No. _______

In The
Supreme Court of the United States

MERSCORP HOLDINGS, INC., MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.,

Petitioners,

v.

DANNEL P. MALLOY, GOVERNOR, STATE OF CONNECTICUT; GEORGE C. JEPSEN, ATTORNEY GENERAL, STATE OF CONNECTICUT; DENISE L. NAPPIER, TREASURER, STATE OF CONNECTICUT; KENDALL F. WIGGIN, STATE LIBRARIAN, STATE OF CONNECTICUT; LEANN R. POWER, PUBLIC RECORDS ADMINISTRATOR, STATE OF CONNECTICUT,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Connecticut

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Connecticut Supreme Court created a conflict with this Court's cases by holding that a state law does not discriminate against interstate commerce on its face (and thereby violate the dormant Commerce Clause *per se*) even though the law expressly targets a "national" business for unfavorable treatment to "level the playing field" inside the State.

2. Whether, in the alternative, the Connecticut Supreme Court departed from this Court's precedent by holding that the State's singling out of a "national" business for unfavorable treatment does not impermissibly burden commerce among the States under this Court's balancing test in *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137 (1970).

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

The parties to the proceedings include those listed on the cover.

MERSCORP Holdings, Inc. does not have any stock-owning parent corporations. Fannie Mae and Freddie Mac each owns more than 10 percent of MERSCORP Holdings, Inc. Mortgage Electronic Registration Systems, Inc. is a wholly owned subsidiary of MERSCORP Holdings, Inc.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners MERSCORP Holdings, Inc. (MERSCORP) and Mortgage Electronic Registration Systems, Inc. (MERS) respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of Connecticut.

OPINIONS AND ORDERS BELOW

The Connecticut Supreme Court's opinion (App., *infra* 1-41) is reported at 131 A.3d 220 (Conn. 2016). The opinion of the Superior Court of Connecticut, Judicial District of Hartford (App., *infra* 42-93) is unreported and available at 2014 WL 2854013.

STATEMENT OF JURISDICTION

The judgment of the Connecticut Supreme Court was entered on February 23, 2016. Justice Ginsburg extended the filing date for this petition to June 22, 2016. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause of the Constitution of the United States, U.S. CONST., art. I, § 8, cl. 3, provides:

[Congress shall have Power:] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes[.]

Section 7-34a of the Connecticut General Statutes provides:

> (A) * * * [T]own clerks shall receive from a nominee of a mortgagee for the recording of any document * * * as follows: For the first page * * * , one hundred sixteen dollars; for each additional page of such deed or assignment, five dollars; and for each assignment of mortgage, subsequent to the first two assignments, two dollars.
>
> * * *
>
> (C) For purposes of this subdivision, "nominee of a mortgagee" means any person who (i) serves as mortgagee in the land records for a mortgage loan registered on a national electronic database that tracks changes in mortgage servicing and beneficial ownership interests in residential mortgage loans on behalf of its members, and (ii) is a nominee or agent for the owner of the promissory note or the subsequent buyer, transferee or beneficial owner of such note.

CONN. GEN. STAT. § 7-34a(a)(2) (2013).

The full provisions of the relevant Connecticut General Statutes are set forth at App., *infra* 94-98.

STATEMENT

The Commerce Clause gives Congress the power "[t]o regulate Commerce * * * among the several States." U.S. CONST., art I, § 8, cl. 3. This grant of authority was drafted specifically "to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *Hughes* v. *Oklahoma*, 441 U.S. 322, 325 (1979). Thus the Commerce Clause was seen at the Founding as a barrier against parochialism, which would impede economic relations across the internal borders of the young Nation.

To safeguard that positive grant of power, this Court has consistently interpreted congressional authority over interstate commerce "to contain a further, negative command, known as the dormant Commerce Clause, prohibiting certain state [economic regulation] even when Congress has failed to legislate on the subject." *Oklahoma Tax Comm'n* v. *Jefferson Lines, Inc.*, 514 U.S. 175, 179 (1995). The dormant Commerce Clause prevents States from enacting legislation that would discriminate against—and thus regulate—commerce on the basis of an interstate element. *Boston Stock Exch.* v. *State Tax Comm'n*, 429 U.S. 318, 332 n.12 (1977). Nor may a State "tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State." *Armco Inc.* v. *Hardesty*, 467 U.S. 638, 642 (1984). Similarly, a State cannot "discriminat[e] between two kinds of interstate transactions." *Boston Stock Exchange*, 429 U.S. at 333.

Here, the Connecticut Supreme Court has explicitly acknowledged that the State's legislature "*create*[*d*] *a two tiered system* in which a mortgage nominee operating a *national* electronic database * * * must pay recording fees approximately three times higher than do other mortgagees." App. 2 (emphases added). The second tier of mortgagees—on which Connecticut has imposed higher recording fees—comprises only MERS, a national company. Although the recording services provided by Connecticut's clerks do not depend on or relate to the mortgagee's identity, Connecticut has attempted to subsidize its local residents and businesses by imposing additional fees on MERS as a mortgagee simply because it has loans that are registered on a "national electronic database." This blatant discrimination against interstate commerce is an affront to the dormant Commerce Clause and this Court's precedents enforcing that provision.

Because the Connecticut law charges more for recording merely because a mortgagee has loans registered on a "national electronic database"—and here, petitioners do business nationally, in all 50 States—the legislation is facially discriminatory and should be struck down. Beyond that, Connecticut admitted that its law was designed to recover more in fees from companies that engage in interstate commerce. *Id.* at 34. Without a legitimate rationale to justify its higher fees on interstate companies, the law is an undue burden unable to survive any sort of balancing test to measure its constitutionality.

This Court's review in this type of case is vital. The dormant Commerce Clause violation is blatant, and the potential for further mischief is significant. After all, if a State can now charge additional fees on companies engaged in interstate commerce simply because—as here—the State wants more money, there is no end to the fees and other burdens on interstate commerce that can be imposed.

Modern technology heightens the importance of this Court's enforcement of the dormant Commerce Clause. Today's interconnected world permits interstate commerce to occur more easily than ever before. Indeed, technology enabled and made possible petitioners' business model, which relies on the speed, efficiency and ease of access afforded by the use of a national electronic database. Electronic sales (e.g., sales through websites) and services (such as those provided by petitioners) readily cross state lines. Thus permitting state discrimination against national companies also threatens electronic commerce, an area of concern to Congress. Cf. Internet Tax Freedom Act, Pub. L. No. 105-277, Div. C, Tit. XI, §§ 1100-1104, 112 Stat. 2681-719 to 2681-726 (1998) (banning multiple taxation of electronic commerce). Certiorari should be granted now, before other States give in to the temptation of charging higher fees to disfavored national companies.

The economic protectionism embodied by the Connecticut statute is precisely what the Founders sought to guard against. This Court alone can prevent States from enacting legislation that contravenes federal law.

The Court should grant the petition, resolve the conflict, and reinforce the Court's precedents holding that the Commerce Clause does not permit discrimination against interstate commerce—especially where the discrimination is as blatant as it is here, and where the discrimination threatens companies that engage in innovative means of electronic interstate commerce.

1. When buying a home, most people borrow money and secure repayment of their loan by a mortgage, pledging the property purchased as collateral. App. 3-4. In Connecticut, when a borrower obtains a home loan, the borrower typically executes two documents in favor of the lender: (1) a promissory note that creates the borrower's legal obligation to repay the lender; and (2) a mortgage that grants the lender a lien on the property as security for repayment of the debt. *Id.* at 4. To give notice to the world, including subsequent purchasers and creditors, the mortgage may be recorded in the public land records where the property is located. *Ibid.* In Connecticut, as elsewhere, the recording of a mortgage is optional, and not mandated by law. *Ibid.*

2. Petitioner MERSCORP operates and maintains a national electronic database known as the MERS® System that tracks the transfer of beneficial ownership interests and servicing rights in loans for which MERS is designated as the mortgagee on the mortgage. Members of the MERS® System include residential mortgage lenders, servicers of residential mortgage loans, and investors in such loans. Members

are typically national companies engaged in interstate commerce, such as Freddie Mac and Fannie Mae.[1]

When a borrower obtains a home loan from a MERS® System member-lender, the lender may designate MERS as the mortgagee on the security instrument (as the nominee for the lender). The mortgage is recorded in public land records where the real property (i.e., the secured collateral) is situated. Because MERS is the mortgagee, it will often be indexed by the county clerk in the public land-records index as a "grantee." App. 7. The member then registers the loan on the national electronic database known as the MERS® System.

As the mortgagee, MERS is the nominee or agent of the original lender and any of the lenders' successors or assigns. Thus, MERS serves as a common agent or nominee for the members of the MERS® System. As long as a MERS® System member is involved with the mortgage loan, MERS typically will remain the mortgagee and no assignment of the mortgage is necessary. If there is no MERS® System member involved with the mortgage loan, then MERS executes an assignment of the mortgage to the non-MERS® System member, and that assignment is recorded

[1] The Connecticut Supreme Court's opinion struggled to differentiate between MERS and MERSCORP, and resorted to referring to them collectively as MERS. App. 6 n.3. MERS is designated on mortgages as the mortgagee (as the nominee for the lender and its successors and assigns). MERSCORP maintains and operates a national electronic database that tracks those loans around the country for which MERS has been designated as the mortgagee.

in the public land records—and, of course, the applicable recording fees must be and are paid.

For example, if the lender transfers the promissory note associated with the loan to another MERS® System member, that member agrees that MERS will remain as the mortgagee (now as the nominee for the lender to whom the note was transferred). So when the debt is transferred between MERS® System members, the mortgagee MERS does not change and MERS remains the holder of the mortgage in the land records—an assignment of the mortgage is unnecessary, as there is no change in the mortgagee.

The MERS® System thus effectively streamlines successive sales of mortgage loans, making the sales much more efficient. This innovative process results in fewer assignments of mortgages being executed and recorded.

3. Like most States, Connecticut charges a fee for the recording of mortgages and mortgage assignments in its public land records. Before July 2013, Connecticut charged all filers a base recording fee of $53 per filing. CONN. GEN. STAT. § 7-34a(a)(1). But thereafter, Connecticut chose to impose special, additional recording fees on companies engaged in interstate commerce by registering loans on a national electronic database: The revised statute imposes an additional $116—for precisely the same recording services—on a "nominee of a mortgagee," which the statute defines as one who "serves as mortgagee in the land records for a mortgage loan registered on a *national electronic database* that tracks changes in

mortgage servicing and beneficial ownership interests in residential mortgage loans on behalf of its members." *Id.* § 7-34a(a)(2)(A), (C) (emphasis added).

Counsel for Connecticut admitted at oral argument below that the legislature crafted this language to impose the additional fee for recording where MERS, and MERS alone, is the designated mortgagee. See App. 34; Oral Argument Transcript at 18. Thus, MERS, and MERS alone, must pay three times the fees as everyone else to have Connecticut clerks record mortgages, mortgage assignments, and mortgage satisfactions, solely because the mortgage loan is registered on a national electronic database.

4. MERS and MERSCORP challenged Section 7-34a on numerous grounds in state court. After the parties filed cross-motions for summary judgment, the trial court granted summary judgment in favor of Connecticut. App. 42. The companies appealed to the Appellate Court and the Connecticut Supreme Court transferred the appeal directly to that court pursuant to state law. *Id.* at 3 n.2.

5. On appeal, the Connecticut Supreme Court affirmed each of the trial court's rulings. App. 2-3. As relevant here, the court bifurcated its dormant Commerce Clause analysis into two parts. First, it rejected the argument that the statute facially discriminated against interstate commerce. *Id.* at 31-37. Second, the

court held that the new law did not impose an "undue burden" on interstate commerce. *Id.* at 37-41.

The Connecticut Supreme Court offered four rationales for its holding that Section 7-34a did not facially discriminate against interstate commerce. First, the court determined that the statute did not discriminate against interstate commerce because there was no in-state analogue to MERS and the MERS® System, and because MERS would pass the additional fees on to borrowers, Connecticut residents. *Id.* at 31-34.

Second, the court determined that Connecticut did not truly intend to discriminate against companies operating "national electronic databases," but meant only to impose charges on MERS and other future, similar businesses. *Id.* at 34-35. Notwithstanding the plain language of the statute, the discrimination against "national" companies was just an accident according to the court.

Third, the court concluded that MERS and MERSCORP were not similar to other entities recording mortgages in Connecticut, *despite receiving identical recording services from the State*. *Id.* at 35-36.

Fourth, the court concluded that even if the statute did discriminate against interstate commerce, its "legitimate local purpose" would outweigh this discrimination. *Id.* at 36-37.

Moving on to the determination whether, even if not facially discriminatory, the statute nonetheless violates the dormant Commerce Clause by burdening interstate commerce, the court articulated two different tests. *Id.* at 37-41. The court stated that a facially neutral statute does not violate the dormant Commerce Clause unless it either: (a) imposes burdens that clearly outweigh the benefits of the legislation; or (b) would unduly burden interstate commerce if every State adopted an identical policy. The court determined that Section 7-34a did not do the former, *id.* at 37-39, and would not do the latter. *Id.* at 39-41.

REASONS FOR GRANTING THE PETITION

The dormant Commerce Clause forbids a State to exercise its police powers to commercially disfavor out-of-state residents relative to in-state ones. *Granholm* v. *Heald*, 544 U.S. 460, 474 (2005). This Court first asks whether the challenged law facially discriminates against interstate commerce—i.e., whether the law necessarily subjects interstate commerce to unfavorable treatment. *Oregon Waste Sys.* v. *Dep't of Envtl. Quality*, 511 U.S. 93, 94 (1994). Laws that facially discriminate against interstate commerce are almost always found to violate the dormant Commerce Clause. At the same time, even those laws that do not facially discriminate will be held unconstitutional when they impose burdens on interstate commerce clearly greater than the in-state benefits that the laws

provide. *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

Proper application of these tests has proven difficult for States—and unsurprisingly, the States tend to err in their favor. This tendency is exemplified by this case, where the Connecticut Supreme Court interpreted this Court's precedents to justify a facially discriminatory statute with nothing more than an economic protectionist rationale. For the Connecticut Supreme Court to hold that a "legitimate local purpose" of generating revenues from out-of-state companies can salvage a facially discriminatory statute shows a level of confusion that is intolerable and warrants this Court's review. Indeed, given how patent the facial violation is in this case, the Court may wish to consider summarily reversing the Connecticut Supreme Court without the need for merits briefing and argument. See, e.g., *Amgen Inc.* v. *Harris*, 136 S. Ct. 758 (2016) (per curiam) (summarily reversing in case involving pleading standards for breach of fiduciary duty claims against ERISA fiduciaries after initial decision was GVR'd and Ninth Circuit reached same conclusion on remand); *Nitro-lift Techs., L.L.C.* v. *Howard*, 133 S. Ct. 500 (2012) (per curiam) (summarily reversing in arbitration case); *Am. Tradition P'ship* v. *Bullock*, 132 S. Ct. 2490 (2012) (per curiam) (same in First Amendment case).

Throughout the Nation's history, this Court has ensured the fair treatment of individuals across state lines and prevented state legislatures from transgressing constitutional boundaries. If this Court's cases

teach anything, it is that the dormant Commerce Clause keeps States from "discriminat[ing] between transactions on the basis of some interstate element." *Boston Stock Exchange*, 429 U.S. at 332 n.12. Were the Connecticut Supreme Court's decision here to stand, it would establish a dangerous roadmap for other desperate, cash-strapped States to follow in enacting similar legislation—with virtually no limits on the industries, products, and services that could be targeted for discriminatory treatment. This Court should resolve the conflict, restore the proper boundaries, and remind States that while the police power is broad, it is not unlimited and may not be used to transgress constitutional commands.

I. The Connecticut Supreme Court's Refusal To Invalidate A Facially Discriminatory Statute Irreconcilably Conflicts With This Court's Precedent.

"[T]he dormant Commerce Clause precludes States from 'discriminat[ing] between transactions on the basis of some interstate element.'" *Comptroller of Treasury* v. *Wynne*, 135 S. Ct. 1787, 1794 (2015) (alteration in original) (quoting *Boston Stock Exchange*, 429 U.S. at 332 n.12). Under this Court's precedent, a court analyzes a statute challenged on dormant Commerce Clause grounds by first asking "whether it discriminates on its face against interstate commerce." *United Haulers Ass'n* v. *Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338 (2007) (citing *Am. Trucking Ass'ns* v. *Michigan Pub. Serv. Comm'n*, 545 U.S. 429,

433 (2005)). "'[D]iscrimination' simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Id.* at 338 (quoting *Oregon Waste*, 511 U.S. at 99).

On its face, the Connecticut statute at issue discriminates against a person who serves as a mortgagee for loans registered on a "*national electronic database*" by requiring payment of higher recording fees than other designated mortgagees. CONN. GEN. STAT. § 7-34a(a)(2)(C) (emphasis added). Just because MERSCORP operates a MERS® System *national* electronic database (rather than an in-state database), a person who serves as a mortgagee for a loan registered on that national database must now pay higher recording fees to record in Connecticut's land records its mortgages, mortgage assignments, and mortgage satisfactions. This is as blatant an instance of facial discrimination as one could imagine.

Connecticut imposes higher fees *only* on a mortgagee engaging in interstate commerce by registering loans on a "national electronic database." CONN. GEN. STAT. § 7-34a(a)(2)(C). The MERS® System is a national registry with national member-lenders—indeed, it is the national aspect and size of the MERS® System's membership that allows the system to work—and nationally, it is the only business that operates in the manner described by the Connecticut legislature. The statute's "two tiered system" thus expressly "discriminate[s] between transactions on the basis of

some interstate element." *Boston Stock Exchange*, 429 U.S. at 332 n.12.

On its face, the Connecticut law engages in differential treatment of in-state and out-of-state (i.e., "national") economic interests. Yet the Connecticut Supreme Court refused to invalidate it—and in the process created a serious conflict with this Court's precedent.

A. This Court Has Routinely Invalidated Similarly Discriminatory Laws.

This Court has routinely concluded that similar laws discriminate against interstate commerce. See, e.g., *Oregon Waste*, 511 U.S. at 99 (holding that Oregon discriminated against interstate commerce by "subject[ing] waste from other States to a fee almost three times greater than the [fee] imposed on solid in-state waste"); *Chem. Waste Mgmt., Inc.* v. *Hunt*, 504 U.S. 334, 342 (1992) (holding that Alabama discriminated against interstate commerce by imposing a higher fee on the disposal of out-of-state waste than on the disposal of in-state waste); *New Energy Co. of Ind.* v. *Limbach*, 486 U.S. 269, 274 (1988) (holding that Ohio discriminated against interstate commerce by depriving products made in other States of beneficial tax treatment). Like the laws in these cases, the Connecticut law discriminates against interstate commerce on its face and is thus "virtually per se invalid." *Fulton Corp.* v. *Faulkner*, 516 U.S. 325, 331 (1996) (quoting *Oregon Waste*, 511 U.S. at 99).

Even apart from the law's differential treatment of "national" electronic databases, Connecticut admits that it enacted the law to target MERS and MERSCORP, out-of-state parties engaging in interstate commerce. App. 34. Indeed, MERS is the only entity that "serves as mortgagee in the land records for a mortgage loan registered on a national electronic database that tracks changes in mortgage servicing and beneficial ownership interests in residential mortgage loans on behalf of its members." CONN. GEN. STAT. § 7-34a(a)(2)(C)(i). And as the only "nominee of a mortgagee" in the country (as defined by § 7-34a), only mortgages, mortgage assignments, and lien releases involving MERS must pay the higher recording fees. But this Court's precedent recognizes that a law does "not need to be drafted explicitly along state lines in order to demonstrate its discriminatory design." *Amerada Hess Corp.* v. *Director, Div. of Taxation, N.J. Dept. of Treasury*, 490 U.S. 66, 76 (1989).

For example, in *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263 (1984), this Court considered a Hawaii statute that established an exemption to the state liquor tax for "okolehao," a brandy distilled from the root of an indigenous shrub of Hawaii. *Id.* at 265. Even though this exemption did not contain an express interstate element, this Court readily concluded that the exemption "seems clearly to discriminate on its face against interstate commerce by bestowing a commercial advantage on okolehao." *Id.* at 268.

Just as Hawaii could not discriminate against interstate commerce by enacting a "neutral" law that evenhandedly favored all producers of a particular type of liquor (who all happened to be located in-state), Connecticut cannot enact a "neutral" law that evenhandedly disfavors MERS and MERSCORP (which happen to be located out-of-state). Even if Connecticut's law were not drafted explicitly along state lines to disfavor "national" products, the State's admitted intent to target MERS would still reveal a discriminatory design.

