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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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S. Ct. Appellate Case No. _____ (not yet assigned)
(Ct. App. Case No. 2022-000393)

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U.S. Bank Trust, N.A. as Trustee for LSF10 Master Participation Trust,……..……Respondent,

v.

Austin A. Lowery a/k/a Austin Lowery a/k/a Austin Allen Lowery a/k/a Allen Lowery, individually, and as Heir or Devisee of the Estate of Lisa D. Lowery a/k/a Lisa Marie Davis Lowery, Deceased; South Carolina Department of Revenue; The United States of America acting by and through its agency, Department of the Treasury - Internal Revenue Service; and Elizabeth A. Lowery,.……Defendants,

Of whom Austin A. Lowery a/k/a Austin Lowery a/k/a Austin Allen Lowery a/k/a Allen Lowery, individually, and as Heir or Devisee of the Estate of Lisa D. Lowery a/k/a Lisa Marie Davis Lowery, Deceased, is the…….....Petitioner.

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# PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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## INTRODUCTION

The Petitioner ("Lowery") asks this Court to issue a writ of certiorari to review the Court of Appeals' opinion in this mortgage foreclosure case, which affirmed the master-in-equity and held no genuine issue of material fact exists about most of the issues in the case. This is despite the undisputed facts that the lender lied to Lowery, making a false promise to get him to enter into the mortgage loan, that the lender never gave Lowery an opportunity to state his preference of counsel to represent him in the closing, that the lender told Lowery no lawyer was required to close the loan, that the lender closed the loan without any attorney supervision, that the lender tucked a property description behind the mortgage document (which was not present with it when it was signed) saying Lowery had mortgaged 53 acres when what was intended to be mortgaged was five acres, that the lender recorded that mortgage document and left it on record even after it tried to correct it, leaving the property records to seem like there were two mortgages, that the lender reneged on its promise to refinance or modify the loan, that the lender sued for foreclosure previously but allowed the case to be dismissed (which dismissal was with prejudice as a matter of law), that this action was brought after some 15 years had passed since the default on which the Respondent sues, and that the Respondent recorded a release of mortgage shortly before this case was commenced.

The Court of Appeals concluded none of that matters and that Lowery has no defenses at all to the mortgage foreclosure. The Court of Appeals also affirmed the procedure the trial court ordered would govern what happens next – even though the procedure deprives Lowery of any ability to cross-examine Respondent's trial witnesses.

All of this of course matters to the instant case, but there are also questions here that matter for everyone in this state. They matter to the health of the law.

Perhaps most important for the question of whether to grant a writ of certiorari is the lack of any precedent that directly addresses one of this case's central issues. South Carolina has no reported case that analyzes what the words "induced by unconscionable conduct" mean in S.C. Code Ann. § 37-10-105(C), a statute that speaks directly to lender misconduct that is at the heart of this case and what remedies are available for it. Respectfully, the undersigned notes that such a published opinion is needed. It is now time for this Court to issue a reported opinion that speaks to what this statutory language means. It is evident that the Court of Appeals has not been of one mind about it.

## CERTIFICATE OF COUNSEL

The Court of Appeals issued its opinion in this case on October 8, 2025. Counsel for the Petitioners certify that the petition for rehearing was served and filed on October 22, 2025. The petition for rehearing was finally ruled on by the Court of Appeals by an order filed on January 21, 2026.

This petition for a writ of certiorari is timely served and filed on February 20, 2026.

## QUESTIONS PRESENTED

1) Did the Court of Appeals err in granting summary judgment to the Respondent? Subsidiary questions include, but are not necessarily limited to:

   a. What conduct falls within the scope of "induce[ment] by unconscionable conduct" under S.C. Code Ann. § 37-10-105(C),

and is there evidence here of conduct that does, precluding summary judgment from being properly granted?

b. Is there a genuine issue of material fact about whether the undisputed misconduct of the lender amounts to unclean hands, precluding summary judgment from being properly granted?

c. Can the defense of laches apply here, and, if so, does this record present a genuine issue of material fact that bars summary judgment on that defense?

d. Is there at least a genuine issue about whether res judicata bars the Respondent's claim?

e. Is there at least a genuine issue about whether the Respondent has released any mortgage it held on the subject property?

2) Did the Court of Appeals err in affirming the trial court's order that created an evidence presentation process that does not allow Lowery the opportunity to cross-examine Respondent's witnesses?

## STATEMENT OF THE CASE

As discussed in depth in Lowery's briefs, Respondent's predecessor, Household, put Lowery and his wife (to whose interest he has succeeded) in a very bad spot, depriving them of the benefit of an attorney to represent them in the closing and taking advantage of the disadvantage at which Household put them, inducing them to enter into this loan with false promises that Household would shortly refinance the loan on more favorable terms. (R. pp. 310-12.) Household's refusal to use a lawyer in closing the mortgage loan – despite South Carolina law requiring attorney supervision of mortgage closings from 1987 forward – resulted in Household recording a document

in the land records stating that it held a mortgage on 53.73 acres of Lowery's land, not just five. (R. pp. 311-12, 331-35.) Household employees slipped the 53.73 acre description in without Lowery ever having an opportunity to see it and stop them, since they added it after he signed the mortgage document. (R. pp. 311, 331-35.) This document remained in the land records for over 15 years, along with the one that Household did in an attempt to correct its mistake, effectively preventing Lowery from ever refinancing the mortgage and getting free of the mortgage relationship Household created. (R. pp. 116-17, 312, 331-35.)

