NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

GEORGIA PLUMB, JOSHUA PLUMB, KAMERON PLUMB, and THE WORD CHURCH,
Petitioners Pro Se,

v.

U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE SUCCESSOR IN INTEREST TO WILMINGTON TRUST COMPANY, AS TRUSTEE SUCCESSOR IN INTEREST TO BANK OF AMERICA, NATIONAL ASSOCIATION, AS TRUSTEE FOR STRUCTURED ASSET INVESTMENT LOAN TRUST MORTGAGE PASS-THROUGH CERTIFICATES SERIES 2005,
Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of the State of Washington

PETITION FOR WRIT OF CERTIORARI

Georgia Plumb, Joshua Plumb,
Kameron Plumb, and The Word Church
4902 Richey Rd.
Yakima, WA 98908
Tel. 509-965-4304;
Email: georgia@plumbsafety.com

June 26, 2018

QUESTION PRESENTED

Whether the Plumbs' procedural due process rights under the Fourteenth Amendment were violated by the state when final summary judgment and judgment of foreclosure was granted to U.S. Bank, despite U.S. Bank's failure to establish that it was the holder in possession of the subject note on the date that it filed its foreclosure complaint against the Plumbs.

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Petitioners, Georgia A. Plumb, Joshua C. Plumb, Kameron F. Plumb, and The Word Church (aka Rev. Georgia A. Plumb, jointly and severally, joining together and proceeding *pro se*, respectfully petition for a writ of certiorari to review the judgment of the Washington State Court of Appeals, Division III in this case. The unrepresented Petitioners also pray that the Supreme Court would construe this "inartful" petition liberally and hold it to less stringent standards than formal filings drafted by lawyers pursuant to the Court's unanimous holding in *Haines v. Kerner*, 404 U.S. 519, 92 S. Ct. 594, 30 L.Ed.2d 652 (1972) (per curiam) at 654. *See also*, *Boag v. MacDougall*, 454 U.S. 364, 102 S. Ct. 700, 70 L.Ed.2d 551 (1982) (per curiam) at 553; *Erickson v. Pardu* 551 U.S. 89, 94, 127 S. Ct. 2197, 167 L. Ed 2d 1081 (2007).

INTRODUCTION

This case presents an important and recurring question regarding standing and due process in judicial foreclosure proceedings.

Courts across this country are encountering banks that file judicial foreclosure cases prematurely before they become the holder of the subject promissory note. The bank falsely claims in its foreclosure complaint that it is the holder of the note, when in reality, the bank acquires the note for the first time at some later date after the case is filed. Thus, when the case was filed, the bank had suffered no "injury in fact", lacks standing, is invoking the jurisdiction of the court and enforcing a foreclosure when it is not authorized to do

so. Several state supreme courts across this country have recently addressed this very issue, ruling that when a foreclosing bank did not possess the note when it filed its foreclosure complaint, even if it acquired the note at a later date prior to judgment, the bank lacked standing and the case must be dismissed.[1]

In this present case, the foreclosing bank claimed in its foreclosure complaint that it was the owner and holder of the note and was foreclosing under Article Three of the Uniform Commercial Code. The bank subsequently produced evidence in discovery showing that it did not hold the note when it filed its complaint, but that it first became a holder of the note several months after the case was filed. Furthermore, the bank's affidavits in support of support of summary judgment and judgment in foreclosure never once established that the bank possessed enforcement rights of the subject promissory note at the time the case was filed. When the bank moved for summary judgment, the Plumbs disputed the bank's standing, raising these issues of material fact to the

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[1] *Bank of Am., N.A. v. Reyes-Toledo*, 139 Haw. 361, 368-69, 390 P.3d 1248, 1255-56 (2017); *FV-I, Inc. v. Kallevig*, 306 Kan. 204, 392 P.3d 1248 (2017); *Deutsche Bank Nat. Trust Co. v. Johnston*, 2016- NMSC 013, 369 P.3d 1046, 1052 (N.M. 2016); *Deutsche Bank Nat. Trust v. Brumbaugh*, 2012 OK 3, 270 P.3d 151, 154 (Okla. 2012); *U.S. Bank Nat. Ass'n v. Kimball*, 190 Vt. 210, 27 A.3d 1087, 1092 (Vt. 2011); *Fed. Home Loan Mtge. Corp. v. Schwartzwald*, 134 Ohio St. 3d 13, 2012-Ohio-5017, 979 N.E. 2d 1214 (2012).

court. The state courts (both superior and appellate) recklessly ignored these issues, granting final summary judgment and judgment of foreclosure in favor of the bank. The arbitrary, indefensible actions by the state deprived the Plumbs of their only home without due process of law which is a direct violation of the Constitution of the United States, Amendment XIV, Section 1, which states in pertinent part, "*No State shall . . . deprive any person of . . . property, without due process of law . . . .*"

The importance of this issue is difficult to overstate. Mortgage debt comprises roughly two-thirds of household debt in the United States, totaling over $8 trillion, and tens of thousands of foreclosures are initiated every month.[2] In 2016 alone, nearly 400,000 homes were lost to foreclosure, including about 200,000 in judicial foreclosure States, and approximately 330,000 homes were in some state of foreclosure at year's end.[3]

Because this case presents an optimal vehicle for resolving this significant issue of standing and due process in foreclosure cases, the petition should be granted.