Like other targets of discrimination against interstate commerce, MERS has no "remedy at the polls." *Wynne*, 135 S. Ct. at 1798. Because MERS is an out-of-state corporation, schemes that impose discriminatory fees on MERS "may be attractive to legislators and a majority of their constituents for precisely this reason." *Ibid.* Protecting out-of-state corporations, like MERS, from discriminatory taxation and fees is the heart of the dormant Commerce Clause. Even apart from the statute's discrimination against companies providing "national" products, the State's admitted targeting of MERS constitutes discrimination against interstate commerce.

Under this Court's precedent, such a law must be invalidated unless it survives strict scrutiny—i.e., unless the State can show that the law "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *Oregon Waste*, 511 U.S. at 101 (quoting *New Energy Co. of Ind.*, 486 U.S. at 278). Connecticut has not even

attempted to carry this heavy burden. The opinion below states, in passing, that discrimination against interstate commerce "advances a legitimate local purpose." App. 36. The purported "legitimate local purpose" is raising revenue by charging MERS, as a "nominee of a mortgagee," three times what others pay for identical services provided by recording clerks—a rationale this Court has firmly rejected. See *C & A Carbone, Inc.* v. *Town of Clarkstown*, 511 U.S. 383, 393 (1994). And the court below wholly failed to consider reasonable nondiscriminatory alternatives. As a result, the court's refusal to invalidate a patently discriminatory statute cannot be squared with this Court's precedent.

B. The Connecticut Supreme Court's Rationales For Upholding The Law Only Confirm The Conflict.

If the Connecticut law does not amount to facial discrimination against interstate commerce under this Court's precedents, it is difficult to imagine what would. That is likely why the decision below rests on the rather remarkable holding that the Connecticut statute does not, despite its plain text, facially discriminate against interstate commerce at all. Not surprisingly, the court's scattershot justifications for this conclusion are unavailing.

Several—such as the theory that companies are not harmed by fees that can be passed on to their customers—have been expressly rejected by this Court.

Others—such as the theory that MERS would be a "free rider" if it paid the same fees as other filers for the same services—rest on shoddy and confused economics and legal principles. In the end, the Connecticut Supreme Court's strained attempts to demonstrate that the statute does not facially discriminate at all only underscore why the statute cannot stand—and why this Court's guidance is needed to re-set the proper metes and bounds of facial discrimination for dormant Commerce Clause purposes.

First, the Connecticut Supreme Court suggested that in the absence of higher fees, members of the MERS® System would "free ride on the public recording system." App. 24. As the term is used in economics, a "free ride" (or the "free rider problem") refers to "taking the fruits while contributing nothing to the labor." *US Airways, Inc.* v. *McCutchen*, 133 S. Ct. 1537, 1550 (2013). When MERS opts to record a mortgage, it of course pays the fees in return for the clerk's services in recording the mortgage. What MERS resists is having to pay grossly disproportionate fees for exactly the same recording services received by other mortgagees whose loans are not registered on a national electronic database. Far from attempting to "free ride on the public recording system," MERS seeks only to pay the same fees for the same services provided to other mortgagees.

The opinion further suggests that town clerks are entitled to fees when a mortgage is assigned, and that members of the MERS® System somehow evade paying amounts that would otherwise be due. App. 24.

But recording of a mortgage or an assignment is entirely optional, and is not mandated by Connecticut law. *Id.* at 3. If a mortgage assignment is not recorded (whether because MERS remains the mortgagee and thus there is no mortgage assignment created to record, or because the assignee chooses not to record the assignment of the mortgage), then no recording services are provided by the town clerks, and thus no recording fees are owed for a service not performed.

Second, the court below held that the statute does not facially discriminate because it "levels the playing field" between in-state and national players. *Id.* at 36. But far from justifying the law, this purported justification only underscores its impropriety. The statute requires that MERS pay a higher fee for the same services for the sole reason that it engages in interstate commerce. Recording a mortgage for MERS is no more burdensome or costly to the State than recording a mortgage for anyone else—and the State has never argued otherwise. See *Chemical Waste*, 504 U.S. at 343-44 (noting, in holding that Alabama's disposal fee for waste generated outside the State violated the dormant Commerce Clause, that "there is absolutely no evidence before this Court that waste generated outside Alabama is more dangerous than waste generated in Alabama").

To the extent that fewer mortgage assignments are recorded resulting in the State realizing less in recording fees, this is only because mortgages and other instruments involving MERS result in fewer mortgage assignments being created and executed, and thus

there is less of the permissive recording of these assignments in the land records. The fact that fewer mortgage assignments involving MERS are not being recorded in Connecticut's land records is not because these MERS mortgages and other instruments are being recorded elsewhere such as on the MERS® System. The reason that fewer mortgage assignments are recorded is that with MERS as the common agent of the MERS® System members, loan transactions between those members do not necessitate the mortgage being assigned. MERS® System members agree that MERS may remain as the mortgagee and therefore the MERS® System members do not need the identity of the mortgagee to be changed in the land records. This, in turn, results in fewer assignments being created and then recorded in the public land records.

The Connecticut Supreme Court's response to this argument is revealing—it notes that a reduction in the demand for the county clerk's services will not reduce the overhead expenses—i.e., the fixed costs of running a recording clerk's office. App. 23. But that should not be a single private national company's burden. Connecticut is merely subsidizing its operations by assessing higher fees on an innovative out-of-state company. Rather than providing a reason to uphold the statute, the Connecticut Supreme Court's analysis only confirms its invalidity.

MERS's and MERSCORP's innovative and nationwide electronic system has resulted in less demand for the recording services of clerks. But in response to the reduced demand, Connecticut chose to penalize those associated with MERS and MERSCORP's electronic

national database to fund the state and its local municipalities. Instead of distributing overhead costs evenhandedly among all users of recording services, the Connecticut legislature decided to impose a disproportionate share of these overhead costs on MERS—thereby subsidizing local Connecticut residents at the expense of a company engaged in interstate commerce, not to mention creating a profit center that also funds various programs that benefit in-state residents.

This Court's precedent confirms that such a scheme violates the dormant Commerce Clause: "[R]evenue generation is not a local interest that can justify discrimination against interstate commerce." *C & A Carbone*, 511 U.S. at 393. An interstate firm "expects to pay local fees that are uniformly assessed upon all those who engage in local business, interstate and domestic firms alike." *Am. Trucking Ass'ns*, 545 U.S. at 438. The dormant Commerce Clause forbids Connecticut to impose additional fees on disfavored, interstate firms.

Third, the court below held that the statute did not discriminate on its face since imposing higher recording fees on MERS does not actually harm MERS because, according to the court, "the likely result will be that Connecticut homeowners, who, the parties agree, typically absorb the higher upfront fees for MERS-listed loans, will subsidize out-of-state banks."

App. 32-33.[2] But this Court rejected a materially indistinguishable argument in *Bacchus Imports*, where Hawaii argued that "the wholesalers have no standing to challenge the tax because they have shown no economic injury from the claimed discriminatory tax" that they pass along to their customers. 468 U.S. at 267.

This Court noted that the wholesalers were "liable for the tax" and that "[a]lthough they may pass it on to their customers, and attempt to do so, they must return the tax to the State whether or not their customers pay their bills." *Ibid.* And "even if the tax is completely and successfully passed on," the tax "increases the price of [the wholesalers'] products as compared to the exempted beverages." *Ibid.* Thus, "[t]he wholesalers plainly have standing to challenge the tax in this Court." *Ibid.* There is no serious argument that MERS cannot challenge the discriminatory fees imposed on it by Connecticut's statute.

Fourth, the court below held there could be no facial discrimination as long as there is no in-state competitor. See App. 35-36; see also *id.* at 33 (characterizing a mortgage nominee "that operates a Connecticut only electronic database" as "a chimera"). This argument is without merit. Indeed, this Court has already considered—and rejected—a similar argument, explaining that "where discrimination is patent, as it is here, neither a widespread advantage to in-state

[2] The meaning of the Connecticut Supreme Court's reference to "subsidize" is unclear. Throughout the opinion below, economic terms are used imprecisely or incorrectly.

interests nor a widespread disadvantage to out-of-state competitors need be shown." *New Energy Co.*, 486 U.S. at 276.

This Court noted that in earlier cases, it did not "consider the size or number of the in-state businesses favored or the out-of-state businesses disfavored relevant to our determination"—and there is certainly no *de minimis* exception for discrimination. *Ibid.* "Varying the strength of the bar against economic protectionism according to the size and number of in-state and out-of-state firms affected would serve no purpose except the creation of new uncertainties in an already complex field." *Id.* at 276-77.

The same analysis applies here to compel the conclusion that the "number of the in-state businesses favored" is simply not relevant to the dormant Commerce Clause determination. To be sure, considering the practical effect on interstate commerce and competition may be necessary when a neutral statute is challenged as burdening interstate commerce under the *Pike* balancing test. But where, as here, discrimination is patent on the face of the statute, there is no need to look further.

Finally, the court below held that despite the statute's reference to "national electronic databases," it is not "a facial attack on interstate commerce" because according to the court, the "legislature's apparent intent" was to target all "virtual recording systems," not merely national ones. App. 34. That is, although the Connecticut legislature enacted a statute that

discriminates against interstate commerce, it did so by accident. Not surprisingly, this theory of "accidental" discrimination does not make the statute any less facially discriminatory and cannot save it.

On its face, the statute targets a company that is a mortgagee that has loans registered on a "national electronic database"—the MERS® System—and charges that company treble fees. Such facial discrimination does not become permissible merely because a court concludes that the legislature did not really mean to discriminate. Cf. *Univ. of Tex. Sw. Med. Ctr.* v. *Nassar*, 133 S. Ct. 2517, 2528-29 (2013) ("What the legislative intention was, can be derived only from the words they have used; and we cannot speculate beyond the reasonable import of these words." (quoting *Gardner* v. *Collins*, 27 U.S. 58, 93 (1829))). Speculation about the legislature's motives cannot save a facially discriminatory statute.

II. The Connecticut Supreme Court's Decision Conflicts With This Court's Precedent Because The Statute Lacks A Legitimate Justification For Burdening Interstate Commerce.

Even if a statute does not facially discriminate against interstate commerce (unlike the Connecticut statute at issue in this case), "nondiscriminatory burdens on commerce may be struck down on a showing that those burdens clearly outweigh the benefits of a state or local practice." *Dep't of Revenue* v. *Davis*, 553

U.S. 328, 353 (2008). In this case, the burdens on interstate commerce plainly outweigh the benefits of the state statute under the balancing test of *Pike* v. *Bruce Church, Inc*. The Connecticut Supreme Court's contrary holding conflicts with this Court's precedent for that reason, too.

Connecticut simply has no legitimate justification for the burden its statute places on interstate commerce. The Connecticut Supreme Court concluded that the statute was justified because MERS would only pay a recording fee once, rather than every time that a loan is transferred. App. 38. But as already discussed, that is irrelevant. See *supra* pp. 19-22. If MERS pays fewer recording fees, that is because it uses fewer services. There is no rational reason that MERS should pay higher recording fees than other filers for the same services—particularly given that MERS uses those services less and should not have to pay for services it did not receive.

The Connecticut Supreme Court's conclusion that the statute "level[s] the playing field" between MERS® System members and non-members, App. 36, not only misunderstands the statute's operation, but also underscores why the statute is impermissible. Far from leveling the playing field, the statute treats parties who use the same state resources radically differently, depending solely on whether they are engaged in interstate commerce.

Because Connecticut offers no legitimate justification for burdening interstate commerce with the

additional recording fees, its burden on interstate commerce would violate the dormant Commerce Clause even if the statute were not discriminatory on its face—and the Connecticut Supreme Court sharply departed from this Court's precedent in holding otherwise.

III. The Petition Presents Constitutional Questions Of Substantial Importance That Can Only Be Resolved By This Court.

The Court's review is warranted to safeguard "[t]he 'negative' aspect of the Commerce Clause" that was "considered the more important [one] by the 'father of the Constitution,' James Madison." *W. Lynn Creamery, Inc.* v. *Healy*, 512 U.S. 186, 192, 193 n.9 (1994). Indeed, by "prohibiting States from discriminating against * * * interstate commerce without congressional approval, [the dormant Commerce Clause] strikes at one of the chief evils that led to the adoption of the Constitution" in the first place. *Wynne*, 135 S. Ct. at 1794. Yet without this Court's intervention from time to time, state courts could nullify the dormant Commerce Clause, undermine the intent of the Founders, and interfere with the free flow of goods and services across state lines. See 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 478 (Max Farrand ed., Yale University Press) (1911) ("[The Commerce Clause] grew out of the abuse of the power by the importing States in taxing the non-importing, and was intended as a negative and preventive provision against injustice among the States themselves, rather

than as a power to be used for the positive purposes of the General Government.").

The Connecticut Supreme Court's decision in this case approves what is essentially a naked wealth transfer as the cost of doing business in the State. It does so by singling out—on its face—"national" businesses and "has the same economic effect as a state tariff, the quintessential evil targeted by the dormant Commerce Clause." *Wynne*, 135 S. Ct. at 1792. Some dormant Commerce Clause cases may present difficult line-drawing problems, but this is not one of them. Under the Connecticut Supreme Court's decision, it is difficult to imagine a statute that could *not* pass muster, given the patent facial discrimination and the lack of any legitimate justification for the statute.

As a result, if the Connecticut Supreme Court's decision is allowed to stand, it will provide a road map for other cash-strapped States, counties, and cities to similarly target any "national" business for what amounts to an impermissible state tariff—under the guise of simply "leveling the playing field." This case thus implicates precisely the concern motivating the dormant Commerce Clause—that States will favor their own interests over those of the Nation as a whole. This Court should grant the petition, remedy the constitutional violation, and restore the proper metes and bounds of the Commerce Clause.

IV. The Connecticut Supreme Court's Decision Is An Excellent Vehicle For Resolving The Conflict And Reaffirming This Court's Dormant Commerce Clause Jurisprudence.

This case provides an ideal vehicle for restoring the proper bounds of the dormant Commerce Clause. The Connecticut Supreme Court's decision is final, its opinion is published, and its discriminatory effect is immediate.

There is no need for further percolation, and no possibility that the conflict can resolve itself. No antecedent questions of fact or law would prevent this Court from deciding the issue. Indeed, the discrimination is plain on the face of the statute—and the lack of any legitimate justification makes application of the *Pike* balancing test particularly straightforward.

Under the Connecticut Supreme Court's logic, there is no reason that other States could not adopt similar protectionist regulations of their own. As explained above, if the decision below is permitted to stand, it can only embolden other States to pass laws blatantly discriminating against other "national" businesses.

The effect is magnified by the fact that the statute here targets the "national electronic database." Congress has made clear that it does not want States impeding the flow of Internet commerce, which is inherently interstate. Cf. Internet Tax Freedom Act §§ 1100-1104 (prohibiting multiple taxation). Here, it is precisely *because* of the substantial efficiencies

achieved by MERS and MERSCORP's innovative approach, enabled by modern technology, that have made it a target for Connecticut's protectionist legislation.

In today's Internet-age and e-business environment, permitting this dormant Commerce Clause violation would open the floodgates to fee enhancements against all manner of on-line businesses. And at least according to the Connecticut Supreme Court, those States will have legitimate purposes, such as seeking additional revenue to pay for the overhead at the state comptroller's office. The potential for this case to spawn significant litigation later is more than enough reason for this Court to review it now before even more damage is done to interstate (and electronic) commerce.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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320 Conn. 448
Supreme Court of Connecticut.

MERSCORP HOLDINGS, INC., et al.
v.
Dannel P. MALLOY et al.

No. 19376.
|
Argued Oct. 14, 2015.
|
Decided Feb. 23, 2016.

Attorneys and Law Firms

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Ryan P. Barry and Michael J. Dyer, Manchester, filed a brief for the Connecticut Bankers Association et al. as amici curiae.

J.L. Pottenger, Jr., Jeffrey Gentes, and Aurelia Chaudhury, Nicholas Gerschman and Marian Messing, law student interns, filed a brief for the Jerome N. Frank Legal Services Organization and the Connecticut Fair Housing Center as amici curiae.

PALMER, ZARELLA, EVELEIGH, ESPINOSA and ROBINSON, Js.

Opinion

PALMER, J.

In 2013, the legislature amended the statutes governing Connecticut's public land records system to create a two tiered system in which a mortgage nominee operating a national electronic database to track residential mortgage loans must pay recording fees approximately three times higher than do other mortgagees. The plaintiffs, MERSCORP Holdings, Inc., and Mortgage Electronic Registration Systems, Inc., who are currently the only entities required to pay the increased recording fees, commenced the present action against the defendants, Governor Dannel P. Malloy, Attorney General George Jepsen, Treasurer Denise L. Nappier, Kendall F. Wiggin, the state librarian, and LeAnne R. Power, the state public records administrator,[1] seeking, inter alia, injunctive relief and a judgment declaring that this two tiered fee structure violates various provisions of the federal and state constitutions. Specifically, the plaintiffs alleged that General Statutes §§ 7-34a (a)(2) and 49-10(h), as amended, violate the equal protection, due process, and takings provisions of the federal and state constitutions, the federal dormant commerce clause, and the federal prohibition against bills of attainder. The plaintiffs further alleged that enforcement of the statutes violates 42 U.S.C. § 1983. The parties filed motions for summary judgment, and the trial court granted the state's

[1] We hereinafter refer to the defendants collectively as the state.

motion for summary judgment on all counts and rendered judgment thereon. This appeal followed.[2] We affirm the judgment of the trial court.

I

This case concerns the filing fees that the parties to a residential mortgage loan must pay to record mortgage documents in the public land records in Connecticut. Because the plaintiffs raise both federal and state constitutional issues of first impression, it will be helpful before considering the plaintiffs' claims to briefly review the traditional procedure for recording residential mortgage documents, certain relatively recent changes to that system, and the novel response of the Connecticut legislature to those changes.

Under the traditional residential mortgage model, a person seeking to finance the purchase of a residential property obtains a loan from a lender, typically a

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[2] The plaintiffs appealed from the judgment of the trial court to the Appellate Court, and we transferred the appeal to this court pursuant to General Statutes § 51-199(c) and Practice Book § 65-1.

The plaintiffs have not appealed from the trial court's ruling that the challenged statutes do not offend the takings provisions of the federal and state constitutions, and, accordingly, those claims are not before us.

We granted permission for two groups to file amicus curiae briefs: the Connecticut Bankers Association, Connecticut Mortgage Bankers Association, and American Land Title Association; and the Jerome N. Frank Legal Services Organization and the Connecticut Fair Housing Center.

bank, in exchange for a promissory note committing the borrower to repay the loan. To secure the loan, the borrower provides the lender a mortgage on the property. Although, in Connecticut, there is no legal requirement that the lender record the mortgage in the public land records, mortgages typically are recorded—via the clerk of the town in which the property is situated—in order (1) to perfect the lender's security interest by giving public notice thereof, and (2) to maintain a complete public chain of title.

Under the traditional model, the bank or other lender maintains the loan on its books and continues to service the loan until it is repaid. At that point, the parties typically record a release of the mortgage in the land records. At a minimum, then, the life of a residential mortgage loan may involve only two recordable events, although other events—for example, a transfer of the mortgage loan to another lender, or the creation or subordination of a home equity credit line—also may arise under the traditional model.

The most significant factor in the decline of the traditional residential mortgage model has been the development and evolution of the secondary mortgage market. A secondary market is created when the initial lender sells the mortgage loan to outside investors. Doing so provides local lenders with greater liquidity, which facilitates additional home buying, and also allows large outside investors to pool—and thus to minimize—the risk that any particular loan will go into default. Although the modern secondary mortgage market had its genesis in the creation of the Federal

Housing Authority and associated government sponsored financing corporations such as Fannie Mae in the 1930s, it expanded dramatically in the 1980s with the advent of new types of mortgage backed securities for sale in the private equity markets.

For mortgage loans sold in the secondary market, the investor typically engages a third party to perform servicing functions such as payment collection and file maintenance. Both the loan itself and the servicing rights may be sold or transferred multiple times over the life of a loan. Under the common-law rule, as codified in many states, the mortgage follows the note, so that an investor who acquires a residential note automatically obtains the attached security interest as well.

Although the development of a robust and sophisticated secondary market has had a dramatic impact on the liquidity and, with some notable exceptions, the stability of the residential mortgage loan market, it also has created challenges for the public land record system. Because the ownership and servicing rights to a loan may be transferred multiple times over the life of a loan, the mortgagee of record, which may be either the note holder or the servicer as nominee, will frequently change. This means that each subsequent holder must choose either (1) to undertake the costly and time-consuming process of recording each of the numerous mortgages that it may briefly hold, subject to the varying costs and requirements of each state's county or, as in Connecticut, each town clerk, or (2) to

decline to record its interest, which may result in potential problems and costs resulting from an incomplete public chain of title.