Respondent sued the Appellant, Austin A. Lowery a/k/a Austin Lowery a/k/a Austin Allen Lowery a/k/a Allen Lowery, individually and as heir or devisee of the Estate of Lisa D. Lowery (hereinafter "Lowery"), in 2019, seeking foreclosure of a mortgage on 53.73 acres of land and a judgment that a mobile home was part of the mortgaged property. (R. pp. 35-46.) The complaint alleged debt under the mortgage pursuant to a note dated September 24, 2002, alleged that the note was in default since May of 2004, and alleged that a release of the mortgage had been "inadvertently recorded" in January of 2019. (R. pp. 37-45.) The complaint alleged the note and mortgage were given to Household Finance Corporation II (hereinafter "Household") and later assigned to Respondent. (R. pp. 37-38.)

Respondent then amended its complaint as of right, to reflect that Lisa Lowery, whom it had originally named as a defendant, had died in 2017. (R. pp. 55-65.) The other allegations of the complaint remained virtually identical, with Respondent still seeking foreclosure of a mortgage on 53.73 acres of land and a judgment that a mobile home was part of the mortgaged property and still alleging debt under the mortgage pursuant to a note dated September 24, 2002, that the note was in default since May of

2004, and that a release of the mortgage had been "inadvertently recorded." (R. pp. 55-65.)

Lowery answered the amended complaint and counterclaimed. (R. pp. 74-81.) Lowery noted that the property description added to the mortgage document was not in the document he signed and was added to the document later, as he had contemplated, with Household's knowledge, mortgaging five acres. (R. pp. 75, 79-80.) Lowery answered that the recording of the mortgage release was not an error and that Respondent had released the mortgage. (R. pp. 75, 78.) He pled a number of affirmative defenses and a defense and counterclaim for violation of S.C. Code Ann. § 37-10-102, commonly known as the attorney preference statute, in connection with the closing of the mortgage loan involved in this case, along with inducement of the mortgage loan by unconscionable conduct. (R. pp. 78-80.) Lowery noted that no attorney had supervised the closing. (R. pp. 80.)

By consent, Respondent amended its complaint again, this time seeking foreclosure of the mortgage as to only five acres, relying on a different mortgage document executed six days after the one described in the first two complaints. (R. pp. 82-92.) The second amended complaint's allegations about debt and default dates remained the same as in the first two amended complaints. (R. pp. 82-92.)

Lowery again answered and counterclaimed. (R. pp. 93-100.) In response to Respondent's allegations of a mortgage, Lowery answered that he "admits he signed something styled as a mortgage document; however, to the extent this document ever constituted a valid mortgage, it has been released. This is the same mortgage as that released mortgage described in [Respondent]'s Amended Complaint in this case, just with a corrected property description. The recording of the release was not an error."

(R. p. 94 ¶ 7.) Lowery pled affirmative defenses of release, unclean hands, the statute of limitations, res judicata, and laches. (R. pp. 96-98 ¶¶ 26-44.) He again also pled a defense and counterclaim for violation of the attorney preference statute, with the mortgage loan having been induced by unconscionable conduct. (R. pp. 98-99 ¶¶ 45-51.)

Respondent moved to dismiss Lowery's counterclaim. (R. pp. 105-10.) The court heard and denied that motion. (R. pp. 18-20.) After the motion to dismiss was heard, Lowery swore and filed an affidavit that reads as follows:

> 2. I have read my answer and counterclaim filed on November 1, 2019, in this case, and I hereby verify that the factual statements in it are true.
>
> 3. My late wife, Lisa D. Lowery, and I got the mortgage that is involved in this case because we needed to refinance a construction loan. Time was a major factor, as our construction loan was about to mature.
>
> 4. The mortgage loan involved in this case was made by Household Finance Corporation II. (I will call them "Household" in this affidavit for ease of reference.) Household promised us a lower interest rate than we got. As we approached the closing date for the loan, Household told us that they could only make the loan at the high interest rate that is in the note, but they also said that they would refinance or modify the loan at a five percent fixed rate if we made our payments on time for one year.
>
> 5. Relying on this statement to be true, we went through with getting the loan.
>
> 6. We were never given any opportunity to choose a lawyer to represent us in closing the loan. No one asked us, in writing or otherwise, for our preference as to an attorney to represent us in connection with closing the loan. Household told us we did not need a lawyer and that they would

close the loan themselves. They told us they closed loans without a lawyer all the time.

7. That is what they did. On September 24, 2002, we went to Household's office and were presented with the closing papers for the loan. We were not given advice or explanations of the documents. Instead, the Household employee who was with us just said things like "Sign here." We signed where the employee told us to sign. No lawyer was present at the closing.

