rates of foreclosures.

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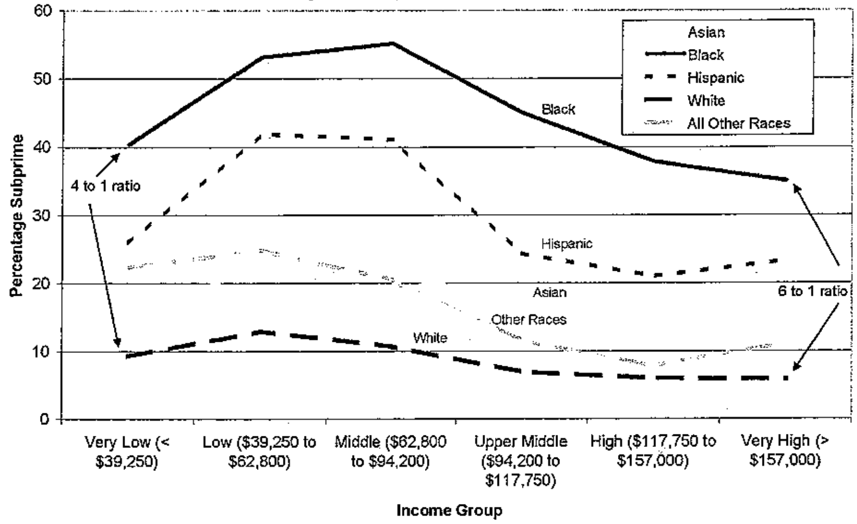
[8] Lending institutions have identifiable lending patterns, making mostly prime or mostly sub-prime loans. Prime lenders often have subsidiaries that concentrate on the subprime market. For example, HSBC is predominantly a prime lender (97% prime in the Twin Cities in 2004-2006), while its subsidiary Decision One is predominantly a subprime lender (92% subprime).

Chart 2: Twin Cities, Percentage of Home Purchase Loans That Are Subprime by Race and Income, 2004-2006



C. Racial Minorities Disproportionately Apply for Subprime Loans

Racial minorities in the Twin Cities are more likely to make loan applications to subprime lenders. *See table 2.* While racial minorities, overall, have lower incomes and worse credit than whites, research shows that neither income nor credit scoring explains away racial lending disparities. Munnell, *supra* at 12. Moreover, research suggests that more than fifty percent of subprime mortgagors were eligible for prime loans. Fannie Mae Foundation, *Financial Services in Distressed Communities*, (2001); Rick Brooks & Ruth Simon, *Subprime Debacle Traps Even Very Credit-Worthy*, *Wall St. J.* A1 (Dec. 3, 2007).

The disproportionate representation of minority applicants with subprime lenders suggests that some subprime lenders are targeting minorities in the Twin cities. Predatory lending is strongly tied with high rates of foreclosure. Joint Center for Housing Studies of Harvard University, *The State of the Nation's Housing*, 18 (2006).

Table 2: Percentage of Home Purchase Applications Filed at Prime, Near-Prime and Subprime Lending Institutions by Race of Applicant

	Total Number of Loans	% of Applications by Lending Institution			
		All Lenders	Prime	Near Prime	Subprime
American Indian	409	100.0	45.0	16.9	38.1
Asian	10,030	100.0	52.3	18.9	28.8
Black	10,265	100.0	27.8	16.6	55.5
Hispanic	7,408	100.0	39.3	18.3	42.5
Pacific Islander	350	100.0	62.0	15.4	22.6
White	131,317	100.0	76.9	11.0	12.1
Two or More Races	340	100.0	43.8	18.2	37.9
Joint Races	2,122	100.0	76.6	9.8	13.6
Total	162,241	100.0	70.3	12.2	17.4

D. Minority Neighborhoods have Disproportionate Foreclosure Rates

In Hennepin County, there is a strong spatial relationship between mortgage foreclosures and racial minority mortgagors. Map 4 shows the number of foreclosures per 100 owner households in Hennepin County neighborhoods (census tracts) between January 1st, 2006 and June 13th, 2007.[9] The north side of Minneapolis has by far the greatest concentration of foreclosures with 8.7 to 25.4 foreclosures per 100 owner units. Neighborhoods with the highest rates of foreclosure, north and south Minneapolis, also have the greatest percentages of racial minority borrowers. *See* map 5.

Predatory lending is strongly tied with high rates of foreclosure. Joint Center for Housing Studies of Harvard University, THE STATE OF THE NATION'S HOUSING, 18 (2006). Disproportionately high rates of foreclosure in minority neighborhoods suggests racially targeted predatory lending. MERS' failure to record assignments makes it impossible to accurately link lender data with broker and foreclosure data.