To address these problems, in the 1990s, the major public financial service corporations, in collaboration with various private interests, developed the national Mortgage Electronic Registration Systems (MERS) system. There are two primary components to the MERS model.[3] First, MERS operates a national electronic registration system that tracks any changes in the ownership and servicing rights of MERS-registered loans between MERS members, who include instate and out-of-state mortgage lenders, servicers and subservicers, and public finance institutions. In this sense, MERS operates as a centralized, virtual alternative to the hundreds of traditional county or town land recording systems throughout the country. Second, because MERS members cannot completely eschew the use of the public land records, MERS becomes the mortgage nominee on any loans held by MERS members, and is identified as such when the mortgage is initially recorded in the land records. Recording a mortgage with MERS as a mortgage nominee essentially creates a placeholder for the electronic MERS system in the public records, allowing the two systems to interoperate. That is to say, if a party searching the

[3] For the sake of brevity, in this opinion, we use the term MERS to refer to (1) the electronic recording system, (2) the entities that are the plaintiffs in this case, in their capacity as operators of the MERS system, and (3) the general model according to which changing legal interests in residential mortgages and mortgage loans are recorded in the MERS system.

chain of title on a property comes upon a recorded mortgage to MERS, the party is thereby notified that the MERS database may be consulted to determine the present beneficial owner of the mortgage and loan, as well as any related servicing rights or subordinate security interests. MERS remains the mortgagee of record in the public records until the mortgage either is released or assigned to a nonmember of MERS.

One potential advantage of the MERS system is that it eliminates the costs, in both time and fees, associated with recording each subsequent mortgage assignment in the public land records. Although the plaintiffs in the present case do not concede that any such savings have been realized in Connecticut, the parties do agree that, as of 2013, approximately 65 percent of mortgage loans nationally and in Connecticut originated with MERS acting as the mortgagee. The plaintiffs' principal place of business is in Virginia.

Turning our attention to the legislation that led to the present action, we note that, prior to July 15, 2013, § 7-34a required that all filers pay the town clerk $10 for the first page of each document filed in the land records, plus $5 for each subsequent page. General Statutes (Rev. to 2013) § 7-34a (a). Section 7-34a imposed additional fees of $3 and $40 per filing; General Statutes (Rev. to 2013) § 7-34a (d) and (e); and an additional fee of $2 per assignment after the first two assignments. General Statutes (Rev. to 2013) § 7-34a (a).

In 2013, General Statutes (Rev. to 2013) § 7-34a was amended by Public Acts, No. 13-184, § 98 (P.A.

13-184), and Public Acts, No. 13-247, § 82 (P.A. 13-247). As amended, § 7-34a defines a "nominee of a mortgagee" as "any person who (i) serves as mortgagee in the land records for a mortgage loan registered on a national electronic database that tracks changes in mortgage servicing and beneficial ownership interests in residential mortgage loans on behalf of its members, and (ii) is a nominee or agent for the owner of the promissory note or the subsequent buyer, transferee or beneficial owner of such note." General Statutes § 7-34a (a)(2)(C). The parties agree that MERS is presently the only entity that qualifies as a nominee of a mortgagee, as so defined, and that the legislature crafted the statutory language with MERS specifically in mind.

Section 7-34a, as amended, further provides that, with two exceptions, when a nominee of a mortgagee files a document in the land records, the town clerk shall collect a fee of $116 for the first page filed and $5 for each additional page. General Statutes § 7-34a (a)(2)(A). In addition, the clerk continues to collect $3 for each document pursuant to § 7-34a (d) and $40 for each document pursuant to § 7-34a (e). The two exceptions are that, when a nominee of a mortgagee files "(i) an assignment of mortgage in which a nominee of a mortgagee appears as assignor, or (ii) a release of mortgage by the nominee of a mortgagee," the town clerk collects a fee of $159, plus $10 for the first page and $5 for each additional page.[4] See General Statutes § 7-34a

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[4] The state interprets § 7-34a (a)(2)(B) to mean that, in addition to the $159 recording fee, a nominee of a mortgagee filing an

(a)(1) and (2)(B). The recording fees for all other filers remain unchanged under the amended statute.

The net effect of the amendments to § 7-34a (a) is to collect from a nominee of a mortgagee, namely, MERS, substantially more for the filing of deeds, assignments, and other documents in the land records than from any other filer. When filing a mortgage deed, for example, if MERS is a party to the transaction, the recording fee will be $159 ($116 plus $3 plus $40) for the first page and $5 for each additional page. See General Statutes § 7-34a (a)(2)(A), (d) and (e). If MERS is not a party to the transaction, the recording fee will be $53 ($10 plus $3 plus $40) for the first page and $5 for each additional page. See General Statutes § 7-34a (a)(1), (d) and (e). When filing a mortgage assignment or release, if MERS is a party to the transaction, the recording fee will be $159, plus $10 for the first page and $5 for each additional page.[5] See General Statutes § 7-34a (a)(1) and (2)(B). If MERS is not a party to the transaction, the recording fee will be $53 ($10 plus $3 plus $40) for the first page and $5 for each

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assignment or release under that subparagraph must pay $10 for the first recorded page and $5 for each additional page pursuant to § 7-34a (a)(1). The plaintiffs contend that it is unclear whether town clerks are permitted to charge these additional fees, in light of the statement in § 7-34a (a)(2)(B) that "[n]o other fees shall be collected from the nominee for such recording." For purposes of this appeal, because we glean from the state's brief that these additional fees are in fact being imposed on the plaintiffs, and that they are therefore a subject of the plaintiffs' complaint, we assume without deciding that the statute authorizes such additional fees.

[5] See footnote 4 of this opinion.

additional page. See General Statutes § 7-34a (a)(1), (d) and (e).

The 2013 amendments also shifted how the recording fees on MERS-related transactions are allocated. See generally P.A. 13-184, § 97, and P.A. 13-247, § 81, codified at General Statutes § 49-10(h). The $159 assessed for the filing of mortgage deeds in connection with MERS transactions is allocated as follows: $10, plus any fees for additional pages, to the town clerk; $39 to the municipality's general revenue accounts; and $110 to the state, of which $36 is paid into the community investment account and $74 into the state's general fund. General Statutes § 49-10(h). The $159 fee assessed in connection with MERS-related assignments and releases is allocated slightly differently: $32 to municipal general revenue accounts; $36 to the state's community investment account; and $91 to the state's general fund. General Statutes § 49-10(h). By contrast, the $53 paid by other mortgagees for all recorded transactions continues to be allocated as follows: $12 for the first page ($10 plus $1 of the $3 fee pursuant to § 7-34a [d], plus $1 of the $40 fee pursuant to § 7-34a [e]), and $5 per additional page to the town clerk; $3 to the municipality for local capital improvement projects; and $38 to the state, of which $2 is dedicated to historic document preservation and $36 for community investment. See General Statutes § 7-34a (a)(1), (d) and (e).

The parties agree that the legislature adopted the amendments to § 7-34a (a) at least in part as a revenue enhancing measure to help balance the state budget.

They also agree that there is no evidence that any member of MERS has discontinued its membership in the MERS system or halted or reduced its use of that system as a result of the 2013 amendments. Finally, the parties agree that, in most cases, the recording fees at issue will be collected from the borrowers at closing and not paid by MERS itself.

II

As an initial matter, we must address the dispute between the parties about whether the fees imposed by § 7-34a are more properly characterized as user fees or taxes. The state contends that the payments are more akin to taxes than user fees because the statute was enacted primarily to raise revenues for the state and its municipalities and because the lion's share of the fees incurred in connection with MERS-related transactions is allocated to the state's general fund, the state's community investment account, and municipal general revenue accounts, whereas only a small fraction of the fees is retained by the town clerks as compensation for the recording service. The plaintiffs, by contrast, contend that the fees, which are identified in the statute as recording "fees"; General Statutes § 7-34a; and are paid in exchange for a discrete service of benefit to the filer, are properly considered user fees. Courts in other jurisdictions that have considered the question in other contexts—e.g., for purposes of the federal tax injunction law, 28 U.S.C. § 1341 (2012)—have reached different conclusions as to whether a purported "fee" that generates more revenue than is

needed to fund the service for which the fee is charged, with the surplus allocated to the government's general fund, constitutes a tax or a fee. Compare, e.g., *Empress Casino Joliet Corp.* v. *Balmoral Racing Club, Inc.*, 651 F.3d 722, 730 (7th Cir. 2011) (tax), with, e.g., *San Juan Cellular Telephone Co.* v. *Public Service Commission*, 967 F.2d 683, 686 (1st Cir. 1992) (fee). But see S. Wolfe, "Municipal Finance and the Commerce Clause: Are User Fees the Next Target of the 'Silver Bullet'?," 26 Stetson L.Rev. 727, 729 (1997) ("[r]ecent rulings by the [United States Supreme] Court suggest that the difference between user fees and taxes may be a distinction without a difference"). Because the payments at issue in this case are hybrids, bearing some indicia of both taxes and user fees, and because the parties have not fully briefed the issue, we will assume, solely for purposes of the present appeal, that we must apply the constitutional standards governing both taxes and fees.

III

We now address the merits of the plaintiffs' various constitutional challenges,[6] beginning with the plaintiffs' claim that §§ 7-34a (a)(2) and 49-10(h), by

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[6] Because a challenge to the constitutionality of a statute presents a question of law, our review is plenary. E.g., *Keane* v. *Fischetti*, 300 Conn. 395, 402, 13 A.3d 1089 (2011). We recognize, however, that legislation that structures and accommodates the burdens and benefits of economic life carries a strong presumption of constitutionality. See, e.g., *Schieffelin & Co.* v. *Dept. of Liquor Control*, 194 Conn. 165, 186, 479 A.2d 1191 (1984).

charging nominees such as MERS higher recording fees than other mortgagees, violate the equal protection guarantees of the state and federal constitutions.[7] We reject this claim.

"To prevail on an equal protection claim, a plaintiff first must establish that the state is affording different treatment to similarly situated groups of individuals * * * * [I]t is only after this threshold requirement is met that the court will consider whether the statute survives scrutiny under the equal protection clause." (Citation omitted; internal quotation marks omitted.) *Keane* v. *Fischetti*, 300 Conn. 395, 403, 13 A.3d 1089 (2011). For purposes of this case, we will assume without deciding that the similarly situated requirement is satisfied and proceed to consider whether the legislature was warranted in singling out the plaintiffs for disparate treatment. Cf. *City Recycling, Inc.* v. *State*, 257 Conn. 429, 449, 778 A.2d 77 (2001).

"When a statute is challenged on equal protection grounds, whether under the United States constitution or the Connecticut constitution, the reviewing court

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[7] The equal protection clause of the fourteenth amendment to the United States constitution provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const.amend. XIV, § 1. Article first, § 20, of the constitution of Connecticut provides in relevant part: "No person shall be denied the equal protection of the law * * * * " Neither party contends that the state and federal constitutional analyses diverge with respect to equal protection challenges to tax and fee statutes. Accordingly, for purposes of this case, we treat the relevant state and federal protections as coextensive. See, e.g., *Keane* v. *Fischetti*, 300 Conn. 395, 403, 13 A.3d 1089 (2011).

must first determine the standard by which the challenged statute's constitutional validity will be determined." (Internal quotation marks omitted.) *D.A. Pincus & Co.* v. *Meehan*, 235 Conn. 865, 875, 670 A.2d 1278 (1996). In the present case, to prevail on their equal protection claim, the plaintiffs must overcome a highly deferential standard of review. "If the statute does not [affect] either a fundamental right or a suspect class, its classification need only be rationally related to some legitimate government purpose * * * * " (Internal quotation marks omitted.) Id. This rational basis review test "is satisfied [as] long as there is a plausible policy reason for the classification * * * the legislative facts on which the classification is apparently based rationally may have been considered to be true by the government decisionmaker * * * and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational * * * * " (Citations omitted; internal quotation marks omitted.) Id., at 876, 670 A.2d 1278.

"It is undisputed that the constitutionality of the taxation scheme at issue * * * must be analyzed under rational basis review because it neither implicates a fundamental right, nor affects a suspect class. Indeed, claims that taxation schemes violate the equal protection rights of those more heavily taxed are subject to an especially deferential rational basis review. The United States Supreme Court has explained that in taxation, even more than in other fields, legislatures possess the greatest freedom in classification. Since

the members of a legislature necessarily enjoy a familiarity with local conditions [that a reviewing] [c]ourt cannot have, the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes * * * * Accordingly, that court has repeatedly held that inequalities [that] result from a singling out of one particular class for taxation or exemption, infringe no constitutional limitation." (Citation omitted; internal quotation marks omitted.) *Markley* v. *Dept. of Public Utility Control*, 301 Conn. 56, 70, 23 A.3d 668 (2011); see, e.g., *Alabama Dept. of Revenue* v. *CSX Transportation, Inc.*, ___ U.S. ___, 135 S.Ct. 1136, 1142-43, 191 L.Ed.2d 113 (2015). "Similarly, this court consistently has held that the state does not violate the equal protection clause by singling out a particular class for taxation or exemption." *Markley* v. *Dept. of Public Utility Control*, supra, at 71, 23 A.3d 668. Rather, "[t]he burden is on the one attacking the legislative arrangement to negative *every conceivable basis* [that] might support it." (Emphasis in original; internal quotation marks omitted.) *D.A. Pincus & Co.* v. *Meehan*, supra, 235 Conn. at 876-77, 670 A.2d 1278. The same deferential standards govern equal protection challenges to user fees. See, e.g., *United States* v. *Sperry Corp.*, 493 U.S. 52, 65, 110 S.Ct. 387, 107 L.Ed.2d 290 (1989); *Kadrmas* v. *Dickinson Public Schools*, 487 U.S. 450, 462-63, 108 S.Ct. 2481, 101 L.Ed.2d 399 (1988).

Turning to the case before us, we first consider whether the challenged statutes seek to accomplish a

legitimate public purpose. The parties agree that one primary purpose of the legislature in imposing higher recording fees on mortgage nominees such as MERS was simply to raise additional revenues, either to compensate for fees allegedly lost as a result of the MERS business model or, more generally, to help balance the state's budget. It is well established that raising revenues is a legitimate purpose—often the primary purpose—of a tax or a fee. See *Harbor Ins. Co.* v. *Groppo*, 208 Conn. 505, 511, 544 A.2d 1221 (1988) (tax); *Eagle Rock Sanitation, Inc.* v. *Jefferson County*, United States District Court, Docket No. 4:12-CV-00100-EJL-CWD, 2013 WL 6150779 (D.Idaho November 22, 2013) (fee). Accordingly, the first prong of the test is satisfied.[8]

The dispute between the parties thus centers around the question of whether it is permissible for the legislature to impose a higher share of the state's revenue burden on nominees such as MERS than it does on other recording parties. That is to say, we must determine whether the disparate treatment imposed by

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[8] The plaintiffs also contend that the amendments to §§ 7-34a and 49-10 were motivated by an impermissible desire to punish MERS for its business model. The trial court rejected this allegation, and we find no support for it in the legislative history. Even if it were true, however, the outcome of our analysis would be no different. As long as the challenged distinction is rationally related to some legitimate public purpose that conceivably may have motivated the legislature, it is irrelevant whether certain legislators also may have been motivated by animus toward the plaintiffs. See, e.g., *United States* v. *O'Brien*, 391 U.S. 367, 383-84, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968); see also *Wisconsin Education Assn. Council* v. *Walker*, 705 F.3d 640, 653 (7th Cir. 2013).

§§ 7-34a (a)(2) and 49-10(h) is rationally related to the goal of raising revenues and recouping lost fees.

Before considering whether the legislature had a rational basis for imposing higher recording fees on nominees such as MERS than on other mortgagees, we first address the plaintiffs' contention that we must restrict our analysis in this regard to those theories that the state raised before the trial court and that find evidentiary support in the record. The plaintiffs misstate the law. As the trial court properly recognized, the state "has no obligation to produce evidence to sustain the rationality of a statutory classification. [A] legislative choice is not subject to courtroom [fact-finding] and may be based on rational speculation unsupported by evidence or empirical data * * * * A statute is presumed constitutional * * * and [t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it * * * whether or not the basis has a foundation in the record." (Citations omitted; internal quotation marks omitted.) *Heller* v. *Doe ex rel. Doe*, 509 U.S. 312, 320-21, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993). Indeed, it is well established that a reviewing court need not restrict its analysis even to those rationales proffered by the parties but may itself hypothesize plausible reasons why a legislative body might have drawn the challenged statutory distinctions. See, e.g., *Federal Communications Commission* v. *Beach Communications, Inc.*, 508 U.S. 307, 318, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993); *Kadrmas* v. *Dickinson Public Schools*, supra, 487 U.S. at 462-63, 108 S.Ct. 2481;

American Express Travel Related Services Co. v. *Kentucky*, 641 F.3d 685, 690 (6th Cir. 2011). In the present case, in light of the highly deferential standard of review that applies to tax and user fee legislation and other forms of purely economic regulation, we perceive at least two conceivable bases on which the legislature might reasonably have imposed higher recording fees on nominees such as MERS than on other mortgagees.

First, the legislature might simply have concluded that a large corporation such as MERS, which is involved in nearly two thirds of the nation's residential mortgage transactions, is better able to shoulder high recording fees than are smaller mortgagees. Although it is true that large banks, loan servicing companies, and other well-heeled mortgagees may be no less able to afford such fees, a statute subject to rational basis review can be under inclusive without running afoul of the equal protection clause. See, e.g., *Nordlinger* v. *Hahn*, 505 U.S. 1, 11, 112 S.Ct. 2326, 120 L.Ed.2d 1 (1992) ("[i]n structuring internal taxation schemes the [s]tates have large leeway in making classifications and drawing lines [that] in their judgment produce reasonable systems of taxation" [internal quotation marks omitted]); *Markley* v. *Dept. of Public Utility Control*, supra, 301 Conn. at 70, 23 A.3d 668 ("[A] legislature is not bound to tax every member of a class or none. It may make distinctions of degree having a rational basis, and when subjected to judicial scrutiny they must be presumed to rest on that basis if there is any conceivable state of facts [that] would support it." [Internal quotation marks omitted.]); *Harbor Ins. Co.* v.

Groppo, supra, 208 Conn. at 511, 544 A.2d 1221 ("[R]ecognizing that any plan of taxation necessarily has some discriminatory impact * * * we have previously stated the operative test for the validity of a tax statute to be the following: As long as some *conceivable* rational basis for the difference exists, a classification is not offensive merely because it is not made with mathematical nicety." [Citations omitted; emphasis in original; internal quotation marks omitted.]). Indeed, our sister state courts have upheld taxation schemes that impose a heightened burden on individual corporate taxpayers when there is a principledbasis for doing so. See, e.g., *North Pole Corp.* v. *East Dundee*, 263 Ill.App.3d 327, 336-37, 200 Ill.Dec. 721, 635 N.E.2d 1060 (1994); *Horizon Blue Cross Blue Shield* v. *State*, 425 N.J.Super. 1, 21-23, 39 A.3d 228 (App.Div.), cert. denied, 211 N.J. 608, 50 A.3d 41 (2012); see also *Verizon New England, Inc.* v. *Rochester*, 156 N.H. 624, 631, 940 A.2d 237 (2007) (city could tax one public utility more heavily than others if selective taxation was reasonably related to legitimate public interest).[9]

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[9] The equal protection cases on which the plaintiffs rely are readily distinguishable, as they primarily address legislative distinctions that (1) implicate federalism or other constitutional interests, (2) are transparently arbitrary and without rational basis, or (3) impose criminal or quasi-criminal sanctions. See, e.g., *Cleburne* v. *Cleburne Living Center, Inc.*, 473 U.S. 432, 449-50, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985) (in rare case in which United States Supreme Court held that challenged social legislation failed to withstand rational basis review, court concluded that irrational fear of mentally disabled individuals did not justify discriminatory zoning ordinance); *Williams* v. *Vermont*, 472 U.S. 14,

Second, as the trial court recognized, the legislature reasonably may have determined that mortgage assignments that typically would be recorded in the public land records are not recorded for loans registered with the MERS system because MERS remains the mortgagee of record for its members. Accordingly, the legislature could have raised the initial recording fee that MERS pays, as well as the final fee that is paid when the mortgage is released or transferred out of the MERS system, to compensate for the fees "lost" over the course of the life of the loan.