8. Among the documents we signed at the closing on September 24, 2002, was the document that is Exhibit A to this affidavit.

9. What we intended to mortgage for this loan was five acres that is part of a 53-acre tract of land. We told that to the Household people, and they represented to us that the five-acre parcel was what was being mortgaged.

10. If any of the papers we signed at the closing had a property description of the 53-acre tract in them, that was not shown to us.

11. A few days after the closing, someone from Household called us and said that they had made an error in the mortgage and that we needed to come in and re-sign the same mortgage. We did that on September 30, 2002. No lawyer was present for that re-signing, either.

12. We made our payments on time for a year like Household said to do. I then contacted Household about getting the lower interest rate they had promised us. The Household people said we would have to apply for a refinance to do that. We applied, and Household turned us down.

13. Because of the two mortgage documents on record, one of which described the whole 53-acre tract, I was unable to get refinancing to get out of this mortgage with Household.

(R. pp. 310-12.) Exhibit A to Lowery's affidavit is a document styled as an attorney preference selection form that states "None" for preference as to attorney and which is dated September 24, 2002, the date of the mortgage loan closing. (R. p. 313.)

Respondent moved for summary judgment on Lowery's counterclaim. (R. pp. 107-08.) Lowery moved for summary judgment on Respondent's claims and for liability in his favor on his counterclaim. (R. pp. 110-17.)

The lower court denied Lowery's motions. (R. pp. 24-27.) The lower court granted Respondent's motion for summary judgment but kept Lowery's attorney preference violation defense alive, ruling that "Lowery's counterclaim against U.S. Bank is dismissed WITH PREJUDICE to the extent such counterclaim is asserted to secure an award of monetary damages and attorney's fees from U.S. Bank[,]" while also ruling that "[t]his order is without prejudice to Lowery's right to raise his counterclaim as an equitable and statutory defense for the purpose of setoff or recoupment, or both, and introduce evidence in support thereof, to Respondent's request for foreclosure of the mortgage." (R. pp. 28-34.)

Some months passed, and Respondent moved for summary judgment as to the entire case. (R. pp. 118-25.) In support of this motion, Respondent filed a number of documents, including the HUD-1 settlement statement for this loan, which gives a closing date of September 24, 2002, lists Household as the settlement agent, and contains no charges for attorneys' fees. (R. pp. 143-45, 346-48.)

Among the materials that Lowery filed in opposition to this motion were an amended complaint from a 2008 action Household had brought to foreclose the mortgage, and the last order from that 2008 action, a Form 4 order filed July 26, 2013, that stated "IT IS ORDERED that this case is hereby stricken from the active roster for

failure to prosecute, pursuant to Rule 40(j), and may be restored to the active docket without a filing fee once the parties are ready to proceed." (R. pp. 278-87.) That order contains no indication that any party consented to what the court ordered in it. (R. pp. 286-87.)

On February 23, 2022, the lower court issued an order stating that "[t]he only issues remaining after this order are the amount of the debt and the amount of [Lowery]'s set off/recoupment." (R. p. 1.) The lower court decided that "Lowery has failed to come forward with sufficient facts which would create a genuine issues [sic] of material fact to lead this court to conclude that the agreement or transaction to have been unconscionable at the time it was made, or to have been induced by unconscionable conduct. Therefore, U.S. Bank is entitled to summary judgment as a matter of law." (R. p. 10.) The order ruled as follows:

> Plaintiff is granted summary judgment as to Defendant's affirmative defenses of res judicata, release and unconscionability.
>
> Plaintiff is granted summary judgment as to Defendant's liability for foreclosure subject to submitting by affidavit appropriate documentation supporting the amount of the debt at least three days prior to a final hearing.
>
> Defendant is granted judgment by way of offset only for an attorney preference violation subject to submitting the amount claimed for the offset by way of affidavit at least three days prior to a final hearing.

(R. p. 11.)

Lowery moved for reconsideration or at least clarification of this order, pointing out, among other things, that the court had not addressed his laches defense and that the order's affidavit procedure to be used for the trial of the case infringed upon his

right to cross-examine Respondent's witness or witnesses. (R. pp. 171-75.) The court denied this motion. (R. pp. 14-17.)

This appeal was brought, and the Court of Appeals affirmed on all grounds in a terse opinion that is sparse when it comes to analysis. Lowery petitioned for rehearing, noting, among other things, that there are no published opinions analyzing S.C. Code Ann. § 37-10-105(C) and that the Court of Appeals previously issued an unpublished opinion that appears entirely at odds with the view of the statute that was taken in the opinion issued by the panel. The Court of Appeals denied that petition.

## ARGUMENT

There are defenses to mortgage foreclosure actions. They are lawsuits like any other. To ignore evidence that supports the existence of multiple defenses to a foreclosure claim and grant summary judgment is, respectfully to the master-in-equity and the Court of Appeals, to abandon the law. To shrug one's shoulders at the deprivation of the right to cross-examine is similarly to abandon the law.