9 Foreclosures are properties in the process of being sold at the Hennepin County sheriff's foreclosure auction

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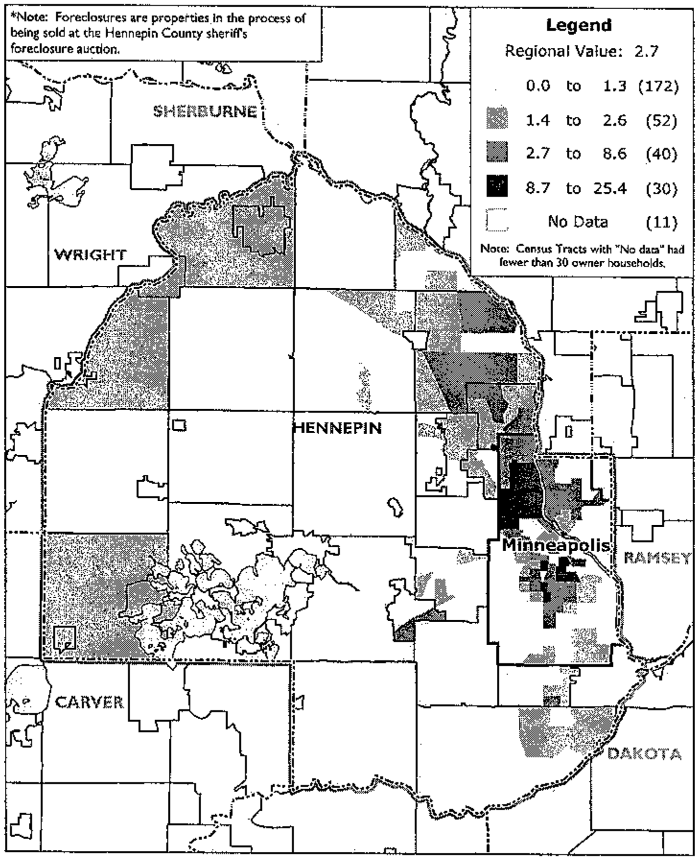
Map 4: HENNEPIN COUNTY Foreclosures* Per 100 Ownership Units by Census Tract, 01/01/2006 - 06/13/2007



Data Source: 2007 Hennepin County Sheriffs Office, 2000 U.S. Census Bureau.

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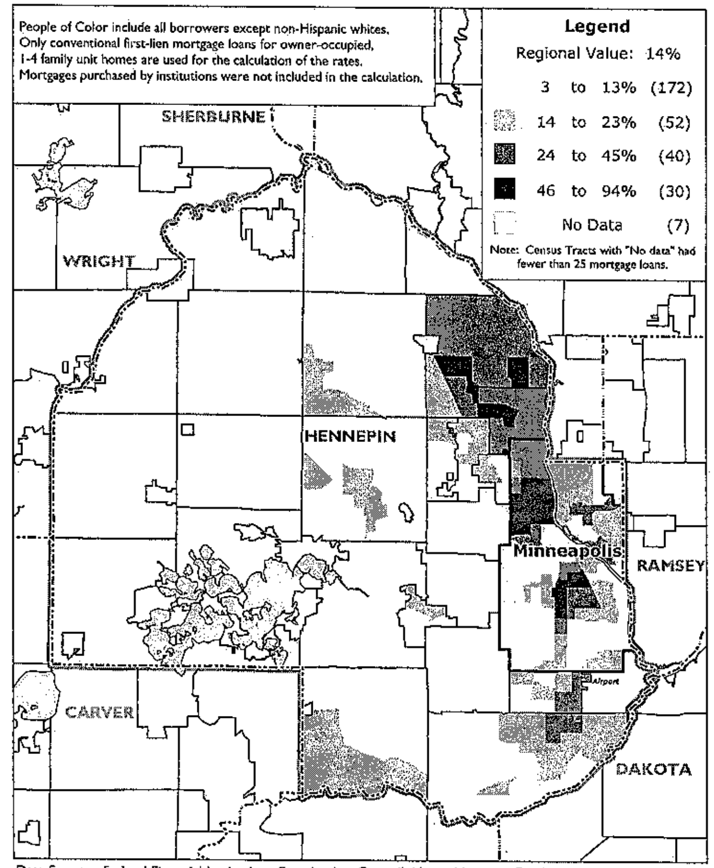
Map 5: HENNEPIN COUNTY Percentage of Mortgages Acquired by People of Color by Census Tracts, 2004-2006



Data Source: Federal Financial Institutions Examination Council, Home Mortgage Disclosure Act

III. MERS Makes it Impossible to Conduct Accurate Research on Mortgage Lending.

Scholars and advocates for fair lending use county foreclosure records to identify institutions involved in disparate lending and foreclosures. Without a clear record of the transference of the ownership of mortgage loans, it is impossible to connect brokers, primary lenders, and secondary lenders to foreclosures resulting from their practices. Without this information, it is impossible to develop a clear view of lending patterns and the racial impact of those patterns in the Twin Cities.