The plaintiffs offer four arguments in response: (1) there is no evidence in the record to support the contention that assignments are recorded less frequently for MERS loans than for other mortgagees' loans; (2)

23, 105 S.Ct. 2465, 86 L.Ed.2d 11 (1985) (state impermissibly discriminated against nonresidents); *Zobel* v. *Williams*, 457 U.S. 55, 64, 65, 102 S.Ct. 2309, 72 L.Ed.2d 672 (1982) (apportioning state benefits on basis of duration of residency would impermissibly divide citizens into castes and unduly infringe interstate travel rights); *James* v. *Strange*, 407 U.S. 128, 138-39, 92 S.Ct. 2027, 32 L.Ed.2d 600 (1972) (statute imposed "unduly harsh or discriminatory terms" on indigent criminal defendants and potentially infringed right to counsel); *City Recycling, Inc.* v. *State*, supra, 257 Conn. at 453, 778 A.2d 77 (trial court's specific factual findings "directly negate[d] every conceivable rational basis for the legislation"); *State* v. *Reed*, 192 Conn. 520, 531-32, 473 A.2d 775 (1984) (quasi-penal statute imposing liability for hospital care expenses on certain confined individuals but not others was deemed to be "entirely arbitrary"); *Caldor's, Inc.* v. *Bedding Barn, Inc.*, 177 Conn. 304, 316-18, 417 A.2d 343 (1979) (applying stricter standard in case of penal statute); see also *Allegheny Pittsburgh Coal Co.* v. *County Commission*, 488 U.S. 336, 345, 109 S.Ct. 633, 102 L.Ed.2d 688 (1989) (county assessor failed to comply with uniform state tax policy).

there is no legal requirement that assignments be recorded in the public land records; (3) even if town clerks do perform fewer recording duties with respect to MERS loans than non-MERS loans, there is no reason to compensate town clerks for lost recording revenues because they already save the costs associated with not having to record assignments of MERS loans, or, put differently, clerks are not entitled to payment for services that they do not perform; and (4) even if town clerks have lost recording fees under the MERS system, there is no rational relationship between those losses and the fees imposed under §§ 7-34a (a)(2) and 49-10(h) because those fees are primarily allocated to the state's general fund and to municipal accounts, rather than to the clerks themselves. We consider each argument in turn.

With respect to the plaintiffs' argument that there is no evidence in the record that mortgage assignments are recorded less frequently for MERS-listed loans than for non-MERS loans, we already explained that, under the rational basis test, our review is not limited to theories that the state has documented at trial or that have been subject to judicial fact-finding. Rather, courts may consider—and it is the plaintiffs who must debunk—any rationale that might plausibly have motivated the legislature. In the present case, it cannot be seriously suggested that the MERS model might not result in fewer recordings in the public land records, with concomitant cost savings to MERS and its users. Indeed, the plaintiffs' argument is undercut repeatedly by the amici supporting their own position. The amici

comprising two bankers associations and a land title association represent, for example, that (1) prior to the advent of MERS, recording expenses added at least $30 to the cost of each loan, and sometimes substantially more, (2) MERS was devised "with an eye toward eliminating many of the unnecessary costs * * * associated with land title and recording issues," (3) assignments that typically were filed on the land records before the establishment of MERS are no longer required, (4) this reduced need for assignments results in lower title insurance and closing costs for both buyers and sellers using the MERS system, and (5) MERS "made the transfer of loans in the secondary market both cheaper and simpler."

The amici also direct our attention to scholarly literature concluding that MERS "reduces the need to pay additional recording fees associated with subsequent transfers of mortgage loans or mortgage loan servicing rights" and to an article published by a former senior executive officer of MERS predicting that, because MERS "eliminates the need to record later assignments in the public land records * * * MERS will save the mortgage industry $200 million a year by eliminating the need for many assignments. Because MERS should decrease the cost of servicing transfers, mortgage loan portfolios may begin to reflect a price difference if the loans are MERS registered." Moreover, "[w]hether [town recorders'] assignment revenues will drop [as a result] remains an open question." In light of these publicly available statements, we have no

difficulty concluding that the legislature might reasonably have determined that parties to MERS-listed loans can obtain significant cost savings in recording fees over the life of a loan and that, as a result, it is not unfair to ask them to pay higher recording fees at the outset and again when the mortgage ultimately is released or transferred out of the MERS system.

The plaintiffs' second argument, namely, that there is no legal requirement that assignments of loan servicing rights be recorded in Connecticut, is a red herring. It is clear from the above quoted statements that, when the plaintiffs represent that the MERS system "eliminates the *need* to record later assignments in the public land records"; (emphasis added); they refer not to any legal recording requirement but, rather, to the fact that, from a practical standpoint, loan assignments must be recorded if the holder is to perfect its security interest and to avoid potentially costly gaps in the chain of title.

Nor are we persuaded by the plaintiffs' third argument, namely, that the legislature had no legitimate reason to compensate town clerks for lost recording revenues because, if a document is not recorded, the town clerk has performed no service for which he or she deserves to be compensated. There are three flaws with this argument. First, the argument accounts for only the marginal costs associated with recording a document. The costs of running a town clerk's office, including the clerk's salary and benefits, building and utilities, information technology infrastructure, and the like, are largely fixed. By contrast, the marginal

costs associated with recording any particular document—a bit of paper and ink, or the digital equivalents thereof—are quite limited. Thus, if increased use of the MERS system means that a clerk's workload drops by 10 percent, it is unlikely that the clerk's office will recognize a corresponding 10 percent cost savings. It therefore was reasonable for the legislature to impose higher upfront and back-end fees on MERS transactions to help the town clerks maintain budget stability.

Second, the plaintiffs fail to acknowledge that the service provided by a clerk's office only begins with the recording of a document. The principal service provided, and the principal value to the recording party, is that a record of the transaction is perpetually maintained and made available to the public for search by any interested party. This is the primary reason parties opt to record assignments and other loan documents. One value of the MERS system to subsequent transferees, then, is that it allows them essentially to free ride on the public recording system. They reap the benefit of MERS' initial recording as mortgagee, without having to pay—at least without having to pay the clerk—for the ongoing benefit of the public notice. It is reasonable to assume that the legislature imposed higher up-front recording fees on MERS loans as a way to remedy this free rider problem.

Third, the plaintiffs go astray in considering the issue solely from the standpoint of the town clerk. Regardless of whether the clerks have lost money as a result of a lower recording rate for assignments of MERS loans, it seems clear that MERS, its members, and the

buyers and sellers involved in MERS-listed transactions do achieve some savings in recording costs. If the legislature concluded that this system of loan processing results in significant cost savings for MERS members and its users, the legislature was free to impose a higher tax or fee on those transactions in order to recapture a portion of those savings. See *Rosemont* v. *Priceline.com, Inc.*, United States District Court, Docket No. 09 C 4438, 2011 WL 4913262 (N.D.Ill. October 14, 2011) (equal protection clause was not offended when town imposed hotel tax on only those travel companies using distinct business model that otherwise would have resulted in tax savings for those companies); *Horizon Blue Cross Blue Shield* v. *State*, supra, 425 N.J.Super. at 22-23, 39 A.3d 228 (equal protection clause was not offended when state imposed tax solely on health service companies, of which plaintiff was sole exemplar, which previously had advantage of certain tax loopholes).

Finally, the plaintiffs' fourth argument is that, even if town clerks have lost recording fees as a result of the MERS system, there is no rational relationship between those losses and the heightened fees imposed under §§ 7-34a (a)(2) and 49-10(h), which primarily are allocated to the state's general fund and municipal accounts. This argument fails because, among other things, it assumes a system of municipal financing that is largely obsolete. Pursuant to General Statutes § 7-34b (b), "[a]ny town may, by ordinance, provide that the town clerk shall receive a salary in lieu of all fees and

other compensation provided for in the general statutes * * * * Upon the adoption of such ordinance the fees or compensation provided by the general statutes to be paid to the town clerk shall be collected by such town clerk and he shall deposit all such money collected by him in accordance with such provisions of law as govern the deposit of moneys belonging to such town." On the basis of publicly available documents, the legislature reasonably could have concluded that only a handful of Connecticut towns still hew to the traditional model under which financially independent clerks' offices retain the recording fees they collect, and that, in most cases, such fees are now paid into a town's general revenues. See Office of Legislative Research, Connecticut General Assembly, Report No. 2006-R-0297, Town Clerks: Duties, Responsibilities, and Fee Collection (April 26, 2006). Accordingly, a falloff in recording fees will adversely impact municipal budgets and potentially result in a heightened need for local community support by the state. For these reasons, we conclude that the distinctions established by §§ 7-34a (a)(2) and 49-10(h) are rationally related to legitimate public interests and, therefore, do not offend the equal protection provisions of the state or federal constitution.

IV

We next consider the plaintiffs' claim that §§ 7-34a (a)(2) and 49-10(h) violate the dormant commerce clause of the federal constitution. The commerce clause provides that Congress shall have the power

"[t]o regulate Commerce with foreign Nations, and among the Several States, and with the Indian Tribes * * * * " U.S. Const. art. I, § 8, cl. 3. "Although the [c]lause is framed as a positive grant of power to Congress, [the United States Supreme Court has] consistently held this language to contain a further, negative command, known as the dormant [c]ommerce [c]lause, prohibiting certain state [regulation] even when Congress has failed to legislate on the subject." (Internal quotation marks omitted.) *Comptroller of the Treasury* v. *Wynne*, ___ U.S. ___, 135 S.Ct. 1787, 1794, 191 L.Ed.2d 813 (2015). "[T]he dormant [c]ommerce [c]lause precludes [s]tates from discriminat[ing] between transactions on the basis of some interstate element * * * * This means, among other things, that a [s]tate may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the [s]tate * * * * Nor may a [s]tate impose a tax [that] discriminates against interstate commerce either by providing a direct commercial advantage to local business, or by subjecting interstate commerce to the burden of multiple taxation." (Citations omitted; internal quotation marks omitted.) Id.

Although the recording transactions at issue in this case may themselves be purely local in nature, the presence of MERS as a participant indicates that many of the mortgage loans involved ultimately will be transferred on the national secondary loan market. For this reason, and in light of the unique role that MERS plays in the national secondary market, we will assume that interstate commerce is implicated. See

Camps Newfound/Owatonna, Inc. v. *Harrison*, 520 U.S. 564, 573, 117 S.Ct. 1590, 137 L.Ed.2d 852 (1997) ("if it is interstate commerce that feels the pinch, it does not matter how local the operation [that] applies the squeeze" [internal quotation marks omitted]).

We first consider what legal standard governs challenges to taxes and user fees under the dormant commerce clause. The plaintiffs, at varying times, suggest that the fees at issue in this case should be assessed according to the tests and legal analysis that the United States Supreme Court has applied to dormant commerce clause challenges against (1) general regulatory measures, (2) tax schemes, and (3) user fees. The plaintiffs may be forgiven for any confusion in this regard, however, as the United States Supreme Court's dormant commerce clause jurisprudence is less than a model of clarity, particularly in the area of user fees and general and special revenue taxes.[10] That court itself has acknowledged "the uneven course of [its] decisions in this field"; *American Trucking Assns., Inc.* v. *Scheiner*, 483 U.S. 266, 269, 107 S.Ct. 2829, 97 L.Ed.2d 226 (1987); and has indicated that its inability to settle on a guiding legal framework has created "a quagmire of judicial responses * * * * " (Internal quotation marks omitted.) Id., at 280, 107 S.Ct. 2829; see

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[10] Because the statutory scheme at issue in this case allocates a portion of the nominee filing fees to the state's general fund and municipal accounts, and a portion to the town clerks and the state's community investment account, the fees have characteristics of both general and special revenue taxes.

also S. Wolfe, supra, at 26 Stetson L.Rev. 778-81 (discussing ambiguous state of law). Moreover, the high court's recent dormant commerce clause decisions have been decided by the narrowest of margins, with substantial disagreement among the members of that court as to the proper test or tests to be applied. See, e.g., *Comptroller of the Treasury* v. *Wynne*, supra, 135 S.Ct. at 1791. As a result, several distinct but partially overlapping tests may be thought to govern the present case. See, e.g., id., at 1802 (applying internal consistency test to income tax scheme); *Dept. of Revenue* v. *Davis*, 553 U.S. 328, 338-40, 128 S.Ct. 1801, 170 L.Ed.2d 685 (2008) (general two part test governs all state regulations, including taxes, but different rules may govern taxes and fees imposed by state in its dual capacity as market participant and regulator); *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 279, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977) (establishing four part test governing state taxes that impact interstate commerce); *Evansville-Vanderburgh Airport Authority District* v. *Delta Airlines, Inc.*, 405 U.S. 707, 716-17, 92 S.Ct. 1349, 31 L.Ed.2d 620 (1972) (establishing three part test governing user fees and special revenue taxes); *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970) (establishing balancing test governing any facially neutral state regulation). As United States Supreme Court Justice Antonin Scalia recently lamented: "One glaring defect of the negative [c]ommerce [c]lause is its lack of governing principle. Neither the [c]onstitution nor our legal traditions offer guidance about how to separate

improper state interference with commerce from permissible state taxation or regulation of commerce. So we must make the rules up as we go along. That is how we ended up with the bestiary of ad hoc tests and ad hoc exceptions that we apply nowadays * * * * " (Citations omitted.) *Comptroller of the Treasury* v. *Wynne*, supra, at 1809 (Scalia, J., dissenting).

Fortunately, we need not wade into this quagmire or attempt to divine the precise standards by which the United States Supreme Court might judge the statutes at issue in this case. This is because the parties apparently agree that their dispute boils down to the question of whether two central criteria—criteria that reappear throughout the United States Supreme Court's various dormant commerce clause tests and frameworks—are satisfied. First, a state user fee or tax is presumed to violate the dormant commerce clause if it facially discriminates against interstate commerce. See, e.g., *United Haulers Assn., Inc.* v. *Oneida-Herkimer Solid Waste Management Authority*, 550 U.S. 330, 338, 127 S.Ct. 1786, 167 L.Ed.2d 655 (2007). "In this context, discrimination simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter * * * * Discriminatory laws motivated by simple economic protectionism are subject to a virtually per se rule of invalidity * * * [that] can * * * be overcome [only] by a showing that the [s]tate has no other means to advance a legitimate local purpose * * * * " (Citations omitted; internal quotation marks omitted.) Id., at 338-39, 127 S.Ct. 1786. Second, a fee

or tax that is facially neutral nevertheless may offend the dormant commerce clause if it has the practical effect of imposing a burden on interstate commerce that is disproportionate to the legitimate benefits. See, e.g., *Dept. of Revenue* v. *Davis*, supra, 553 U.S. at 365, 128 S.Ct. 1801 (Kennedy, J., dissenting). We consider each criterion.

A

Facial Discrimination

The plaintiffs first contend that the challenged statutes discriminate on their face against interstate commerce because they impose higher recording fees only on those transactions involving a mortgage nominee, such as MERS, that operates in conjunction with a national electronic database. The plaintiffs argue that there is no apparent justification for penalizing companies that operate *national* databases, as opposed to a hypothetical nominee operating a database that tracks only mortgage loans transferred between Connecticut-based entities or securing Connecticut-based properties. For this reason, they contend, §§ 7-34a (a)(2) and 49-10(h) presumptively violate the dormant commerce clause. There are at least four problems with this argument.

First, although the plaintiffs correctly note that a statute can facially discriminate against interstate commerce even if it does not expressly favor in-state over out-of-state businesses; see *Healy* v. *Beer Institute*, 491 U.S. 324, 340-41, 109 S.Ct. 2491, 105 L.Ed.2d 275

(1989); the United States Supreme Court nevertheless has emphasized that "[t]he central rationale for the rule against discrimination is to prohibit state or municipal laws whose object is local economic protectionism, laws that would excite those jealousies and retaliatory measures the [c]onstitution was designed to prevent." *C & A Carbone, Inc.* v. *Clarkstown*, 511 U.S. 383, 390, 114 S.Ct. 1677, 128 L.Ed.2d 399 (1994); see also *Dept. of Revenue* v. *Davis*, supra, 553 U.S. at 337-38, 128 S.Ct. 1801 ("economic protectionism * * * designed to benefit in-state economic interests by burdening out-of-state competitors" is paradigmatic form of discrimination [internal quotation marks omitted]); *Healy* v. *Beer Institute*, supra, at 326, 109 S.Ct. 2491 (challenged statute ensured favorable pricing for residents of Connecticut and maintained competitiveness of Connecticut-based retailers); *Philadelphia* v. *New Jersey*, 437 U.S. 617, 624, 98 S.Ct. 2531, 57 L.Ed.2d 475 (1978) ("[t]he crucial inquiry * * * must be directed to determining whether [the challenged statute] is basically a protectionist measure, or whether it can fairly be viewed as a law directed to legitimate local concerns, with effects [on] interstate commerce that are only incidental"). In the present case, there is no indication that the legislative choice to impose higher fees on nominees—whether in state or out of state—who operate national mortgage databases reflected an invidious discrimination against out-of-state interests, or an effort to favor Connecticut-based financial companies. If anything, the opposite is true, as the likely result will be that Connecticut homeowners, who, the parties agree, typically absorb the higher upfront fees

for MERS-listed loans, will subsidize out-of-state banks and government sponsored financing corporations or their agents, who, upon acquiring the loans in the secondary market, will receive the benefits of recordings in the public land records without having to pay the associated costs. See *United Haulers Assn., Inc.* v. *Oneida-Herkimer Solid Waste Management Authority*, supra, 550 U.S. at 345, 127 S.Ct. 1786.

Nor do we believe that the hypothetical favored mortgage nominee the plaintiffs conjure up—one that operates a Connecticut only electronic database—is anything other than a chimera. Because the secondary residential mortgage market is national in scope and is dominated by federal agencies that are located outside of this state, there would be no reason for a company to invest in an electronic registration system that tracks only loan transfers between Connecticut investors, or only loans issued in connection with Connecticut-based properties.[11] The plaintiffs do not contend that any such competitor currently exists or is likely to emerge in the foreseeable future. As the Supreme

[11] To the extent that they suggest otherwise, the plaintiffs place the cart before the horse. The amici consisting of the bankers associations and the land title association, who support the plaintiffs' position in this case, have presented scholarship indicating that it was the national mortgage lending industry and government sponsored financing corporations such as Fannie Mae and Freddie Mac that partnered to create MERS to fill the need for a central registry for the national residential mortgage industry. See R. Arnold, "Yes, There Is Life on MERS," 11 Prob. & Prop. 33, 33 (1997); see also P. Sargent & M. Harris, "The Myths and Merits of MERS" (September 25, 2012). From its very inception, then, the MERS business was necessarily national in scope.

Court explained in *Associated Industries* v. *Lohman*, 511 U.S. 641, 114 S.Ct. 1815, 128 L.Ed.2d 639 (1994), "[it has] never deemed a hypothetical possibility of favoritism to constitute discrimination that transgresses constitutional commands." Id., at 654, 114 S.Ct. 1815; see also *Exxon Corp.* v. *Governor*, 437 U.S. 117, 125, 98 S.Ct. 2207, 57 L.Ed.2d 91 (1978) (disparate treatment claim was meritless when state's entire gasoline supply flowed in interstate commerce).

Second, notwithstanding the statutory reference to national electronic databases; General Statutes § 7-34a (a)(2)(C); we do not interpret the challenged statute to be a facial attack on interstate commerce. Rather, the record suggests—and the plaintiffs conceded at oral argument—that the language in question appears in § 7-34a only because the legislature cut and pasted it from MERS' own corporate documents describing the company's business model. In other words, the legislature's apparent intent was not to impose higher recording fees on residential mortgage transactions with a national character but, rather, merely to indicate that the higher fees are directed at MERS and any other mortgage nominees that may develop virtual recording systems to facilitate transactions in the secondary mortgage market. It is only because that market, like many modern financial markets, happens to be national in scope that the "national electronic database" language found its way into

§ 7-34a.[12] Both this court and the United States Supreme Court have emphasized in this regard "the importance of looking past the formal language of [a] tax statute [to] its practical effect * * * * " (Internal quotation marks omitted.) *Chase Manhattan Bank* v. *Gavin*, 249 Conn. 172, 210, 733 A.2d 782, cert. denied, 528 U.S. 965, 120 S.Ct. 401, 145 L.Ed.2d 312 (1999); accord *Quill Corp.* v. *North Dakota ex rel. Heitkamp*, 504 U.S. 298, 310, 112 S.Ct. 1904, 119 L.Ed.2d 91 (1992). As we discuss hereinafter, we perceive no deleterious effect of the challenged legislation on the national secondary mortgage market.