Lowery asks this Court not to abandon the law. In this Court's courtroom are displayed the words *nil ultra* – nothing beyond. Lowery should not have to be here. The master should never have issued the order she did, and the Court of Appeals should never have allowed it to stand – and, had they followed the law, they never would have. But, rather than follow and implement the law, those courts chose to ignore and abandon it. Lowery pled several affirmative defenses to Respondent's claim. (R. pp. 96-98.) The record contained evidence supporting all of those defenses. (R. pp. 116-17, 145, 278-87, 310-13, 346.) Even after Lowery did all he had to in order to put that evidence before the court, the master refused to issue a ruling that acknowledged this evidence exists. The Court of Appeals then did the same thing. Lowery's only choices

now are 1) to accept those unlawful decisions and resign himself that no court will ever give consideration to how the pervasive lender misconduct here should affect this case's outcome or 2) seek a writ of certiorari from this Court in the only attempt available to him to try and get something like justice. Lowery chooses the latter.

It is quite true that there is a novel question here regarding the meaning and scope of what unconscionable inducement of a loan means under S.C. Code Ann. § 37-10-105(C), and that itself is a good reason to issue a writ of certiorari. But it is also true that the master and the Court of Appeals took leave of well-established law that required them to reach very different decisions than they did. This petition focuses on issues especially well suited to certiorari and does not go into all of Lowery's defenses. Lowery would welcome the opportunity to address his other defenses through briefing, should this Court issue a writ of certiorari.

## I. It makes no sense to decide that there is not even a genuine issue of material fact about Lowery's defense S.C. Code Ann. § 37-10-105(C) – an attorney preference violation coupled with inducement by unconscionable conduct.

A reason certiorari should be granted here is because this case presents an issue that has never before been determined by any published opinion of this state: what unconscionable inducement of a loan means under S.C. Code Ann. § 37-10-105(C).

By providing an attorney preference form to Lowery at the time of closing, by failing to ascertain his preference as to a lawyer to represent him, and by deceiving him into believing a lawyer was not needed to close the mortgage loan, Household violated the attorney preference statute – as the master agreed. (R. pp. 10-11.)

In pertinent part, the attorney preference statute provides:

> Whenever the primary purpose of a loan that is secured in whole or in part by a lien on real estate is for a personal, family or household purpose -

> (a) The creditor must ascertain prior to closing the preference of the borrower as to the legal counsel that is employed to represent the debtor in all matters of the transaction relating to the closing of the transaction and except in the case of a loan on property that is subject to the South Carolina Horizontal Property Act (Section 27-31-10 et seq.) the insurance agent to furnish required hazard and flood property insurance in connection with the mortgage and comply with such preference.
>
> The creditor may comply with this section by:
>
> (1) including the preference information on or with the credit application so that this information shall be provided on a form substantially similar to a form distributed by the administrator; or
>
> (2) providing written notice to the borrower of the preference information with the notice being delivered or mailed no later than three business days after the application is received or prepared. If a creditor uses a preference notice form substantially similar to a form distributed by the administrator, the form is in compliance with this section.

S.C. Code Ann. § 37-10-102.

A lender violates S.C. Code Ann. § 37-10-102 when it fails to "ascertain *prior to closing* the preference of the borrower as to the legal counsel that is employed to represent the debtor in all matters of the transaction relating to the closing of the transaction" and by failing to "comply with such preference." S.C. Code Ann. § 37-10-102(a) (emphasis added). This Court has observed that "the suggestion that the attorney preference statute disclosure may be made at closing borders on frivolity." King v. Am. Gen. Finance, Inc., 386 S.C. 82, 91, 687 S.E.2d 321, 326 (2009).

The attorney preference statute is in Chapter 10 of the South Carolina Consumer Protection Code, which is codified in Title 37 of the South Carolina Code of Laws. A

statute in the same chapter, S.C. Code Ann. § 37-10-105, provides the remedies for a violation of § 37-10-102, stating:

> A) If a creditor violates a provision of this chapter, the debtor has a cause of action, other than in a class action, to recover actual damages and also a right in an action, other than in a class action, to recover from the person violating this chapter a penalty in an amount determined by the court of not less than one thousand five hundred dollars and not more than seven thousand five hundred dollars. No debtor may bring a class action for a violation of this chapter. No debtor may bring an action for a violation of this chapter more than three years after the violation occurred, except as set forth in subsection (C). The three-year statute of limitations applies to actions commenced after May 2, 1997. No inference should be drawn as to the applicable statute of limitations for any pending actions. ***This subsection does not bar a debtor from asserting a violation of this chapter in an action to collect a debt which was brought more than three years from the date of the occurrence of the violation as a matter of defense by recoupment or set-off in such action.***
>
> (B) No creditor may be held liable in an action brought under this section for a violation of this chapter if the creditor shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid the error.
>
> (C) ***If the court finds as a matter of law that the agreement or transaction is unconscionable pursuant to Section 37-5-108 at the time it was made, or was induced by unconscionable conduct***, the court may, in an action other than a class action:
>
> > (1) refuse to enforce the agreement, or a term, or part of the agreement or transaction that the court determines to have been unconscionable at the time it was made;
> >
> > (2) enforce the remainder of the agreement without the unconscionable term or part, or limit the application of the unconscionable term or part to avoid an unconscionable result;