A. MERS.Presence in County Property Records Prevents Research Linking Subprime Lenders to Foreclosures

HMDA data shows that subprime lending is concentrated in predominantly minority neighborhoods that are experiencing high rates of foreclosure. Some of this subprime lending may be racially targeted predatory lending. Without the ability to link foreclosures to lenders and secondary market participants, researchers cannot determine whether a subprime lender or a secondary market participant's activity led to a disproportionate number of foreclosures – a strong sign of predatory lending. A disproportionate number of foreclosures on the part of a lender or mortgage market participant is a sign of predatory lending because loans with predatory features, such as prepayment penalties and balloon payments, are substantially more likely to be foreclosed on than subprime loans without predatory features. *See* Roberto G. Querica et al., *The Impact of Predatory Terms on Subprime foreclosures*, Center for Community Capitalism working paper, Jan. 2005. Research shows disproportionate subprime lending and disproportionate foreclosures in predominantly minority communities. However, without full public records that link mortgage market participants to foreclosures, we cannot assess the probable impact of racially targeted subprime lending nor identify problematic lenders.

B. MERS Obscures the Connection between Predatory Brokers and Lenders

Lenders engaged in racially predatory lending by knowingly incentivizing brokers' predatory lending practices. *See e.g. Commonwealth v. Fremont Inv.*, 23 Mass .L. Rptr. 567 (Mass. D. Ct. 2008). Because HDMA data does not indicate whether a loan went through a broker, there is no way to separate brokered loans from bank loans in HMDA data. When researchers use HMDA data to examine the racial lending practices of banks, the inability to separate loans originated at storefronts from loans originated from brokers could obscure racial disparities in lending, particularly where the bank engages in fair lending in its storefront, but has underwriting practices that encourages brokers to engage in racially predatory lending. [10]

The actions of renegade brokers might explain racial disparities in the subprime market, but there is no way to examine the racial impact of brokers without being able to tie the brokers to the sources of funding through county land records.

C. MERS Obscures Secondary Market Participants' Connection to Disparate Lending Practices.

When MERS fails to record the assignment of the real ownership mortgage loans prior to foreclosure, it is impossible to link secondary market participants to loan

[10] The financial institution that makes credit decisions, usually the originator rather than the broker, reports loans to federal regulators under the HMDA. Federal Financial Institutions Examination Council, A GUIDE TO HMDA REPORTING (2007).

originators and brokers that engage in discriminatory lending. While secondary market participants report their loan purchases to HMDA, the purchase is not linked to the loan origination in HMDA This makes it possible to ascertain the institution's market presence, but impossible to link the loan purchase guidelines of the institution to the lending patterns of loan originators. Secondary market participants' loan purchasing standards can influence loan originators and brokers to lend in racially discriminatory ways. For example, restrictions on purchasing prime loans tied to properties worth less than $100,000 has the intended effect of preventing prime lending in minority neighborhoods. Engel & McCoy, *supra* note 11.

Research shows that that discriminatory behavior in the secondary market effects lending in the primary market, but researchers and advocates cannot tie underwriting issues with secondary market to originator because, with MERS obscuring the connection between brokers, lenders, and assignees, there is no way of determining if and how the secondary markets effects patterns of lending in the Twin Cities. Cathy Cloud & George Galster, *What Do We Know About Racial Discrimination In Mortgage Markets*? 22 *Rev. Black Pol. Econ.* 115 (1993).

IV. MERS Makes it Impossible for Individuals and Advocacy Groups to Determine Whether Homeowners Facing Foreclosure have Received Racially Predatory Loans

There are two ways to look for discrimination in the secondary home mortgage market. One is through HMDA data, and the other is through county records of mortgages. The HMDA data gives us a picture of potential lending disparities, but cannot show that a particular individual was affected by the disparity. County foreclosure records provide a record of lending to an individual home owner. Complete and accurate county property records reveal the link between the property in foreclosure, the mortgage broker, the loan originator, and secondary market participants. MERS' failure to record mortgage assignments prior to foreclosure leads to inaccurate and incomplete public records and frustrates the enforcement of civil rights laws against mortgage lenders and investors that participate in discriminatory lending.

V. **Conclusion**

For the reasons stated above, *amici* urge the Court to hold that MERS violates MINN. STAT. 580.02 when it fails to record the assignments of the real ownership of mortgage loans prior to foreclosure.

Dated: April 21, 2008

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CERTIFICATE OF COMPLIANCE WITH THE REQUIREMENTS OF MINN. R. APP. P. 132.01

I, Geneva E. Finn, one of the attorneys for *Amicus Curiae*, hereby certify that this brief complies with the form and length requirements of Minn. R. App. P. 132.01, subds. 1 and 3. Attorneys for *amicus* prepared this brief using the word processing software Microsoft Word 2003. The *amicus* brief was printed in 13-point type using the proportional font Times New Roman. According to the software's word county utility, the brief contains 4,210 words and, hence, even with maps and tables is within the 7,000-word limit set by Minn. R. App. P. 132.01 Subd. 3.

April 21, 2008

Geneva E. Finn