Third, the United States Supreme Court has explained that "a fundamental element of dormant [c]ommerce [c]lause jurisprudence [is] the principle that any notion of discrimination assumes a comparison of substantially similar entities." (Internal quotation marks omitted.) *Dept. of Revenue* v. *Davis*, supra, 553 U.S. at 342, 128 S.Ct. 1801. As we explained in part III of this opinion, MERS is not substantially similar to other mortgagees—even other mortgage nominees—with respect to the roles they play in Connecticut's residential mortgage recording market. Whereas traditional mortgagees are primarily lenders or loan servicing companies, MERS is identified as a mortgagee in the public land records as a sort of

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[12] Although the plaintiffs suggest in their reply brief that the statutes bespeak a legislative intent to punish MERS for transacting business outside of Connecticut, there is no evidence in either the record of this case or the legislative history to support such a suggestion.

place-holder, indicating to interested parties that the recent chain of title to a MERS-listed property may be traced by consulting the MERS database. Accordingly, the statutes do not facially discriminate against interstate commerce. Rather, they simply recognize that MERS, which uses the public land records as a means of enhancing the value that its member companies obtain from its electronic registration services, may realize a distinct and greater benefit from recording its interests than do other mortgagees.

Fourth, and relatedly, even if we believed that the statutes in question discriminated against interstate commerce, we would conclude, for reasons discussed in part III of this opinion, that there is no constitutional violation because such discrimination advances a legitimate local purpose. See, e.g., *Camps Newfound/Owatonna, Inc.* v. *Harrison*, supra, 520 U.S. at 581, 117 S.Ct. 1590. It is well established that interstate commerce can be made to "pay its way" under a state regulatory scheme without running afoul of the dormant commerce clause. (Internal quotation marks omitted.) *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609, 616, 101 S.Ct. 2946, 69 L.Ed.2d 884 (1981). In the present case, to the extent that the purpose of the challenged legislation was merely to recoup from MERS the recording fees that its members otherwise would have paid upon the transfer of a mortgage in the secondary market, §§ 7-34a (a)(2) and 49-10(h) represent a legitimate attempt to level the playing field between MERS members and nonmembers and to ensure that recording revenues are not lost as a result of

MERS' novel business model. For all of the foregoing reasons, we agree with the state that the statutes do not discriminate impermissibly against interstate commerce.

B

Undue Burden

We next consider the plaintiffs' claim that the challenged statutes place an undue burden on the national secondary mortgage market. Their argument appears to be that, despite the dearth of any evidence that the increased fees have adversely impacted MERS' business or the secondary mortgage market in general, the simple fact that the state receives more than $5 million per year in increased fees on MERS-related transactions is, ipso facto, proof that interstate commerce has been burdened. The plaintiffs further contend that, because both the costs to the state and the benefits to the filers are the same for the recording of MERS and non-MERS transactions, but MERS is forced to pay fees that are approximately three times higher than other mortgagees, the costs imposed are necessarily disproportionate to the benefits. We are not persuaded.

The amount of a tax or user fee is presumed to be appropriate; S. Wolfe, supra, at 26 Stetson L.Rev. 739; and the plaintiffs must demonstrate that the burdens imposed on interstate commerce *clearly* outweigh the benefits. See, e.g., *Dept. of Revenue* v. *Davis*, supra, 553 U.S. at 353, 128 S.Ct. 1801. As we explained in part III

of this opinion, we are not convinced that either the costs or the benefits of recording a MERS-listed mortgage are the same as for any other mortgagee. Let us assume that a hypothetical non-MERS thirty year mortgage loan is transferred to a different lender every ten years during the life of the loan and that each subsequent holder records its interest in the public land records. Under that scenario, the original lender's recording fees would afford it the benefit of ten years of public notice of its interest in the property, and the clerk's office would receive three recording fees—the initial one and the fees for two assignments—to subsidize its costs of operation over the term of the loan, not including the release when the loan is fully repaid. Under the same circumstances, however, MERS and its members would continue to receive the benefit of the initial filing fee for the entire thirty year term of the loan, regardless of the number of intervening assignments among MERS members, and the clerk's office will be correspondingly poorer. See S. Wolfe, supra, at 742 (noting that length of use of public service "strongly affects cost"); *id.*, at 744 (noting importance of intangibles in calculating value of public service and that continued consumer use suggests that fees are not disproportionate to value provided). Accordingly, we cannot say that imposing higher front-end and back-end fees on MERS transactions in order to compensate for the reduced number of recorded mortgage assignments imposes an undue burden on MERS or, by extension, interstate commerce. See *Associated Industries* v. *Lohman*, supra, at 511 U.S. at 647, 114 S.Ct. 1815 (interstate and intrastate transactions may be

taxed differently, as long as ultimate burdens are comparable).

The United States Supreme Court also has suggested that, in gauging the burdens imposed on interstate commerce, a reviewing court should consider whether, if every state were to adopt the challenged policy, the result would be to "place interstate commerce at a disadvantage as compared with commerce intrastate." (Internal quotation marks omitted.) *Comptroller of the Treasury* v. *Wynne*, supra, 135 S.Ct. at 1802. In the present case, even if every state were to charge $106 extra to record MERS-listed mortgages in its corresponding land records, there is nothing in the record to suggest that those higher fees, taken together, would unduly burden interstate commerce. There is no indication that higher recording fees would so overshadow the benefits of participation in a national electronic registration system that borrowers and lenders would opt not to participate in MERS or that the vitality of the secondary mortgage market would be compromised. The parties have agreed that higher fees have not resulted in a loss of MERS business within this state, and there is no reason to believe the outcome would differ elsewhere, or nationally. Nor is there any evidence of (1) what share of the estimated $5.4 million that the state will receive in additional annual recording fees will be borne by MERS and its members, and how that amount compares to the annual profits on their residential mortgage lending business in Connecticut, (2) what share of the increased fees will be borne by borrowers, and what

impact those fees will have on their total closing costs, or (3) what cost savings MERS, its members, and borrowers in MERS-related transactions have achieved as a result of the MERS system. We are mindful in this regard of the United States Supreme Court's recent guidance that the judiciary is particularly ill-suited to making the sorts of complex predictions and subtle cost-benefit calculations necessary to assess whether a particular tax scheme is unduly burdensome. See *Dept. of Revenue* v. *Davis*, supra, 553 U.S. at 355, 128 S.Ct. 1801.

In *Davis*, the United States Supreme Court also cautioned that a court "should be particularly hesitant to interfere * * * under the guise of the [c]ommerce [c]lause [when] a [state or] local government engages in a traditional government function," of which the maintenance of public land records is clearly an example. (Internal quotation marks omitted.) Id., at 341, 128 S.Ct. 1801 quoting *United Haulers Assn., Inc.* v. *Oneida-Herkimer Solid Waste Management Authority*, supra, 550 U.S. at 344, 127 S.Ct. 1786. In light of this guidance, and given the parties' stipulation that the legislation at issue has not redounded to the tangible detriment of the MERS business model, we are compelled to defer to the legislature's judgment that the fees at issue represent a reasonable approximation of the savings in recording costs generated by use of the MERS system. Accordingly, §§ 7-34a (a)(2) and

49-10(h) do not offend the dormant commerce clause,[13] and we reject the plaintiffs' claim to the contrary.[14]

The judgment is affirmed.

In this opinion the other justices concurred.

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[13] It might also be argued that, insofar as the state's purpose in imposing higher recording fees on MERS-listed mortgages is to prevent a competitor in the mortgage recording business from free riding on its public recording system, the state acts as a market participant—as well as a regulator—with respect to MERS and, therefore, is immune from challenge under the dormant commerce clause. See, e.g., *Dept. of Revenue* v. *Davis*, supra, 553 U.S. at 339, 128 S.Ct. 1801; *SSC Corp.* v. *Smithtown*, 66 F.3d 502, 510-12 (2d Cir. 1995), cert. denied, 516 U.S. 1112, 116 S.Ct. 911, 133 L.Ed.2d 842 (1996); see also *McBurney* v. *Young*, ___U.S. ___, 133 S.Ct. 1709, 1720, 185 L.Ed.2d 758 (2013) (state, having created market by offering program, does not offend dormant commerce clause by restricting access to that market so as to favor local interests). Because neither party has raised this argument, however, we need not consider it.

[14] On appeal, the plaintiffs also contend that enforcement of the challenged statutes violates their substantive due process rights under the federal and state constitutions, the federal constitutional prohibition against bills of attainder, and 42 U.S.C. § 1983. We have reviewed these claims and, for essentially the same reasons that we rejected the equal protection and commerce clause claims, we find them to be without merit.

2014 WL 2854013

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Connecticut,
Judicial District of Hartford.

MERSCORP HOLDINGS, INC. et al.
v.
Dannell [sic] P. MALLOY, Governor, State of Connecticut et al.

No. X04HHDCV136043132S.
|
May 19, 2014.

Attorneys and Law Firms

Heather J. Wilson, Matthew Joseph Budzik, Jane R. Rosenberg, Hartford, for Dannel P. Malloy Governor, State of Connecticut.

Opinion

SHERIDAN, J.

Pursuant to Practice Book § 17-49, the plaintiffs and the defendants have each moved for summary judgment on all counts of the plaintiffs' complaint. For the reasons set forth below, the plaintiffs' motion for summary judgment is denied, and summary judgment is granted on all counts in favor of the defendants.

I. FACTS AND PROCEDURAL BACKGROUND

The plaintiffs, Mortgage Electronic Registration Systems, Inc. and MERSCORP Holdings, Inc., commenced this action on July 2, 2013 by service of process on the defendants, Dannell P. Malloy, Governor of the state of Connecticut, George C. Jepsen, Attorney General of the state of Connecticut, Denise L. Nappier, Treasurer of the state of Connecticut, Kendall F. Wiggin, state librarian of the state of Connecticut, and LeAnne R. Power, public records administrator of the state of Connecticut. The plaintiffs seek a judgment declaring that General Statutes § 7-34a(a)(2) and § 49-10(h), as amended by §§ 97 and 98 of Public Act 13-184 and §§ 81 and 82 of Public Act 13-247, are unconstitutional under both the federal and state constitutions, and therefore wholly void and ineffective for any purpose.

The operative facts do not appear to be in serious dispute. MERSCORP Holdings, Inc. (MERS Holdings) is a private corporation with a principal place of business in Reston, Virginia. Mortgage Electronic Systems, Inc. (MERS) is a wholly owned subsidiary of MERS Holdings. MERS Holdings owns and operates the MERS® System, which is a national electronic database made available to mortgage lenders, servicers, sub-servicers, and government institutions. (Joint Stip. ¶¶ 1-5.)

When a residential mortgage loan is originated, a borrower typically executes a promissory note and a mortgage granting a security interest in the real estate

as collateral in the event of a default on the note. The mortgage is recorded in the local land records where the property is located. Lenders routinely sell their interests in mortgage loans on the secondary market. Such loans may be sold several times, in whole or in part, or bundled into mortgage-backed securities which are also sold and re-sold. Historically, the transfer of a loan obligation to a new owner required a separate assignment of the mortgage which was then recorded on local land records. (Joint Stip. ¶ 14, Complaint and Answer ¶¶ 11-13.)

As the mortgage-backed securities market grew, and the volume of mortgage transfers increased, the recording process for assignments became cumbersome to the industry, and multiple mortgage assignments caused confusion, delay in transfers, and chain of title problems. MERS was formed to eliminate these problems which were negatively affecting the financial industry's ability to provide home loans. (Joint Stip. ¶¶ 18-24, Complaint and Answer ¶¶ 11-13.)

MERS acts as a mortgagee and the holder of the legal security interest for loans registered on the MERS® system. At the origination of a loan, the borrower, lender, and MERS agree in writing that MERS will serve in a representative capacity as the agent (i.e. "nominee") of the lender and the lender's successors and assigns. The mortgage is recorded on the local land records identifying MERS as the mortgagee acting on behalf of the lender (and the lender's successors and assigns) as its nominee/agent. Funds for the payment of fees for recording mortgages which name

MERS as the mortgagee are usually collected by third parties at the time of closing, most often from the borrowers. When a mortgage for which MERS is the nominee/agent is transferred among MERS system members, there is no separate assignment of the mortgage because there is no change in the mortgagee; MERS remains the mortgagee of record. (Joint Stip. ¶¶ 8-10, 25.)

Prior to July 15, 2013, General Statutes § 7-34a required all filers to pay the town clerk $10 for the first page of each document filed, plus $5 for each subsequent page. Additional fees of $3 and $40 per filing were imposed by §§ 7-34a(d) and 7-34a(e) respectively, and an additional fee of $2 per assignment was imposed after the first two assignments.

On July 15, 2013, §§ 97 and 98 of Public Act No. 13-184 and §§ 81 and 82 of Public Act No. 13-247 became effective and amended General Statutes § 7-34a to define the term "nominee of a mortgagee" and specify filing fees to be paid by any such "nominee of a mortgagee." General Statutes § 7-34a(a)(2)(C), as amended by Public Act 13-184, § 98, and Public Act 13-247, § 82, defines a "nominee of a mortgagee" as: "[A]ny person who (i) serves as mortgagee in the land records for a mortgage loan registered on a national electronic database that tracks changes in mortgage servicing and beneficial ownership interests in residential mortgage loans on behalf of its members, and (ii) is a nominee or agent for the owner of the promissory note or the subsequent buyer, transferee or beneficial owner of

such note." MERS falls within the definition of a "nominee of a mortgagee." At this time there is no other entity other than MERS that meets the statutory definition of a "nominee of a mortgagee" under revised Connecticut General Statutes § 7-34a(a)(2)(C). (Joint Stip. ¶ 29, Complaint and Answer ¶ 3.)

General Statutes § 7-34a(a)(2)(A), as amended, further provides that when a nominee of a mortgagee files a document in the land records, with two exceptions, the clerk shall collect a fee of $116 for the first page filed and $5 for each additional page. In addition, the clerk collects $3 pursuant to § 7-34a(d) and $40 pursuant to § 7-34a(e).

The two exceptions are set out in General Statutes § 7-34a(a)(2)(B) and provide that when a nominee of a mortgagee files "(i) an assignment of mortgage in which a nominee of a mortgagee appears as assignor, or (ii) a release of mortgage by the nominee of mortgagee," the town clerks collect a fee of $159, plus $10 for the first page and $5 for each additional page. The recording fees for all other filers remain unchanged pursuant to § 7-34a(a)(1).

The net effect of the amendments to General Statutes § 7-34a(a) will be to collect only from a "nominee of a mortgagee" (i.e., MERS) substantially more for the filing of deeds, assignments, and other documents in the land records than from any other filer. In simple terms, when filing a mortgage deed, if MERS is a party to the transaction, the recording fee will be $159 for the first page and $5 for each additional page; if MERS

is not a party to the transaction, the recording fee will be $53 for the first page and $5 for each additional page. When filing a mortgage assignment or mortgage release, if MERS is a party to the transaction, the recording fee for the document (regardless of number of pages) will be $159; if MERS is not a party to the transaction, the recording fee will be $53 for the first page and $5 for each additional page.

The legislature adopted the amendments to General Statutes § 7-34a(a) as a revenue enhancing measure to help balance the State's 2013 budget. (Complaint and Answer ¶ 6.) From the effective date of the amendments to General Statutes § 7-34a(a) through the date of this motion, there is no evidence that (1) any MERS® System member has discontinued its membership in the MERS® System because of the passage or implementation of 2013 Public Act Nos. 13-184 or 13-247; (2) any MERS® System member has stopped its use of MERS as its nominee for mortgages, or for other transactions, because of the passage or implementation of 2013 Public Act Nos. 13-184 or 13-247; or (3) any MERS® System member that has reduced its use of the MERS® System, or any other services of MERS, because of the passage or implementation of 2013 Public Act Nos. 13-184 or 13-247. (Joint Stip. ¶¶ 26-28.)

The plaintiffs' complaint is in ten counts and alleges denial of equal protection of the law and deprivation of substantive due process in violation of the United States and Connecticut constitutions. The plaintiffs also allege that enforcement of the statutes

as amended will result in a burden on interstate commerce and impose an unlawful bill of attainder in violation of the United States Constitution. Finally, in counts nine through eleven, the plaintiffs allege four separate claims under 42 U.S.C. § 1983 which are derivative of the claims under the federal constitution set forth in Counts one, two, and five of the revised complaint.

On March 11, 2014, both parties filed for summary judgment on all counts of the plaintiffs' complaint. (*See* Docket Entries # 128 and 129, hereinafter "Plaintiffs' Motion," and Docket Entries # 130 and # 131, hereinafter "Defendants' Motion.") The plaintiffs objected to the defendants' motion for summary judgment and filed a memorandum in opposition on April 8, 2014 (hereinafter "Plaintiffs' Opposition"). The defendants also objected to the plaintiffs' motion for summary judgment on April 8, 2014 (hereinafter "Defendants' Opposition"). Thereafter, both the plaintiffs and the defendants filed reply memoranda on April 15, 2014.

The parties have jointly submitted a written stipulation as to certain facts (*see* Docket Entry # 127). In addition, in support of their motion, the plaintiffs have submitted the following additional documentary evidence: 1) A sworn affidavit from William C. Hultman, the Vice President, Legislative Affairs, for MERSCORP Holdings, Inc.; 2) A copy of General Statutes § 7-34a(a)(2) prior to the recent amendments; 3) A copy of an Office and Fiscal Analysis report for House Bill

6706; 4) The Senate proceedings transcripts of the legislative record for House Bill 6704, dated June 3, 2013; 5) A copy of the "Quick Facts" for MERS from MERS' website; 6) The Senate proceedings transcripts of the legislative record for Senate Bill 232; 7) A copy of the proposed amendment to Senate Bill 911, submitted by Senator Leone, Chairman of the Banks Committee; 7) A copy of Governor's Bill Number 6355; 8) The public hearing transcript of the Bank Committee for House Bill 6355; 9) The Senate proceedings transcripts of the legislative record for House Bill 6355; 10) A sworn affidavit of Elton B. Harvey, III, Chair of the Connecticut Bar Association Real Property Section; 11) A copy of the plaintiffs' responses and objections to the defendants' first set of interrogatories and requests for production; and 12) A copy of Rule 8 of MERS' system rules of membership.

In support of their motion, the defendants have submitted two excerpts of deposition transcripts for William C. Hultman, the Vice President, Legislative Affairs, for MERSCORP Holdings, Inc.

Both parties were heard at oral argument on April 17, 2014.

II. STANDARD OF REVIEW

"Practice Book [§ 17-49] provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and

that the moving party is entitled to judgment as a matter of law * * * In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party." *Patel* v. *Flexo Converters U.S.A., Inc.*, 309 Conn. 52, 56-57 (2013). "A genuine issue has been variously described as a triable, substantial or real issue of fact * * * and has been defined as one which can be maintained by substantial evidence." (Citation omitted; internal quotation marks omitted.) *United Oil Co.* v. *Urban Development Commission*, 158 Conn. 364, 378, 260 A.2d 596 (1969). "The motion for summary judgment is designed to eliminate the delay and expense of litigating an issue when there is no real issue to be tried * * * However, since litigants ordinarily have a constitutional right to have issues of fact decided by a jury * * * the moving party for summary judgment is held to a strict standard * * * of demonstrating his entitlement to summary judgment." (Citation omitted; emphasis added; internal quotation marks omitted.) *Grenier* v. *Commissioner of Transportation*, 306 Conn. 523, 534-35, 51 A.3d 367 (2012).

A party's challenge to the constitutionality of a statute presents a question of law, rather than a question of fact. *Keane* v. *Fischetti*, 300 Conn. 395, 402, 13 A.3d 1089 (2011). "It [also] is well established that a validly enacted statute carries with it a strong presumption of constitutionality, [and that] those who challenge its constitutionality must sustain the heavy burden of proving its unconstitutionality beyond a reasonable doubt * * * The court will indulge in every

presumption in favor of the statute's constitutionality * * * Therefore, [w]hen a question of constitutionality is raised, courts must approach it with caution, examine it with care, and sustain the legislation unless its invalidity is clear." (Emphasis added; internal quotation marks omitted.) *Id.*

III. ANALYSIS—COUNTS ONE AND SIX (EQUAL PROTECTION)

The plaintiffs contend that § 7-34a(a)(2) and § 49-10(h), as amended by §§ 97 and 98 of Public Act 13-184 and §§ 81 and 82 of Public Act 13-247, are unconstitutional because they violate the equal protection clauses of the United States constitution and the Connecticut constitution. In particular, the plaintiffs argue that there is no rational basis for the legislature to single out MERS and require MERS to pay a higher fee in comparison to all other filers, especially in light of the purpose of § 7-34a(a)(2), which is to compensate town clerks for their services. The defendants argue that § 7-34a(a)(2) and § 49-10(h) are constitutional and do not violate the equal protection clause because raising filing fees as to MERS, given its ability to eliminate the need to record subsequent assignments and transfers of notes, is rationally related to the legitimate governmental purpose of raising revenue.