> (3) rewrite or modify the agreement to eliminate an unconscionable term, part, or result and enforce the new agreement; or
>
> (4) award:
>
> > (a) not more than the total amount of the loan finance charge and allow repayment of the unpaid balance of the loan without any finance charge;
> >
> > (b) not more than double the amount of the excess loan finance charge or other charges or fees actually received by the creditor or paid by the debtor to a third party; and
> >
> > (c) attorney's fees and costs.
>
> An action pursuant to this subsection may not be brought after the original scheduled maturity date of the debt.
>
> (D) In an action in which it is found that a creditor has violated this chapter, the court shall award to the debtor the costs of the action and to his attorneys their reasonable fees. In determining attorneys' fees, the amount of the recovery on behalf of the debtor is not controlling.

S.C. Code Ann. § 37-10-105 (emphasis added).

At issue here is whether, for this violation of the attorney preference statute, under these circumstances, Lowery is limited to only the relief available under S.C. Code Ann. § 37-10-105(A), "actual damages . . . and a penalty in an amount determined by the court of not less than one thousand five hundred dollars and not more than seven thousand five hundred dollars[,]" or whether there is a genuine issue of fact about whether the stronger remedies under S.C. Code Ann. § 37-10-105(C) may be available to Lowery in the ultimate analysis.

**a. There is a lack of precedent interpreting what "induced by unconscionable conduct" means under S.C. Code Ann. § 37-10-105(C).**

There is no reported case in this state that addresses what the words "induced by unconscionable conduct" mean in S.C. Code Ann. § 37-10-105(C). The closest a South Carolina appellate court has come to doing so in a published opinion is a discussion by the Court of Appeals in Deutsche Bank Natl. Trust Co. v. Estate of Houck, 434 S.C. 500, 507, 508-09, 863 S.E.2d 829, 833, 834 (Ct. App. 2021), *aff'd as modified*, 440 S.C. 409. That opinion, however, only discusses the remedies available under this statutory subsection, not what conduct falls within its scope. Id.

*Unconscionability* simply means "[e]xtreme unfairness." Black's Law Dictionary 1663 (9th ed. 2009). In discussing unconscionability, this Court has said that "[a]bsence of meaningful choice on the part of one party generally speaks to the fundamental fairness of the bargaining process in the contract at issue." Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663, 669 (2007). But Simpson, along with, it seems, all other cases on unconscionability from this Court and the Court of Appeals, deals with *substantive* unconscionability, the unconscionability of the *terms* of a transaction. See id. We have zero published cases that speak to the other kind of unconscionability subject of S.C. Code Ann. § 37-10-105(C), unconscionable *conduct* in the inducement of a transaction, which might be called *procedural* unconscionability.

West Virginia has a statute with similar language, applying to instances of a loan or other transaction being induced by unconscionable conduct. McFarland v. Wells Fargo Bank, N.A., 810 F.3d 273, 283-84 (4th Cir. 2016) (analyzing West Virginia statute and unconscionability law). The federal Fourth Circuit concluded that what the

West Virginia legislature had done in that statutory language was "diverging from [the] traditional understanding [of substantive unconscionability] and authorizing a claim for unconscionable inducement that does not require a showing of substantive unconscionability." Id. at 284. Under this excellent logic, inducement by unconscionable conduct focuses on process rather than substantive transaction terms. S.C. Code Ann. § 37-10-105(C); cf. McFarland, 810 F.3d at 284. In a situation of inducement by unconscionable conduct, the underlying loan terms do not have to be unconscionable; rather, the court looks to the surrounding conduct and assesses that conduct for extreme unfairness. See McFarland, 810 F.3d at 284; S.C. Code Ann. § 37-10-105(C).

The Court of Appeals has issued two unpublished opinions that speak to what constitutes inducement by unconscionable conduct: the one in the instant case and the one in Wells Fargo Bank, N.A. v. Morgan, 2021 WL 3910274, 2021-UP-313 (S.C. App. Sept. 1, 2021), which came to what seems a directly opposite view of inducement by unconscionable conduct from that taken by the panel in the instant case.