"The [e]qual [p]rotection [c]lause of the [f]ourteenth [a]mendment to the United States Constitution is essentially a direction that all persons similarly situated should be treated alike." (Internal quotations

marks omitted.) *Stuart* v. *Commissioner of Correction*, 266 Conn. 596, 601, 834 A.2d 52 (2003). "Conversely, the equal protection clause places no restrictions on the state's authority to treat dissimilar persons in a dissimilar manner * * * Thus, [t]o implicate the equal protection [clause] * * * it is necessary that the state statute [or statutory scheme] in question, either on its face or in practice, treat persons standing in the same relation to it differently * * * [Consequently], the analytical predicate [of consideration of an equal protection claim] is a determination of who are the persons [purporting to be] similarly situated." (Citations omitted; internal quotation marks omitted.) *Id.*, at 601-02. "[I]t is only after this threshold requirement is met that the court will consider whether the statute survives scrutiny under the equal protection clause." (Internal quotation marks omitted.) *Keane* v. *Fischetti*, 300 Conn. 395, 402-03, 13 A.3d 1089 (2011).

The plaintiffs argue that the similarly situated requirement is met for the following reasons. First, because the purpose of the statute relates to fees charged by town clerks as compensation for the service of recording documents and the procedure of recording documents is not different for those identified as a "nominee of mortgage," MERS is not different than any other filer recording documents on town land records. Second, the plaintiffs argue that the Connecticut Supreme Court has articulated a presumption that the "similarly situated" requirement is met where a plaintiff shows that it is the specific target of a particular

legislation, and because MERS is the specific target of this legislation, the requirement is met.

The defendants argue that the requirement is not met because the plaintiffs have not alleged that there are any similarly situated entities that bear an "extreme degree of similarity" to MERS. Rather, MERS is different from other filers because MERS' method of recording "is so different from traditional methods of filing that the MERS filing method solves important problems like confusion, delays in title transfer, chain of title problems, and decreased availability of home loan to consumers." Particularly, a MERS registered loan eliminates the need to record subsequent assignments of the note.

"[T]he analytical predicate [of an equal protection claim] is a determination of who are the persons [purporting to be] similarly situated * * * The similarly situated inquiry focuses on whether the [challenger is] similarly situated to another group for purposes of the challenged government action * * * Thus, [t]his initial inquiry is not whether persons are similarly situated for all purposes, but whether they are similarly situated for purposes of the law challenged." (Emphasis added; internal quotation marks omitted.) *Kerrigan* v. *Commissioner of Public Health*, 289 Conn. 135, 157-58, 957 A.2d 407 (2008). "Entities are situated similarly in all relevant aspects if a prudent person, looking objectively at the incidents, would [deem] them roughly equivalent and the protagonists similarly situated. Much as in the lawyer's art of distinguishing cases, the

relevant aspects are those factual elements which determine whether reasoned analogy supports, or demands, a like result. Exact correlation is neither likely nor necessary, but the cases must be fair congeners. In other words, apples should be compared to apples." (Internal quotation marks omitted.) *State* v. *Dyous*, 307 Conn. 299, 315-16, 53 A.3d 153 (2012).

In the present case, the court finds that MERS is similarly situated to all other filers for purposes of §§ 7-34a and 49-10. Section 7-34a(a)(2) sets forth the fees that town clerks collect for recording documents, such as warranty deeds, quitclaim deeds, mortgage deeds, or assignments of mortgages. Section 49-10(h)(d) provides for the allocation of these fees. Therefore, the issue centers on whether MERS, a "nominee of a mortgagee," is similarly situated to other filers, those who are not nominees of a mortgage, for purposes of recording these documents. In support, the plaintiffs submit the sworn affidavit of Elton B. Harvey, III, the chair of the Connecticut Bar Association Real Property Section and a member of the Closing and Compliance Committee of the Connecticut Mortgage Bankers Association. (Plaintiffs' Opposition, Exhibit A.) Attorney Harvey states: "I have personally recorded in excess of 1,000 mortgages in the town land records throughout Connecticut * * * I have personally recorded in excess of 200 mortgages where MERS is identified as the mortgagee in the town land records throughout Connecticut * * * The method of recording a mortgage in the town land records where MERS is identified as the mortgagee is no different than the method of recording

a mortgage in the town land records where the mortgagee is someone other than MERS." This apparently undisputed evidence is sufficient to demonstrate that MERS is similarly situated to other filers for purposes of recording. In addition, there is no indication in either the text of the statute itself or the legislative history for the statute that the act of filing these documents differs for a "nominee of a mortgagee." In fact, both parties stipulate to the fact that the state is "not aware of any state statutes, state regulations, or state procedures that require Town Clerks to record mortgages or assignments where MERS is identified as a mortgagee in a manner different than any other documents." (Joint Stip. ¶ 17.) Thus, that act of recording the documents is the same for both MERS and other filers.

The defendants argue that there are no other "highly similar" companies being treated differently than MERS because MERS is the only entity that files as a nominee of a mortgagee. This argument is misplaced. The essential question here is not whether MERS is "similarly situated" to any other possible entity that is also a "nominee of a mortgagee," but whether MERS, when engaging in the act of recording documents, is similarly situated to any other person/entity who is also engaging in the same act of recording documents.

The defendants suggest that MERS is not similarly situated to other filers because MERS' "method" of handling assignments of mortgage (i.e., "the MERS® System") is different from traditional methods. The

defendants fail to demonstrate, however, how the *method of recording mortgage documents* is different for MERS. There is nothing in the public acts, or in § 7-34a(a)(2) or § 49-10(h) requiring town clerks to employ a different methodology of recording mortgages for mortgagees that have listed MERS as its nominee. Even though there may be some other differences, as the defendants argue, between MERS and other filers (such as the former will record subsequent assignments and transfers of mortgages less often) the frequency of recording such documents is irrelevant as to the procedure for recording documents. Because there is nothing different in the act of MERS recording mortgage documents in comparison to the act of other individuals recording their documents, the court finds that the "similarly situated" requirement is met for equal protection purposes.

Given that the threshold requirement has been met, the court turns to whether the classification is constitutionally permissible. The plaintiffs argue that there is no reasonable basis for the legislature's decision to single out MERS to pay a higher fee, because the town clerks provide the same service when recording documents for MERS transactions as for any other filings. The defendants argue that raising the filing fees is rationally related to the legitimate state interest of raising revenue.

"When a statute is challenged on equal protection grounds * * * the reviewing court must first determine the standard by which the challenged statute's

constitutional validity will be determined. If, in distinguishing between classes, the statute either intrudes on the exercise of a fundamental right or burdens a suspect class of persons, the court will apply a strict scrutiny standard [under which] the state must demonstrate that the challenged statute is necessary to the achievement of a compelling state interest * * * If the statute does not touch upon either a fundamental right or a suspect class, its classification need only be rationally related to some legitimate government purpose in order to withstand an equal protection challenge." (Internal quotation marks omitted.) *Contractor's Supply of Waterbury, LLC* v. *Commissioner of Environmental Protection*, 283 Conn. 86, 92-93, 925 A.2d 1071 (2007).

Here, there is no claim that the statute intrudes on a fundamental right or burdens a suspect class; accordingly, the statute is subject to a rational basis review.

> "[R]ational basis review in equal protection analysis is not a license for courts to judge the wisdom, fairness, or logic of legislative choices * * * Nor does it authorize the judiciary [to] sit as a super legislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines." (Citations omitted; internal quotation marks omitted.) *Heller* v. *Doe*, 509 U.S. 312, 320 (1993). "In determining whether the challenged classification is rationally related to a

> legitimate public interest, [courts] are mindful that [t]he test * * * is whether this court can conceive of a rational basis for sustaining the legislation; we need not have evidence that the legislature actually acted upon that basis * * * Further, the [e]qual [p]rotection [c]lause does not demand for purposes of rational-basis review that a legislature or governing decisionmaker actually articulate at any time the purpose or rationale supporting its classification * * * Rational basis review is satisfied so long as there is a plausible policy reason for the classification * * * [I]t is irrelevant whether the conceivable basis for the challenged distinction actually motivated the legislature * * * To succeed, the party challenging the legislation must negative every conceivable basis which might support it * * * " (Citation omitted; emphasis in original; internal quotation marks omitted.)

Contractor's Supply of Waterbury, LLC v. *Commissioner of Environmental Protection*, *supra*, 283 Conn. at 93.

Before conducting the rational basis review, it is worth noting a couple of inconsistences and flaws in the plaintiffs' arguments. First, the plaintiffs set forth in their memorandum that "the burden falls on the state to articulate a satisfactory reason why a 'nominee of a mortgagee' should be subject to the heightened fee structure under the [a]cts." (Plaintiffs' Memorandum, p. 17.) The plaintiffs have improperly placed the burden on the defendants. Rather, it is the plaintiffs

who bear the burden of proving that there is no conceivable rational basis for the heightened fee as it pertains to MERS. *See Kelo* v. *New London*, 268 Conn. 1, 110, 843 A.2d 500 (2004) ("[P]laintiffs also claim that the defendants did not provide to the trial court a rational justification for its differential treatment between the property owners. The plaintiffs misstate the applicable burden of proof; indeed, as the trial court noted, they bear the burden of proving that there is no conceivable rational basis for the retention of the club's building" [internal quotation marks omitted]), aff'd, 545 U.S. 469, 125 S.Ct. 2655, 162 L.Ed.2d 439 (2005). Second, the plaintiffs suggest that even if the court were to find that raising revenue is a legitimate governmental purpose, it must also find that the state has done so through legitimate means. In other words, raising revenue is not a legitimate purpose for rational basis analysis if the manner in which the revenue is raised is discriminatory, arbitrary, or unreasonable. The court will address both these arguments, lack of a conceivable legitimate purpose and use of illegitimate methods for achieving an otherwise legitimate purpose, in turn.

As to whether a legitimate purpose exists, the defendants contend that the state has a legitimate governmental purpose in raising revenue. The defendants have referred the court to excerpts of the legislative record that demonstrating [sic] that the legislature sought to raise revenue by raising fees for a "nominee of a mortgagee." Moreover, the Office of Fiscal Analysis report for House Bill 6706 explicitly provides for the

"revenue gain" for Fiscal Year 2014 and Fiscal Year 2015. (Plaintiffs' Motion, Exhibit C.) In various contexts, courts have generally found "raising revenue" to be a legitimate governmental purpose. *See*, *e.g.*, *Harbor Ins. Co.* v. *Groppo*, 208 Conn. 505, 511, 544 A.2d 1221 (1988) (as to taxes, raising revenue legitimate governmental purpose); *Eagle Rock Sanitation, Inc.* v. *Jefferson County*, United States District Court, Docket No. 4:12-CV-00100-EJL-CWD (D.Idaho, November 22, 2013) (as to landfill dumping fees, raising revenue is legitimate governmental purpose); *Jones* v. *Wildgen*, 320 F. Supp. 2d 1116, 1131 (D.Kan.2004) (as to zoning ordinance, raising revenue is a legitimate governmental purpose); *Jasinski* v. *City of Miami*, 269 F. Supp. 2d 1341, 1348 (S.D.Fla.2003) (administrative fees authorized by city ordinance that described city's ability to recover towing and storage costs of automobiles impounded by city served legitimate legislative purpose of raising revenue to cover costs of city's towing services); *Horizon Blue Cross Blue Shield of New Jersey* v. *State*, 425 N.J.Super. 1, 23, 39 A.3d 228 (raising revenue to balance state budget is a legitimate purpose), cert. denied, 211 N.J. 608, 50 A.3d 41 (2012); *In re O'Brien*, 255 P.3d 1228 (Kan.App.2011) (as to drug tax, raising revenue is legitimate purpose).

Furthermore, it appears that the plaintiffs do not directly contest that raising revenue is generally a legitimate purpose. They have offered no persuasive argument as to why raising revenue would not furnish a conceivable basis or a "plausible policy reason" for

legislation imposing heightened fees. It seems self-evident that it is. Accordingly, the court concludes that raising revenue is a legitimate governmental purpose as to the statutes in question.

The plaintiffs also argue that because § 7-34a(a)(2) expressly states that the purpose of the statute is to compensate town clerks for their service in recording documents, this is the only context in which the court should determine whether the classification is justified and no other purpose should be considered. The court finds this argument to be unpersuasive. Although the term "compensation" may be evident throughout the text of § 7-34a(a)(2), the legislature did not choose to articulate the purpose of the statute, or for that matter to explicitly limit the purpose of the statute only to "increased compensation for town clerks." The court needs to remain mindful of the deferential standard that is seen in rational basis review. Limiting an equal protection analysis to only one purpose that may only be found by implication in a statute, instead of determining whether any other conceivable basis for the challenged distinction exists, would run counter to the notion of providing the legislature with the deference to which it is entitled under rational basis review. A plausible inference is that one purpose may serve as the "primary" purpose, while another legitimate purpose may serve as a "secondary" purpose. Therefore, even if assuming that compensation is a primary purpose for the fees, the plaintiffs neither argue nor negate the possibility that the fee

structure could serve the dual purpose of compensating town clerks *and* raising revenue. *See*, *e.g.*, *Eagle Rock Sanitation, Inc.* v. *Jefferson County*, *supra*, United States District Court, Docket No. 4:12-CV-00100-EJL-CWD (as to dumping fees, raising revenue, regulating use of landfill, and preserving resources are legitimate governmental purposes); *Jones* v. *Wildgen*, *supra*, 320 F. Supp. 2d at 1131 (as to zoning ordinance, in addition to maintaining single-family character of neighborhoods, raising revenue is a legitimate governmental purpose); *In re O'Brien*, *supra*, 255 P.3d at 1228 (Kan.App.2011) (as to drug tax, although primary purpose is to curb drug usage, raising revenue is also legitimate purpose). Given that the defendants have set forth a conceivable basis that has generally been construed as a legitimate governmental purpose, and the plaintiffs have failed to negate this conceivable basis, the plaintiffs have failed to meet their burden that there is no conceivable rational basis for the classification. Accordingly, the court finds that the state has a legitimate interest in raising revenue.

Next, the court must determine whether the classification imposing higher fees on MERS and not all individuals/entities is rationally related to the legitimate governmental interest of raising revenue. As a threshold matter, "[a] [s]tate * * * has no obligation to produce evidence to sustain the rationality of a statutory classification. [A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data * * * A statute is presumed constitutional * * * and

[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it * * * whether or not the basis has a foundation in the record. Finally, courts are compelled under rational basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends. A classification does not fail rational-basis review because it is not made with mathematical nicety or because, in practice, it results in some inequality." (Citations omitted; emphasis added; internal quotation marks omitted.) *Heller* v. *Doe*, *supra*, 509 U.S. at 320-21.

Equal protection analyses involving the purpose of raising revenue have often been seen in tax cases, rather than cases involving fees. Raising revenue has often been construed as being the primary purpose for implementing taxes. *City of New Haven* v. *New Haven Water Co.*, 44 Conn. 105, 108 (1876); *Greater New Haven Property Owners Ass'n* v. *New Haven*, Superior Court, judicial district of New Haven, Docket No. CV-06-4020494-S (January 17, 2007, Silbert, J.) (42 Conn. L. Rptr. 676, 689), aff'd, 288 Conn. 181, 951 A.2d 551 (2008). Although it is arguable here that the fee in question could be operating under the guise of a tax, given that neither party has neither asserted such a position nor developed their argument as to this matter, the court need not determine whether the fee in question is an illegal tax. *See*, *generally*, *TracFone Wireless, Inc.* v. *Commission on State Emergency Communications*, 397 S.W.3d 173 (2013) (legislature's decision to label a charge a "fee" rather than a "tax" is not

binding). Rather, the court will focus on the classification and the manner in which it relates to the purpose of raising revenue.

The defendants contend that raising filing fees on entities such as MERS is rationally related to the purpose of raising revenue because MERS eliminates the need to record subsequent assignments and transfers of mortgages that take place between members of MERS. Given that the assignees of the mortgages no longer need to record the assignments, the state is looking to make up for lost revenue. (Defendants' Motion, Exhibit A.) All that is required is that the classification the legislature selects is not arbitrary and rests upon some ground of difference having a fair and substantial relation to the object of the legislation. The crucial difference between MERS or any other filer is the nature of the benefit that members of MERS receive as opposed to non-members. Because MERS is a common agent for its members, recording an assignment of the mortgage is not necessary when ownership of the promissory note or servicing rights transfer between members. In other words, members of MERS, by identifying MERS as a "nominee of a mortgagee," are able to assign and transfer mortgages with other members, without the need to record the subsequent transfers or assignments. Even though the subsequent assignment or transfer is not recorded, the security interest in the mortgaged property remains perfected, as long as it was recorded initially. A nonmember of MERS, who is the subsequent assignee or transferee and who has not identified MERS as a

"nominee of mortgagee," would need to record the assignment or transfer for purposes of perfecting their security interest. Therefore, the crucial difference between members of MERS and non-members is that, for purposes of perfecting security interests, as well as for the purpose of avoiding delay and confusion, the former can assign/transfer amongst themselves an indefinite amount of times, and never need to record or pay a filing fee, whereas the latter would need to record and pay a filing fee with each transaction. *See Bank of New York* v. *Silverberg*, 86 A.D.3d 274, 278, 926 N.Y.S.2d 532 (App.Div.2011) ("Lenders identify MERS as nominee and mortgagee for its members' successors and assignees. MERS remains the mortgagee of record in local county recording offices regardless of how many times the mortgage is transferred, thus freeing MERS's members from paying the recording fees that would otherwise be furnished to the relevant localities * * * " [citation omitted]). Given that 65 percent of mortgage loans nationwide originate with MERS (Joint Stip. ¶ 13), the legislature could have concluded that the state and towns are losing future revenue when a mortgage is filed by a nominee rather than by a traditional mortgagee who is not a nominee. Thus, raising fees as to an entity that is subject to recording fees less often than other mortgagees is reasonable. *See*, *e.g.*, *Direct TV* v. *Commonwealth*, Superior Court, Suffolk County, Docket No. 10-0324-BLS1 (November 26, 2012, Billings, J.) (31 Mass. L. Rptr. 48) (2012) (taxing an industry sector that was viewed as being undertaxed for purpose of raising revenue is reasonable). Given this crucial difference, the court cannot conclude

that the legislature's classification is arbitrary and does not rest upon a difference having a fair and substantial relation to the purpose of raising revenue.

The plaintiffs argue that if the purpose of the act was to create future revenue, then the fees should have been increased as to all filers. This argument, however, overlooks the fact that the state may not have been seeking to raise revenue generally, but raise revenue as it relates specifically to the loss of future revenue that would have otherwise been generated from recordation of subsequent assignments and transfers between the members of MERS had these members been non-members. Mortgages filed by a nominee will most likely only record once regardless of the amount of subsequent assignments, whereas the mortgages filed by a traditional mortgagee will most likely record with each subsequent assignment or transfer. Thus, while requiring the latter to pay a higher fee each time would generate more revenue, it does not take into consideration the fact that there are still subsequent assignments and transfers, for which MERS is identified as a nominee of a mortgagee, upon which no fees are being collected at all. The crucial difference here is the frequency of subsequent recordations, and it is evident from the nature and purpose of MERS, that those who have MERS as a nominee will be recording less frequently. It is precisely this disparity that the legislature intended to address. *See generally New Providence* v. *New Jersey*, 423 N.J.Super. 210, 222, 31 A.3d 958 (2011) ("in view of the substantial disparity in the allocable portion of their real estate taxes contributed

to operation of the sewer system by owners of single-family homes and apartment owners, we perceive nothing irrational in the imposition of the user fee solely upon owners of apartments"). By requiring MERS to pay a higher fee, with the anticipation that subsequent assignments and transfers will not be recorded and no fees will be collected, the legislature addresses this difference between a "nominee of a mortgagee" and all other filers.

The plaintiffs, nonetheless, set forth two alternative arguments as to why imposing a higher fee on MERS is discriminatory, arbitrary or unreasonable. First, the plaintiffs argue that the state cannot charge a fee for a town clerk providing an optional service that the town clerk does not actually perform. It is unclear as to whether the plaintiffs are arguing that a fee may not be collected for any service that is deemed "optional," or whether a fee may not be collected for a service that never takes place. Regardless, the cases to which the plaintiffs cite, *Macon County, Illinois* v. *MERSCORP, Inc.*, 742 F.3d 711 (7th Cir. 2014) and *Union County, Illinois* v. *MERSCORP, Inc.*, 735 F.3d 730 (7th Cir. 2013), may be distinguished.

In *Union County*, an Illinois county and several of its officials, filed a class action suit against MERS, and a number of banks that do business with MERS. The suit alleged that MERS was violating an Illinois statute that allegedly required every mortgage on real property in Illinois to be recorded. The statute specifies that, if it is recorded, it must be recorded in the

public-records office of the county in which the property is located. The court faced the particular issue of whether the Illinois recording statute imposed a mandatory duty to record mortgages. Although the court ultimately found that the statute did not and that recording is "optional," the issue of whether a fee may be collected for any service that is "optional" or whether a fee may be collected for a service that is never performed were not at issue. *Union County, Illinois* v. *MERSCORP, Inc.*, *supra*, 742 F.3d at 734.

Likewise, *Macon County* may also be distinguished for similar reasons. In *Macon County*, the court faced the issue of whether MERS had been unjustly enriched because it was able to bypass the recording system and not pay fees associated with recording. In deciding this issue, the court turned to the two theories of unjust enrichment, and stated: "[T]he one requiring an unlawful act, the other requiring only a finding of "injustice"—merge in cases which say that unjust enrichment is a remedy for a breach of a contract implied in law * * * To posit an implied contract between MERSCORP and the banks on one side and the County recording office on the other would be frivolous." (Citations omitted.) *Macon County, Illinois* v. *MERSCORP, Inc.*, *supra*, 735 F.3d at 714. The court did not address the overall issue of whether a fee may be imposed for an optional service.

Second, the plaintiffs also argue that because the legislature created and penalized a "class of one,"

courts have been reluctant to accept tenuous explanations by the government for the classifications. In support of its position, the plaintiffs primarily rely on *City Recycling, Inc.* v. *State*, *supra*, 257 Conn. at 429 and *Verizon New England, Inc.* v. *City of Rochester*, 156 N.H. 624, 940 A.2d 237 (2007). The court in *City Recycling* stated: "The liberty that the state enjoys, however, to address a problem in a piecemeal fashion does not encompass the liberty to target one entity and, without a rational basis, enact legislation to prevent that entity from doing what it otherwise could lawfully do * * * " (Emphasis added.) *City Recycling, Inc.* v. *State*, *supra*, at 453-54. Similarly, the court in *Verizon New England* stated: "[T]he city offers, the record reveals, and we can conceive of, no rational reason for selectively imposing this tax upon Verizon, and not upon other utilities that use and occupy public property in the same manner as Verizon." (Emphasis added.) *Verizon New England, Inc.* v. *City of Rochester*, *supra*, 156 N.H. 624, 631, 940 A.2d at 237, 244. The plaintiffs' reliance on these statements for its position is misplaced. The plaintiffs have overlooked the fact that in both *City Recycling* and *Verizon New England*, the court determined the issue of whether there was a legitimate governmental purpose and whether the classification bears a reasonable relationship to the purpose, and did not reach the question of whether a "class of one" classification, in itself, fails the rational basis test for equal protection purposes.

For the reasons stated, the court finds that the plaintiffs have failed to carry their burden of proving

that there is no conceivable rational basis for the challenged legislation. Therefore, the plaintiffs' rights to the equal protection of the laws have not been violated by the §§ 7-34a(a)(2) and 49-10(h), as amended by §§ 97 and 98 of Public Act 13-184 and §§ 81 and 82 of Public Act 13-247, and the legislature's decision to higher recording fees to a "nominee of a mortgagee," such as MERS. The plaintiffs' motion for summary judgment is denied as to Counts One and Six, and the defendants' motion for summary judgment is granted as to Counts One and Six.

IV. ANALYSIS—COUNTS TWO AND SEVEN (SUBSTANTIVE DUE PROCESS)

With respect to counts two and seven, the parties have in large part repeated the arguments made with respect to the equal protection counts. The plaintiffs have not claimed that the state constitution affords any greater protection than the federal constitution in this context. Connecticut courts interpreting both the state and federal constitutions approach questions of substantive due process the same way they approach questions of equal protection, requiring that "an act regulating economic activity must bear a reasonable relationship to a proper legislative purpose in a manner that is neither arbitrary nor discriminatory." *Caldor's, Inc.* v. *Bedding Barn, Inc.*, 177 Conn. 304, 314-15, 417 A.2d 343 (1979). Accordingly, for the same reasons expressed with respect to counts one and six, the plaintiffs' motion for summary judgment is denied and the

defendants' motion for summary judgment is granted as to counts two and seven.

V. ANALYSIS—COUNT FIVE (COMMERCE CLAUSE)

The plaintiffs contend that §§ 7-34a(a)(2) and 49-10(h) are unconstitutional because they violate the interstate commerce clause of the United States constitution. The plaintiffs argue that 1) the public acts facially discriminate against interstate commerce based on the express targeting of the operation of a "national electronic database" in the statutory definition of a "nominee of a mortgagee," and 2) the statute places a burden on interstate commerce that is clearly excessive in relation to the putative local benefits because the increased recording fees are excessive in relation to the costs incurred by the municipalities.

The commerce clause provides that "Congress shall have Power * * * [t]o regulate Commerce with foreign Nations and among the several States * * * " U.S. Const. Art. I, § 8, cl. 3. Under the so-called "dormant" commerce clause doctrine, a state's power to take actions impacting interstate commerce is limited. *Hughes* v. *Oklahoma*, 441 U.S. 322, 326, 99 S.Ct. 1727, 60 L.Ed.2d 250 (1979); *Automated Salvage Transport, Inc.* v. *Wheelabrator, Inc.*, 155 F.3d 59, 74 (2d Cir. 1998). The United States Supreme Court recently reiterated: "Our dormant [c]ommerce [c]lause jurisprudence significantly limits the ability of States and localities to regulate or otherwise burden the flow of interstate

commerce * * * It is driven by a concern about economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors * * * *Philadelphia* v. *New Jersey*, 437 U.S. 617, 624, 98 S.Ct. 2531, 57 L.Ed.2d 475 (1978) (The crucial inquiry * * * must be directed to determining whether [the challenged statute] is basically a protectionist measure, or whether it can fairly be viewed as a law directed to legitimate local concerns, with effects upon interstate commerce that are only incidental).” (Citations omitted; internal quotation marks omitted.) *McBurney* v. *Young*, 133 S.Ct. 1709, 1719-20, 185 L.Ed.2d 758 (2013).

A state statute may violate the dormant commerce clause in several ways. First, a statute that clearly discriminates against interstate commerce on its face in favor of intrastate commerce is virtually invalid per se. *Wyoming* v. *Oklahoma*, 502 U.S. 437, 454-55, 112 S.Ct. 789, 117 L.Ed.2d 1 (1992) (“When a state statute clearly discriminates against interstate commerce, it will be struck down * * * unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism * * * Indeed, when the state statute amounts to simple economic protectionism, a ‘virtually per se rule of invalidity’ has applied” [citations omitted]). A state statute violates the “clear discrimination” standard when it constitutes “differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.” (Internal quotation marks omitted.) *Freedom Holdings, Inc.* v. *Spitzer*, 357 F.3d 205, 217 (2nd Cir. 2004).

When a statute clearly discriminates against interstate commerce, it will be struck down as per se invalid, and can survive only if the discrimination is "demonstrably justified by a valid factor unrelated to economic protectionism. *Id.*, at 454. Second, absent clear discrimination, the court applies a lower level of scrutiny known as "Pike balancing," under which an apparently evenhanded regulation will be invalidated only if the burdens it imposes on interstate commerce are "clearly excessive in relation to the putative local benefits." *National Elec. Mfrs. Ass'n* v. *Sorrell*, 272 F.3d 104, 108 (2nd Cir. 2001), citing *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970). Third, a statute will be invalid per se if it has the practical effect of "extraterritorial" control of commerce occurring entirely outside the boundaries of the statute in question. *Healy* v. *The Beer Institute, Inc.*, 491 U.S. 324, 336, 109 S.Ct. 2491, 105 L.Ed.2d 275 (1989).

As to the first test, the plaintiffs have failed to establish that §§ 7-34a(a)(2) and 49-10(h)(h) facially discriminate against interstate commerce. There is nothing on the face of those statutes that distinguishes between in-state mortgagees and out-of-state mortgagees, particularly in-state members of MERS or out-of-state members of MERS. Rather, the statute makes a distinction between a "nominee of a mortgagee," and a non-nominee of a mortgagee. Neither of these terms clearly utilizes the words "in-state" or "out-of-state." The plaintiffs direct the court to the definition for a "nominee of a mortgage" and argue that because of the

phrase "national electronic database," it is a blatant discrimination against interstate commerce. However, even a plain reading of this phrase does not establish that national electronic databases that are located out of state are treated any differently that national databases that are located within the state. *See United Haulers Ass'n, Inc.* v. *Oneida-Herkimer Solid Waste Management Authority*, *supra*, 550 U.S. at 342, 127 S.Ct. 1795 (holding that a county flow control ordinance, which treated in-state private business interests exactly the same as out-of-state ones, did not discriminate against interstate commerce for purposes of the dormant commerce clause).

The plaintiffs cite to *Healy* v. *Beer Institute*, *supra*, 491 U.S. at 324, *Camps Newfound/Owatonna* v. *Harrison*, 520 U.S. 564, 117 S.Ct. 1590, 137 L.Ed.2d 852 (1997), and *Fulton Corp.* v. *Faulkner*, 516 U.S. 325, 116 S.Ct. 848, 133 L.Ed.2d 796 (1996), in support of their position that § 7-34a(a)(2) and § 49-10(h) facially discriminate against interstate commerce. Upon comparing the language of § 7-34a(a)(2) or § 49-10(h) with the language of the statutes challenged in those cases, it is evident that the decisions are distinguishable. For example, in *Healy*, the statute in question specifically included the phrase "out-of-state." Neither § 7-34a(a)(2) nor § 49-10(h) contains such a phrase. In *Camps Newfound/Owatonna*, the statute, on its face, provided a general exemption for those organizations "incorporated in the state of Maine," and a limited tax exemption for those organizations that operated principally for the benefit of persons who are not residents of

Maine. Neither § 7-34a(a)(2) nor § 49-10(h) provide a benefit or an exemption for an organization based upon the location of incorporation. Similarly, in *Fulton Corp.*, the statute clearly provided for a tax benefit for residents of North Carolina who owned stock in a corporation doing all of its business within the state of North Carolina, and not to those residents who owned stock in corporations doing absolutely no business in North Carolina. Unlike this clear distinction, the fee in § 7-34a(a)(2), and the allocation of it in § 49-10(h) apply regardless of whether the business is being conducted solely within the state of Connecticut, between the state of Connecticut and another state, or among two states other than the state of Connecticut. Therefore, the cases to which the plaintiffs cite in support of their position are inapplicable.

Moreover, the plaintiffs have failed to address the issue of whether the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism.

Thus, the court finds that the statute does not facially discriminate against interstate commerce, because the statute on its face treats in-state nominees of mortgagees for a loan registered on a national database the same as out-of-state nominees of mortgages for a loan registered on a national database.

That, of course, does not end the analysis. Even if the acts do not facially discriminate against interstate commerce, the court must look to whether there is a disparate impact on interstate commerce. "Where a

challenged statute or local regulation does not entail 'patent discrimination' against interstate commerce, we assess its validity under the *Pike* standard * * * Under *Pike*, a challenged regulation will be upheld unless it 'places a burden on interstate commerce that is clearly excessive in relation to the putative local benefits' * * * As we have repeatedly emphasized, '[for a state statute to run afoul of the *Pike* standard, the statute, at a minimum, must impose a burden on interstate commerce that is qualitatively or quantitatively different from that imposed on intrastate commerce' * * * To this point, we have recognized three instances in which a non-discriminatory state or local regulation may impose a differential burden on interstate commerce: (1) when the regulation has a disparate impact on any non-local commercial entity; (2) when the statute regulates commercial activity that takes place wholly beyond the state's borders; and (3) when the challenged statute imposes a regulatory requirement inconsistent with those of other states." (Citations omitted; internal quotation marks omitted.) *United Haulers Ass'n, Inc.* v. *Oneida-Herkimer Solid Waste Management Authority*, *supra*, at 156-57. Because the parties base their arguments primarily on the first two instances, only those two will be addressed.

Here, the plaintiffs have failed to establish that the statutes place a burden on interstate commerce that is clearly excessive in relation to the putative local benefits. As to whether the regulation has a disparate impact on any non-local commercial entity, the plaintiffs have failed to establish that the increase in fees

has adversely impacted MERS. The joint stipulation of facts show that there is no evidence that any members of MERS have discontinued their membership because of this fee increase or that any of the members of MERS have reduced or refused to record their mortgages. (Joint Stip. ¶¶ 26, 27, and 28.) Furthermore, the defendants make a compelling argument that the fee itself is not paid by MERS, but by the members of MERS. These members, who are mainly lenders, will most likely pass along the fee to its borrowers. (Joint Stip. ¶ 25.) Given that the borrower is most likely a resident of Connecticut because the mortgaged property is in Connecticut, it is ultimately the Connecticut residents who are paying the higher fee. Thus, the plaintiffs fail to establish that MERS, or any other nonlocal commercial entity, is adversely impacted by the increase in fee.

Likewise, the plaintiffs have failed to establish that the statutes regulate a commercial activity that is taking place wholly beyond the state's borders. In order to determine whether a burden is placed on interstate commerce, it is important to do so in the context of the commercial interest, the specific interstate transaction, that is involved here. Given that the statutes deal with the recording of mortgages, whether it be the original mortgage or a subsequent assignment/transfer, it can logically be inferred that for purposes of interstate commerce, the commercial interest involved is the sale, transfer, assignment of mortgages on the secondary market across state lines, whether it be between the state of Connecticut and another state,

or between two states other than the state of Connecticut. The plaintiffs have failed to demonstrate that it is this specific interstate commercial interest that is being burdened. In regard to the precise commercial interest involved, the applicability of the fee is not determined by whether the mortgage is being sold, assigned, or transferred across state lines on the secondary market. Instead, the applicability of the fee is determined by the nature of the filer, and whether the filer is a "nominee of a mortgagee," irrespective of whether it is located in-state or out-of-state and irrespective of whether mortgages are being transferred across state lines. Thus, a mortgage on real property located in Connecticut may be sold, transferred, or assigned between two members/lenders of MERS who are located in Connecticut and still be subject to the heightened fee upon initial filing, as if they were members/lenders of MERS located outside of Connecticut who had a property interest within the state of Connecticut. The controlling factor as to the applicability of the fee is that the members/lenders have identified MERS as the mortgagee in a representative capacity, and not the members' physical location or where the mortgage interest is subsequently being transferred on the secondary market. Thus, the plaintiffs have failed to demonstrate that the interstate commercial interest of transferring mortgages across state lines is being burdened.

The plaintiffs contend that because the public acts target MERS, which happens to be an out-of-state entity, and impose an increased fee specifically on an

entity that operates a national electronic database, the legislature has burdened interstate commerce. The fee is not being applied to MERS because it is located out-of-state, but is being applied to MERS because it qualifies as a "nominee of a mortgagee." Had MERS been located within the state of Connecticut, rather than the state of Virginia, it would still be subject to the heightened fee structure. Likewise, in the event that a new commercial entity is incorporated in the state of Connecticut that may qualify as a "nominee of a mortgagee," the entity would be subject to the heightened fee as well.

Accordingly, given that the statutes do not facially discriminate against interstate commerce and do not have a disparate impact on interstate commerce, as well as the plaintiffs' failure to carry their high burden of proof, the court finds that § 7-34a(a)(2) and § 49-10(h), as amended by §§ 97 and 98 of Public Act 13-184 and §§ 81 and 82 of Public Act 13-247, do not violate the interstate commerce clause of the United States Constitution. The plaintiffs' motion for summary judgment is denied as to count five, and the defendants' motion for summary judgment is granted as to count five.

VI. ANALYSIS—COUNT THREE (BILL OF ATTAINDER)

The plaintiffs allege that § 7-34a(a)(2) and § 49-10(h) are unconstitutional because the statutes constitute bills of attainder in violation of the United States

constitution. Specifically, the plaintiffs argue that the statutes were enacted to target MERS and require them to pay increased and punitive fees without protection of judicial process. The defendants argue that because the filing fee is applicable to all nominee filers and the purpose of the statutes are to raise revenue, the statutes neither intend to punish nor effectively punish MERS in particular.

Article I, Section 9, cl. 3 of the United States Constitution states that "[n]o Bill of Attainder or ex post facto law shall be passed." "Bills of attainder are legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial * * * The bill of attainder clause was intended to implement the separation of powers, acting as a general safeguard against legislative exercise of the judicial function * * * " (Citations omitted; internal quotation marks omitted.) *Hogan* v. *Dept. of Children & Families*, 290 Conn. 545, 578-79, 964 A.2d 1213 (2009).

Historically, bills of attainder were acts sentencing to death one or more specific persons, although the Supreme Court has read the clause to also outlaw what were known as bills of pains and penalties, which imposed less severe punishments. *U.S.* v. *Brown*, 381 U.S. 437, 442, 85 S.Ct. 1707, 14 L.Ed.2d 484 (1965). In spite of this broader reading of the clause, "[t]he Supreme Court has struck down statutes on bill of attainder grounds only five times in the nation's history. *See* [*Cummings* v. *Missouri*, 71 U.S. 277, 18 L.Ed. 356

(1866)] (targeting Confederate sympathizers); *Ex parte Garland*, [71 U.S. 333], 18 L.Ed. 366 (1867) (same); *Pierce* v. *Carskadon*, [83 U.S. 234], 21 L.Ed. 276 (1873) (same); *United States* v. *Lovett*, 328 U.S. 303, 66 S.Ct. 1073, 90 L.Ed. 1252 (1946) (targeting 'subversives'); [*U.S.* v. *Brown*, *supra*, 381 U.S. at 437] (targeting Communist Party members)." *Elgin* v. *U.S. Dept. of Treasury*, 641 F.3d 6, 19, (1st Cir. 2011), aff'd, 132 S.Ct. 2126, 183 L.Ed.2d 1 (2011).

"For a statute to qualify as a bill of attainder it must: (1) specify the affected person or group, (2) impose punishment by legislative decree, and (3) dispense with a judicial trial." *Elgin* v. *U.S. Dept. of Treasury*, *supra*, 641 F.3d at 19. *See also Hogan* v. *Dept. of Children & Families*, *supra*, 290 Conn. at 579. The party challenging the statute has the heavy burden of "establish[ing] that the legislature's action constituted punishment and not merely the legitimate regulation of conduct." *Nixon* v. *Administrator of General Services*, 433 U.S. 425, 476 n.40, 97 S.Ct. 2777, 53 L.Ed.2d 867 (1977). Because the defendants do not contest whether the third element of a bill of attainder is met, the court need not delve into the issue of whether there is a lack of a judicial trial. The defendants do, however, contest whether the first and second elements are met.

The plaintiffs argue that § 7-34(a)(2) and § 49-10(h) specifically targets MERS because the legislature tailored the statutory definition of a "nominee of a mortgagee" to apply only to MERS. In response, the defendants argue that the statutes do not explicitly or solely apply to MERS, but instead applies to any entity

functioning as a "nominee of a mortgagee." The defendants also argue that even if MERS is presently the only entity that functions as a "nominee of a mortgagee," that, alone, does not render the legislation a bill of attainder.

There is a dearth of authority in our courts that addresses the specificity requirement. Nevertheless, the United [sic] Supreme Court has expressed: "The singling out of an individual for legislatively prescribed punishment constitutes an attainder whether the individual is called by name or described in terms of conduct which, because it is past conduct, operates only as a designation of particular persons." *Communist Party* v. *S.A.C. Board*, 367 U.S. 1, 86, 81 S.Ct. 1357, 6 L.Ed.2d 625 (1961). In contrast, statutes of general applicability that focus on prospective conduct have withstood challenges on bill of attainder grounds. *See*, *e.g.*, *Se- lective Svc.* v. *Minn. Pub. Int. Res. Gp.*, 468 U.S. 841, 848-51, 104 S.Ct. 3348, 82 L.Ed.2d 632 (1984) (finding statute prospective and therefore not bill of attainder); *Communist Party* v. *S.A.C. Board*, *supra*, at 86-87 (finding statute not bill of attainder because it did not attach to "past and ineradicable actions," but rather "turn[ed] upon continuingly contemporaneous fact").