> Initially, we find Morgan sufficiently pled his counterclaim for procedural unconscionability due to a violation of the Attorney Preference Statute. The Attorney Preference Statute is codified in Chapter 10 of the Consumer Protection Code at § 37-10-102. Section 37-10-105 explicitly authorizes causes of action for violations of Chapter 10 of the Consumer Protection Code, and subsection (C) recognizes a cause of action for unconscionability. *See* S.C. Code Ann. § 37-10-105(A) (2015) ("If a creditor violates a provision of this chapter, the debtor has a cause of action, other than in a class action, to recover actual damages ...."); S.C. Code Ann. § 37-10-105(C) (describing the relief a court may grant "[i]f the court finds as a matter of law that the agreement or transaction is unconscionable pursuant to Section 37-5-108 at the time it was made, or was induced by unconscionable conduct"). Thus, it appears the General Assembly has specifically provided a remedy for

> violations of the Attorney Preference Statute accompanied by unconscionable conduct.
>
> To determine the existence of unconscionability under § 37-10-105(C), the court must consider a nonexclusive list of factors set forth in § 37-5-108. *See* § 37-10-105(C) (citing § 37-5-108 for determining the existence of unconscionability); S.C. Code Ann. § 37-5-108(4)(a) (2015) (listing nonexclusive factors the court must consider in determining the existence of unconscionability). Section 37-5-108(4)(a)(iv) requires the court to consider "the fact that the seller, lessor, or lender knowingly has taken advantage of the inability of the consumer or debtor reasonably to protect his interests by reason of physical or mental infirmities, ignorance, illiteracy, inability to understand the language of the agreement, or similar factors." Morgan alleges he was not given the opportunity to choose his counsel in violation of the Attorney Preference Statute, the loan was closed without the supervision of an attorney, and his signature was forged on some of the loan documents. We find Morgan sufficiently pled his § 37-10-105(C) counterclaim.

Id. at *2 (emphasis added).

If the Morgan opinion reflects the law (and it does), the opinion issued by the Court of Appeals in the instant case cannot be right. Falsification of documents (the slipped-in property description) and the closing of a mortgage loan without an attorney, coupled with a violation of the attorney preference statute, are present in the facts of the instant case. (R. pp. 310-13.)

Just like Morgan. Except treated very differently.

This Court can provide clarity here, which this petition's author hopes is to say that our law's view of the operative statutory language is the view reflected in Morgan. That is the view that makes sense. See McFarland, 810 F.3d at 284. In any event, the clarity only this Court can provide is needed to prevent further mutually incompatible interpretations.

**b. If this loan was not induced by unconscionable conduct, it is hard to see how any loan could be.**

The master and the Court of Appeals concluded there was no evidence at all to the effect that this loan was induced by unconscionable conduct. Respectfully to them, to reach such a conclusion is to shut one's eyes to the truth. The facts are set out above, and Lowery will not repeat them here. He simply notes that, if these facts do not amount to inducement of a loan by unconscionable conduct, it may be impossible for any fact pattern to do so.

The General Assembly has provided that the Consumer Protection Code "shall be liberally construed and applied to promote its underlying purposes and policies." S.C. Code Ann. § 37-1-102(1); accord King, 386 S.C. at 89, 90; Davis v. Nationscredit Fin. Services Corp., 326 S.C. 83, 484 S.E.2d 471 (1997); Camp v. Springs Mtg. Corp., 310 S.C. 514, 426 S.E.2d 304 (1992). Among the specifically enumerated purposes of the Consumer Protection Code are "to further consumer understanding of the terms of credit transactions" and "to protect consumer buyers, lessees, and borrowers against unfair practices by some suppliers of consumer credit, having due regard for the interests of legitimate and scrupulous creditors." S.C. Code Ann. § 37-1-102(2)(c)&(d).

Courts should interpret S.C. Code Ann. § 37-10-105, including the statute's use of the word "unconscionable," consistently with the purposes of the Consumer Protection Code, i.e., liberally in favor of the furtherance of consumer understanding of the terms of credit transactions and liberally in favor the protection of consumers against unfair practices by suppliers of consumer credit. S.C. Code Ann. § 37-1-102(1)&(2)(c)&(d).

At issue in this case is a South Carolina mortgage loan. Under South Carolina law, a person has the right to be represented by an attorney of his own choice, without conflicts of interest, in a mortgage closing. See Doe v. McMaster, 355 S.C. 306, 585 S.E.2d 773, 777-78 (2003); State v. Buyers Service Co., Inc., 292 S.C. 426, 357 S.E.2d 15 (1987). A South Carolina mortgage loan closing, including a refinance, must be supervised by an attorney licensed to practice law in South Carolina. Id.

In Wachovia Bank, N.A. v. Coffey, the Court of Appeals observed that "[t]he unauthorized practice of law is *inherently prejudicial* to not only the parties involved in the instant transaction but also the public at large[.]" 389 S.C. 68, 698 S.E.2d 244, 248 (Ct. App. 2010) (emphasis added), *aff'd as modified* 404 S.C. 421, 746 S.E.2d 35, 76 (2013). The Court of Appeals noted that the purpose served by our this Court requiring lawyers to supervise mortgage loan closings is "the protection of the public from the potentially severe economic and emotional consequences which may flow from erroneous advice given by persons untrained in the law." Id. (quoting Buyers Service, 292 S.C. at 431). This Court favorably cited Coffey's "inherently prejudicial" description in Matrix Financial Services Corp. v. Frazer, which reaffirmed that "closing a loan without the supervision of an attorney constitutes the unauthorized practice of law." 394 S.C. 134, 714 S.E.2d 532, 534 (2011). Prejudice inheres in the unauthorized practice of law.