In applying this definition for "specificity," courts have further elaborated that the individual does not necessarily need to be referenced by name. *McMullen* v. *U.S.*, 953 F.2d 761, 765-66 (2nd Cir. 1992), cert. denied, 510 U.S. 913, 114 S.Ct. 301, 126 L.Ed.2d 249 (1993). If the individual or entity is clearly the "object"

of the legislation, the first requirement for a bill of attainder is met. *Id.* Furthermore, the legislation may constitute a bill of attainder if it is directed against a whole class, or "easily ascertainable members of a group." *Foretich* v. *United States*, 351 F.3d 1198, 1217 (D.C.Cir. 2003). A bill of attainder need not expressly name its target; some bills of attainder simply describe them. *BellSouth Corp.* v. *F.C.C.*, 144 F.3d 58, 62 (D.C.Cir. 1998). Courts often turn to the legislative record to determine whether a particular individual or entity is the target of the legislation. *McMullen* v. *U.S.*, *supra*, at 765-66.

In the present case, the express language of § 7-34a(a)(2), as well as the legislative history for § 7-34(a)(2) and § 49-10(h), demonstrate that MERS was the object of the legislation. The plaintiffs refer the court to the legislative history of House Bill 6355 and 6704. The specific references made to MERS in both bills only support the position that both bills were specifically crafted for purposes of applying to MERS only. For example, in the context of House Bill 6355, Chairman Leone and Howard Pitkin, the commissioner of the state department of banking, referred to "the MERS section" of the bill when discussing the requirement that mortgages should be recorded with the town clerk. (Plaintiffs' Motion, Exhibit J.) In the context of House Bill 6704, the manner in which the legislators spoke in opposition to the fee increase also demonstrates that the legislation was directed at increasing fees specifically to MERS. (Plaintiffs' Motion, Exhibit D.) In discussing the allocation of the fee collected,

Senator Linares stated: "For 60 percent of the people who file or record their mortgage under MERS bank, under this new fee structure * * * " (Plaintiffs' Motion, Exhibit D.) In opposition to the fee increase, Senator McKinney stated: "[W]hen someone files their mortgage on MERS—so we're talking about 60 percent of mortgage holders—they're going to now pay $159 instead of $53." (Plaintiffs' Motion, Exhibit D.) Neither of these senators discussed the fee increase as it relates generally to a "nominee of mortgage." Rather, both explicitly refer to MERS, as if "MERS" and a "nominee of a mortgage" are synonyms of one another and may be used interchangeably. Thus, based on such candid use of "MERS" in discussing the legislation, it is reasonable to conclude that MERS was the object of the legislation.

In addition, the definition of a "nominee of mortgagee" in § 7-34a(a)(2)(C) is comparable to the definition seen on MERS' public website. Section 7-34a(a)(2)(C) states: "For purposes of this subdivision, 'nominee of a mortgagee' means any person who (i) serves as mortgagee in the land records for a mortgage loan registered on a national electronic database that tracks changes in mortgage servicing and beneficial ownership interests in residential mortgage loans on behalf of its members, and (ii) is a nominee or agent for the owner of the promissory note or the subsequent buyer, transferee or beneficial owner of such note." MERS' public website states: "MERS System is a national electronic database that tracks changes in mortgages servicing rights and beneficial ownership interests

in loans secured by residential real estate," "MERS is a nominee for the longer and subsequent buyers ('beneficial owners') of a mortgage loan and serves as common agent for the mortgage industry." (Plaintiffs' Motion, Exhibit E.) The definitions are nearly identical. Given that the defendants stipulate to the fact that MERS is currently the only entity that falls under the definition of a "nominee of a mortgage [sic]," it is further inferable that the legislature crafted the statute in such a way that it solely applies to MERS and no other entity. Such precision in the definition for a "nominee of mortgagee," as it compares to the information on MERS' website, eliminates any likelihood that the equivalence is coincidental. Accordingly, the court finds that given the legislative history, as well as the definition for a "nominee of a mortgagee," MERS is the object of the legislation and therefore the specificity requirement is met.

Next, the court must address whether the second requirement as to punishment is met. The plaintiffs argue that the statute has a retrospective focus in that the legislature has defined past conduct, MERS' ability to bypass the recording fees, as wrongdoing, and has imposed punishment on MERS for that past conduct. In response, the defendants argue that the fee increase is prospective, and that neither the statute contains any provisions that define past conduct by MERS as wrongdoing nor does the legislative history contain any assertions that MERS committed an act warranting punishment.

"[T]he [Supreme] Court [has] applied three tests to determine whether legislative punishment of the type contemplated by the [b]ill of [a]ttainder [c]lauses was imposed: [1] the historical test, involving punishment traditionally judged to be prohibited by the [b]ill of [a]ttainder [c]lause * * * including death, imprisonment, banishment, punitive confiscation of property by the sovereign and, in more recent times, laws barring designated individuals or groups from participation in specified employments or vocations * * * [2] the functional test, which analyz[es] whether the law under challenge, viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes * * * and [3] the motivational test, which inquire[s] whether the legislative record evinces a congressional intent to punish * * * " (Citations omitted; internal quotation marks omitted.) *Hogan* v. *Dept. of Children & Families*, *supra*, 290 Conn. at 579-80. Given that not all three tests need to be met for the second requirement to be met, the court must go through each one individually.

In the present case, the plaintiffs argue that given the legislation has singled out a "class of one," such classification alone is sufficient to meet the requirement for punishment. In support of their position, the plaintiffs rely heavily on *Consolidated Edison Co. of New York, Inc.* v. *Pataki*, 292 F.3d 338, cert. denied, 537 U.S. 1045, 123 S.Ct. 619, 154 L.Ed.2d 517 (2002). The plaintiffs argue that the "key" consideration in *Consolidated Edison* was the fact that the legislation singled out a class of one and that "the legislature's explicit

naming of one entity to suffer the sanctions [the statute] inflicts, when the classification is not rational, bespeaks an intent to punish the named entity." (Emphasis added.) What the plaintiffs have overlooked, however, is that this standard sets forth an exception for classifications that are deemed rational. The plaintiffs have also overlooked that the court in *Consolidated Edison* went on to state: "To invalidate legislation as a bill of attainder, the [b]ill of [a]ttainder [c]lause requires not merely 'singling out' but also punishment * * * A legislature may legitimately create a 'class of one' for many purposes * * * but not for punishment." (Citations omitted, internal quotation marks omitted.) *Id.*, at 349-50. The plaintiffs also focus on the court's analysis as to the "retrospective focus on past conduct," but fail to notice that in addition to this element, the court discusses whether the legislation is punitive. Thus, contradictory to what the plaintiffs argue, even if the specificity requirement is met, the legislation does not automatically constitute a bill of attainder. *Id. See also BellSouth Corp.* v. *F.C.C.*, *supra*, 144 F.3d at 63-64 ("Despite the statute's surgical focus on a sole individual, the Court held that the mere specificity of a law does not call into play the [b]ill of [a]ttainder [c]lause * * * and indeed that Congress had on that occasion singled out a legitimate class of one * * * It insisted that the burden must be a punishment to qualify as a bill of attainder * * * " [citations omitted; footnote omitted; internal quotation marks omitted]); *Dehainaut* v. *Pena*, 32 F.3d 1066, 1071 (7th Cir. 1994) ("Even where a fixed identifiable group * * * is singled

out and a burden traditionally associated with punishment * * * the enactment may pass scrutiny under bill of attainder analysis if it seeks to achieve legitimate and non-punitive ends and was not clearly the product of punitive intent"), cert. denied, 514 U.S. 1050, 115 S.Ct. 1427, 131 L.Ed.2d 309 (1995). Accordingly, the plaintiff's reliance on *Consolidated Edison* is misplaced.

Turning to the three elements that constitute legislative punishment, the court finds that neither § 7-34a(a)(2) nor § 49-10(h) meets any of the three tests for legislative punishment. As to the historical punishment, the plaintiffs argue that "the evidence clearly supports a finding that the State is confiscating property belonging to MERS through implementation of an unconstitutional fee increase." (Emphasis added.) This argument fails for two reasons. First, the argument is premised on the assertion that MERS' property (i.e., money) will be used to satisfy the increased fee. In reality, the fee increase will ultimately be borne by MERS' members, rather than the corporation itself. For example, in the joint stipulation of facts, the parties state: "Funds for the payment of fees for recording mortgages, which names MERS as the mortgagee, are usually collected by third parties at a closing, most often from borrowers." (Emphasis added.) (Joint Stip., ¶ 25.) A MERS' Legislative Affairs representative testified in opposition to House Bill 6355 that banks are "just going to pass these fees onto homeowners." Likewise, Senator McKinney referred to a "young couple," purchasing a home for the first time, having to bear

the fee increase. (Plaintiffs' Motion, Exhibit D.) Regardless of whether the banks bear the cost, or whether it is the homeowners, it is evident that MERS is not responsible for the costs of recording mortgages. Second, as analyzed above under the equal protection argument, raising revenue is a legitimate governmental purpose. Courts have stated that a "bona fide revenue-raising measure is not considered confiscation of property * * * " *Horizon Blue Cross Blue Shield of New Jersey* v. *State*, *supra*, 425 N.J.Super. at 25. Therefore, the plaintiffs' argument that the state is confiscating "property belonging to MERS" is without merit. Accordingly, § 7-34a(a)(2) and § 49-10(h) do not meet the test for historical punishment.

Next, as to the functional test, the court "looks to whether the challenged law, viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes * * * " (Internal quotation marks omitted.) *ACORN* v. *U.S.*, 618 F.3d 125, 136 (2nd Cir 2010). "[A] grave imbalance or disproportion between the burden and the purported nonpunitive purpose suggests punitiveness, even where the statute bears some minimal relation to nonpunitive ends." (Internal quotation marks omitted.) *Id.*, at 138. Thus, "[w]here such legitimate legislative purposes do not appear, it is reasonable to conclude that punishment of individuals disadvantaged by the enactment was the purpose of the decisionmakers." (Internal quotation marks omitted.) *Consolidated Edison Co. of New York, Inc.* v. *Pataki*, *supra*, 292 F.3d at 351. In doing so, we "inquire into the existence

of less burdensome alternatives by which [the] legislature * * * could have achieved its legitimate nonpunitive objectives." *Nixon* v. *Administrator of General Services*, *supra*, 433 U.S. at 482.

The plaintiffs here have not established that there is a "grave imbalance" between the burden that is being imposed on MERS, and the purported nonpunitive purpose of raising revenue. The plaintiffs seem to be reemphasizing their equal protection argument, specifically that there is no reasonable basis for applying a heightened fee to MERS and not to all filers. As stated earlier, by requiring MERS to pay a higher fee, with the anticipation that subsequent assignments and transfers will not be recorded and no fees will be collected, the legislature addressed this difference between a "nominee of a mortgagee" and all other filers. Therefore, imposing a higher fee on MERS is not unreasonable. Given that raising revenue is a nonpunitive purpose; *see Horizon Blue Cross Blue Shield of New Jersey* v. *State*, 26 N.J. Tax 575, 600, cert. denied, 211 N.J. 608, 50 A.3d 41 (2012); *State* v. *Jones*, 340 Md. 235, 251, 666 A.2d 128 (1995) (fines, penalties, and forfeitures are readily characterized as sanctions and thereby punitive, whereas revenue raising measures are motivated by non-punitive purposes), cert. denied, 516 U.S. 1173, 116 S.Ct. 1265, 134 L.Ed.2d 213 (1996); the only manner in which the plaintiffs can establish that the functional test is met is by demonstrating that the burden on MERS is excessive. In other words, merely alluding to the fact that MERS is now burdened by the heightened fee, does not automatically

entail that it rises to the level of a "grave imbalance." *Horizon Blue Cross Blue Shield of New Jersey* v. *State*, *supra*, 425 N.J.Super. at 25 (as to revenue raising measures, "mere imposition of burdens by legislation does not constitute punishment because, if it did, all legislation regulating economic activity might be considered punishment"). Hence, the plaintiffs fail to establish that the statute constitutes legislative punishment under the functional test.

Lastly, as to the motivational test, the court finds that the legislative record does not evince a legislative intent to punish the plaintiffs. "The legislative record by itself is insufficient evidence for classifying a statute as a bill of attainder unless the record reflects overwhelmingly a clear legislative intent to punish." *ACORN* v. *U.S.*, *supra*, 618 F.3d at 141. "[O]nly the clearest proof could suffice to establish the unconstitutionality of a statute on [the] ground [of legislative history.]" (Internal quotation marks omitted.) *Id.*, at 141, quoting parenthetically *Flemming* v. *Nestor*, 363 U.S. 603, 617, 80 S.Ct. 1367, 4 L.Ed.2d 1435. Moreover, "[s]tatements by a smattering of legislators "do not constitute [the required] unmistakable evidence of punitive intent." (Internal quotation marks omitted.) *ACORN* v. *U.S.*, *supra*, at 141.

In the present case, the plaintiffs have not demonstrated that there was a "clear legislative intent to punish." The plaintiffs again focus on the contention that because MERS was "targeted" by the public acts in question, that the motivational test is met. Again,

this argument is relevant as to the specificity requirement, which is apart from the punitive requirement. The plaintiffs point to nothing in the legislative record that would support a finding that there was "overwhelmingly a clear intent to punish" MERS. Although the plaintiffs stated during argument that Senator McKinney expressed that House Bill 6704 is "simply for us to grab more money," this statement, alone, does not constitute the required unmistakable evidence of punitive intent. (Plaintiffs' Motion, Exhibit D.) Cf. *United States* v. *Lovett*, 328 U.S. 303, 308-14, 66 S.Ct. 1073, 90 L.Ed. 1252 (1946) (legislative history demonstrated that respondents were targeted, respondents were deemed guilty of "subversive" behavior, and legislation was designed to force the employing agencies to discharge respondents and to bar their being hired by any other governmental agency because of such behavior). Thus, the plaintiffs have not met their burden and have failed to demonstrate that § 7-34a(a)(2) and § 49-10(h) is punishment according to the motivational punishment test.

Accordingly, given that the plaintiffs have failed to establish that the statutes meet any of the punishment tests, the court finds that § 7-34a(a)(2) and § 49-10(h), as amended by §§ 97 and 98 of Public Act 13-184 and §§ 81 and 82 of Public Act 13-247, are not bills of attainder. The plaintiffs' motion for summary judgment is denied as to count three, and the defendants' motion for summary judgment is granted as to count three.

VII. ANALYSIS—COUNTS NINE THROUGH ELEVEN (42 U.S.C. § 1983)

Because the plaintiffs' motion for summary judgment has been denied as to counts one and six (equal protection), counts two and seven (substantive due process), and count five (commerce clause), it is also denied as to counts nine, ten and eleven. Likewise, because the defendants' motion for summary judgment has been granted as to these counts, it is also granted as to counts nine, ten, and eleven.

IX. CONCLUSION

The plaintiffs' motion for summary judgment is denied as to counts one, two, three, five, six, seven, nine, ten, and eleven. The defendants' motion for summary judgment is granted as to counts one, two, three, five, six, seven, nine, ten, and eleven.

C.G.S.A § 7-34a. Fees

Effective: July 15, 2013

(a) (1) Town clerks shall receive, for recording any document, ten dollars for the first page and five dollars for each subsequent page or fractional part thereof, a page being not more than eight and one-half by fourteen inches. Town clerks shall receive, for recording the information contained in a certificate of registration for the practice of any of the healing arts, five dollars. Town clerks shall receive, for recording documents conforming to, or substantially similar to, section 47-36c, which are clearly entitled "statutory form" in the heading of such documents, as follows: For the first page of a warranty deed, a quitclaim deed, a mortgage deed, or an assignment of mortgage, ten dollars; for each additional page of such documents, five dollars; and for each assignment of mortgage, subsequent to the first two assignments, two dollars. Town clerks shall receive, for recording any document with respect to which certain data must be submitted by each town clerk to the Secretary of the Office of Policy and Management in accordance with section 10-261b, two dollars in addition to the regular recording fee. Any person who offers any written document for recording in the office of any town clerk, which document fails to have legibly typed, printed or stamped directly beneath the signatures the names of the persons who executed such document, the names of any witnesses thereto and the name of the officer before whom the same was acknowledged, shall pay one dollar in addition to the regular recording fee. Town clerks shall

receive, for recording any deed, except a mortgage deed, conveying title to real estate, which deed does not contain the current mailing address of the grantee, five dollars in addition to the regular recording fee. Town clerks shall receive, for filing any document, five dollars; for receiving and keeping a survey or map, legally filed in the town clerk's office, five dollars; and for indexing such survey or map, in accordance with section 7-32, five dollars, except with respect to indexing any such survey or map pertaining to a subdivision of land as defined in section 8-18, in which event town clerks shall receive fifteen dollars for each such indexing. Town clerks shall receive, for a copy, in any format, of any document either recorded or filed in their offices, one dollar for each page or fractional part thereof, as the case may be; for certifying any copy of the same, two dollars; for making a copy of any survey or map, the actual cost thereof; and for certifying such copy of a survey or map, two dollars. Town clerks shall receive, for recording the commission and oath of a notary public, ten dollars; and for certifying under seal to the official character of a notary, two dollars.

(2) (A) Notwithstanding any other provision of this subsection and in accordance with subsection (h) of section 49-10, town clerks shall receive from a nominee of a mortgagee for the recording of any document, including, but not limited to, a warranty deed, a quitclaim deed, a mortgage deed, or an assignment of mortgage, except (i) an assignment of mortgage in which the nominee of a mortgagee appears as assignor, and (ii) a release of mortgage, as described in section

49-8, by a nominee of a mortgagee, as follows: For the first page of such warranty deed, quitclaim deed, mortgage deed, or assignment of mortgage, one hundred sixteen dollars; for each additional page of such deed or assignment, five dollars; and for each assignment of mortgage, subsequent to the first two assignments, two dollars.

(B) In accordance with subsection (h) of section 49-10, and in addition to any fees received pursuant to subdivision (1) of this subsection for the recording of (i) an assignment of mortgage in which a nominee of a mortgagee appears as assignor, or (ii) a release of mortgage by the nominee of a mortgagee, town clerks shall receive from a nominee of a mortgagee for the recording of such an assignment, as follows: For the entire such assignment of mortgage or release, one hundred fifty-nine dollars. No other fees shall be collected from the nominee for such recording.

(C) For purposes of this subdivision, "nominee of a mortgagee" means any person who (i) serves as mortgagee in the land records for a mortgage loan registered on a national electronic database that tracks changes in mortgage servicing and beneficial ownership interests in residential mortgage loans on behalf of its members, and (ii) is a nominee or agent for the owner of the promissory note or the subsequent buyer, transferee or beneficial owner of such note.

(b) The fees set forth in subsection (a) of this section received by town clerks for recording documents include therein payment for the return of each document

which shall be made by the town clerk to the designated addressee.

(c) Compensation for all services other than those enumerated in subsection (a) of this section which town clerks are required by the general statutes to perform and for which compensation is not fixed by statute shall be fixed and paid by the selectmen or other governing body of the town or city in which such services are performed.

(d) In addition to the fees for recording a document under subsection (a) of this section, town clerks shall receive a fee of three dollars for each document recorded in the land records of the municipality. Not later than the fifteenth day of each month, town clerks shall remit two-thirds of the fees paid pursuant to this subsection during the previous calendar month to the State Librarian for deposit in a bank account of the State Treasurer and crediting to the historic documents preservation account established under section 11-8i. One-third of the amount paid for fees pursuant to this subsection shall be retained by town clerks and used for the preservation and management of historic documents. The provisions of this subsection shall not apply to any document recorded on the land records by an employee of the state or of a municipality in conjunction with said employee's official duties. As used in this section "municipality" includes each town, consolidated town and city, city, consolidated town and borough, borough, district, as defined in chapter 105 or

chapter 105a,[1] and each municipal board, commission and taxing district not previously mentioned.

(e) In addition to the fees for recording a document under subsection (a) of this section, town clerks shall receive a fee of forty dollars for each document recorded in the land records of the municipality. The town clerk shall retain one dollar of any fee paid pursuant to this subsection and three dollars of such fee shall become part of the general revenue of the municipality and be used to pay for local capital improvement projects, as defined in section 7-536. Not later than the fifteenth day of each month, town clerks shall remit thirty-six dollars of the fees paid pursuant to this subsection during the previous calendar month to the State Treasurer. Upon deposit in the General Fund, such amount shall be credited to the community investment account established pursuant to section 4-66aa. The provisions of this subsection shall not apply to any document recorded on the land records by an employee of the state or of a municipality in conjunction with such employee's official duties. As used in this subsection, "municipality" includes each town, consolidated town and city, city, consolidated town and borough, borough, and district, as defined in chapter 105 or 105a, any municipal corporation or department thereof created by a special act of the General Assembly, and each municipal board, commission and taxing district not previously mentioned.

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[1] C.G.S.A. §§ 7-324 et seq. or 7-339m et seq.