Among the chief reasons this Court requires an attorney licensed to practice law in this state to supervise a mortgage loan closing is so that the mortgage loan customer is in a position to receive accurate information from the lawyer, who represents the customer, about the terms of credit transactions, and so that the lawyer may protect the customer from unfair practices by suppliers of mortgage credit. Doe, 355 S.C. at 315;

Buyers Service, 292 S.C. at 434. The closing lawyer represents the mortgage loan customer[1], Doe, 355 S.C. at 315, and must supervise the closing because, among other things, "attorneys . . . have the ability to furnish their clients legal advice should the need arise and fall under the regulatory rules of" this Court. Buyers Service, 292 S.C. at 434. Per this Court, underpinning the attorney supervision requirement is the principle that "protection of the public is of paramount concern." Id. Chiefly, what this Court has sought to protect the public from are the negative consequences engendered by people entering into mortgage loan transactions without the opportunity to make a meaningful, informed choice about whether to sign on to the terms of those transactions. Doe, 355 S.C. at 315; Buyers Service, 292 S.C. at 434. The closing attorney is there to ensure the choice to enter into the mortgage loan is meaningful and the bargaining process is fundamentally fair. Doe, 355 S.C. at 315; Buyers Service, 292 S.C. at 434.

The right to be represented by an attorney of one's own choice is a substantial right. Hagood v. Sommerville, 362 S.C. 191, 607 S.E.2d 707 (2005). This is no less so in the context of an out-of-court transaction like a mortgage loan closing. See Doe, 355 S.C. at 315; Buyers Service, 292 S.C. at 434. The right of a mortgage loan customer to be represented in a mortgage loan closing by a loyal, unconflicted attorney of his own choice, there to ensure the customer has a meaningful choice about whether to enter into the transaction and that the process is fair, is indeed substantial. Hagood, 362 S.C. 191; Doe, 355 S.C. at 315; Buyers Service, 292 S.C. at 434.

Lowery was deprived of his right to have a lawyer close this mortgage loan. (R. pp. 310-13.) In the absence of the protections that requirement exists to give, Lowery

[1] Under certain circumstances, the closing attorney may also represent the lender. Doe, 355 S.C. at 315.

was the victim of document falsification and the lender's lies told to get him to enter into the loan. (R. pp. 310-13.) At the root of all the problems Lowery experienced with this loan is that the lender shirked its responsibility to notify Lowery of his right to choose a lawyer to represent him. Had he been represented, it is far less likely that these problems would ever have arisen, since the lawyer would have been obligated to engage in supervision of the closing that would have prevented them. Doe, 355 S.C. at 315; Buyers Service, 292 S.C. at 434.

A stronger case for inducement by unconscionable conduct could scarcely be made than that shown by the undisputed facts here.

## II. The master and the Court of Appeals have contravened the law of res judicata.

"General rules governing the conclusiveness of judgments and decrees ordinarily apply" to mortgage foreclosures. 59A C.J.S. Mortgages § 1051 (2009). Res judicata applies in mortgage foreclosure cases. Id. This Court has applied res judicata to a mortgage foreclosure claim. Columbia Natl. Bank of Columbia v. Arthur, 151 S.E. 274, 275, 276 (S.C. 1930). "In order for res judicata to apply, the parties—or their privies—and subject matter must be identical, and the prior suit adjudicated the issue." Equivest Fin., LLC v. Ravenel, 422 S.C. 499, 507, 812 S.E.2d 438, 442 (Ct. App. 2018).

Here, all of that is present. As assignee from Household, Respondent is Household's privy. Yelsen Land Co. v. State, 397 S.C. 15, 22, 723 S.E.2d 592, 596 (2012); Bailey v. U.S. Fid. & Guar. Co., 185 S.C. 169, 193 S.E. 638, 641 (1937); Equivest Fin., LLC v. Ravenel, 422 S.C. 499, 507, 812 S.E.2d 438, 442 (Ct. App. 2018); Roberts v. Recovery Bureau, Inc., 316 S.C. 492, 496, 450 S.E.2d 616, 619 (Ct. App. 1994).

By operation of Rule 41(b), SCRCP, a merits adjudication between these parties about this same subject matter – indeed, suing on the same default of the same note – was already made in the 2008 action Household brought. (R. pp. 278-87.) This Court has repeatedly referred to a case being stricken under Rule 40(j) as a "dismissal" under Rule 40(j), SCRCP. In re Norton, 433 S.C. 115, 118, 857 S.E.2d 1, 2 (2021); In re Stockholm, 415 S.C. 645, 648, 785 S.E.2d 361, 362, 363 (2016); In re Moody, 410 S.C. 334, 339, 764 S.E.2d 519, 522 (2014); In re Gorski, 635 S.E.2d 95, 96 (S.C. 2006); Maxwell v. Genez, 356 S.C. 617, 621, 591 S.E.2d 26, 28 (2003); In re Weinberg, 355 S.C. 649, 651, 587 S.E.2d 101 (2003); Olmstead v. Shakespeare, 354 S.C. 421, 422, 581 S.E.2d 483 (2003). The Court of Appeals has said likewise. Personal Care, Inc. v. Theos, 825 S.E.2d 281, 285 (S.C. App. 2019); Goodwin v. Landquest Development, LLC, 414 S.C. 623, 630-32, 779 S.E.2d 826, 830-31 (Ct. App. 2015).

In 2008, Household brought a foreclosure action. (R. pp. 282.) By order filed July 26, 2013, that action ended when it was "stricken from the active roster for failure to prosecute, pursuant to Rule 40(j)[.]" (R. p. 286.) None of the parties to that case consented to the action being stricken from the active docket under Rule 40(j), SCRCP, or otherwise. (R. pp. 286-87, 296, 302.) Such consent is required in order for an action to be stricken with leave to restore. Id.

Most importantly for the purposes of this appeal, it was a dismissal that was not of a sort provided for under the South Carolina Rules of Civil Procedure, including one not provided for in Rule 41, SCRCP. It was, therefore, a dismissal with prejudice. Rule 41(b) explicitly provides that a dismissal for failure to prosecute as well as any other "dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction

or for improper venue or for failure to join a party under Rule 19, operates as an adjudication upon the merits." Rule 41(b), SCRCP.

The dismissal of Household's claim, which was not one of the dismissals authorized by Rule 41, decided that Household (as mortgagee under the mortgage at issue) was not entitled to anything it sought in its claim. (R. pp. 278-87.) A "dismissal with prejudice indicates an adjudication on the merits and precluded subsequent litigation to the same extent as if the action had been tried to final adjudication. Where an action has been dismissed with prejudice, the judgment operates in subsequent litigation to the same extent as if the action had been tried to a final adjudication." Jones v. City of Folly Beach, 326 S.C. 360, 483 S.E.2d 770, 773 (Ct. App. 1997). The dismissal of the first action, not being a dismissal provided for in Rule 41, SCRCP, adjudicated that action on the merits. Id.; Rule 41(d), SCRCP.

There is at least a genuine issue of material fact about whether res judicata thus bars Respondent's claim here. There is no mortgage foreclosure exception to res judicata. Columbia Natl. Bank, 151 S.E. at 275, 276; 59A C.J.S. Mortgages § 1051.

### III. If certiorari is not granted, an deprivation of due process will be allowed to stand.

The Court of Appeals determined that "[t]he master did not order that Lowery was prohibited from cross-examining witnesses at the final hearing[,]" so there has been no deprivation of his right to cross-examination. Most respectfully to that court, its reasoning ignores what is obvious: the procedure the master set up does not allow for cross-examination.

Here is what the appealed order says about how trial of the remaining issues is to go:

> Plaintiff is granted summary judgment as to Defendant's liability for foreclosure subject to submitting by affidavit appropriate documentation supporting the amount of the debt at least three days prior to a final hearing.
>
> Defendant is granted judgment by way of offset only for an attorney preference violation subject to submitting the amount claimed for the offset by way of affidavit at least three days prior to a final hearing.

(R. p. 11.)

The order below is not made lawful simply because it does not expressly say "no cross-examination" but merely provides for the submission of affidavits at the trial of the few remaining issues. The plain intention and effect of this order is to provide for how the trial court is to receive the trial evidence: in a manner prohibited by constitutional law. On this point, the scant and conclusory analysis used by the Court of Appeals fails to supply answers to basic questions about the opportunity for cross-examination in the procedure ordered here. When, where, or how is cross-examination supposed to happen under the appealed order? There is no room for cross-examination under the existing order, no chance for it to occur, no situation in which cross-examination of Respondent's affiants might be had. (R. p. 11.) Respondent does not have to bring its witnesses to the courtroom or present them live to Lowery in any way. (R. p. 11.) At what point would some cross-examination take place?

Lowery has a due process right to cross-examination. E.g., Moore v. Moore, 376 S.C. 467, 472, 657 S.E.2d 743, 746 (2008). The lower court's prevention of cross-examination is not made proper simply because, in setting up a situation in which it is impossible for cross-examination to happen, its order never mentions denying cross-examination. See id.; (R. pp. 1-13.).

## CONCLUSION

This case demands some adjustment to allow for some justice for Lowery under these circumstances. Perhaps just as or more important for the purposes of this petition, though, this case illustrates that the law needs clarity when it comes to the meaning of "induced by unconscionable conduct" in the statute that provides the remedies available when there has been an attorney preference violation. There is a relatively weak remedy for a merely technical violation, S.C. Code Ann. § 37-10-105(A), and a much stronger one for the worst violations, which include those in which the loan was also induced by unconscionable conduct. The Court of Appeals does not agree with itself on what inducement by unconscionable conduct is. The bench, the bar, the public – we need to know. Only this Court is in a position to tell us.

WHEREFORE, Lowery prays for this Court to issue a writ of certiorari to review the Court of Appeals' opinion and decision in this case.

Respectfully submitted,

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