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[2] *See*, Federal Reserve Bank of New York, *Quarterly Report on Household Debt & Credit* (May 2017).

[3] *See*, http://www.corelogic.com/research/foreclosure-report/national-foreclosure-report-december-2016.pdf

OPINIONS BELOW

The unpublished opinion of the court of appeals to review the merits appears at Appendix A to the petition. The unpublished opinion of the superior court appears at Appendices B and C to the petition. The unpublished opinion of the state supreme court appears at Appendix D to the petition.

JURISDICTION

The judgment of the state court of appeals was entered on December 14, 2017. A copy of that decision appears at Appendix A. The order of the state superior court granting summary judgment was entered on July 1, 2016. A copy of that decision appears at Appendix B. The order of the superior court granting judgment of foreclosure was entered on July 1, 2016. A copy of that decision appears at Appendix C. The order of the state supreme court denying the petition for review was entered on April 4, 2018. A copy of that decision appears at Appendix D. The jurisdiction of the Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitution of the United States of America and statutory provisions involved in the case are lengthy, therefore their pertinent text is set out verbatim in the Appendix E. The citations involved are U.S. Const. art. III, § 1; U.S. Const. art. III, § 2, cl. 1; U.S. Const. art. III, § 2, cl. 2; U.S. Const. art. VI, §

1. cl. 2; U.S. Const. amend. VII; U.S. Const. amend. XIV, § 1; Wash. Rev. Code § 62A.3-203(a)(b)(c); Wash. Rev. Code § 3-205(b); Wash. Rev. Code § 62A.3-301(i).

STATEMENT OF THE CASE

Procedural Background Facts

In December 2013, U.S. Bank filed a residential foreclosure complaint in a superior court of the State of Washington alleging that it was both the "holder" and "owner" of a promissory note evidencing a home loan that the Plumbs had executed and defaulted on.[4]

The Bank did not file the purported original "note" in the court on the date it filed its complaint.

In the Defendants' answers to the complaint and at all times material, the Plumbs disputed the Bank's standing, its note, evidence, allegations, and the court's jurisdiction. The Plumbs moved the court to dismiss the case.

As part of its response to the Plumbs' discovery request, U.S. Bank sent a document entitled "Note Location Determined" that showed Deutsche Bank held possession of the Bank's note on the date U.S. Bank filed the foreclosure complaint, and that Deutsche Bank continued holding the note for about seven months afterwards before sending it to Ocwen, who is U.S. Bank's loan servicing agent.[5]

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[4] *See,* Clerk's Papers (CP), pp. 6, 7.

[5] *See,* Appellants' Brief (Appls'. Br.), App., p. 1.

According to the "Note Location Determined" document, U.S. Bank became the holder of the note for the first time in this case when its servicing agent, Ocwen, received actual possession of the note on August 14, 2014.

On March 2016, U.S. Bank moved for summary judgment. In its memorandum in support of its motion for summary judgment, the Bank stated that it was a person entitled to enforce the note instrument under Washington's Uniform Commercial Code Wash. Rev. Code § 62A.3-301(i) because it was a "holder" in possession of the note endorsed in blank entitled to enforce its provisions.[6] For evidence of its allegations, U.S. Bank relied solely upon its affidavit in support of plaintiff's motion for summary judgment and affidavit in support of judgment and decree of foreclosure.[7] The affidavits were executed over a year after the suit was commenced. The affiants were agents from Ocwen, Bank's loan servicer and attorney in fact.

The Bank's affidavits were ambiguous as to the date when U.S. Bank or its agent obtained actual possession of the note. Neither affiant declared or established that the Bank held actual or constructive possession of the note on the date the Bank commenced the action.[8] Also, although the affiants'

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[6] *See,* CP., p. 829.
[7] *See,* CP., pp. 745-780; 781-823.
[8] *Id.*

copies of the attached purported original note indorsed in blank showed the original lender was Finance America, LLC, they did not show any evidence that established that U.S. Bank was a holder of the note on the date it filed its judicial foreclosure suit against the Plumbs.

In their memorandum in opposition, and also at the summary judgment hearing, the Plumbs argued that the Bank had failed to prove that it held actual possession of the disputed note, and thus it lacked standing "as of the commencement of suit," as required by: including, but not limited to, the U.S. Supreme Court in *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 112 S. Ct. 2130, 119 L.Ed.2d 351 (1992), and Article Three of the Uniform Commercial Code. The Plumbs argued that without the bank providing this necessary proof of standing, the court did not have jurisdiction as a matter of law.[9]

In spite of the Bank's failure to prove it had standing as of the date it filed suit, and in spite of the court's jurisdiction being challenged and in question, the state superior court judge ignored these matters and signed an order granting U.S. Bank summary judgment and judgment of foreclosure on July 1, 2016.[10]

The Plumbs appealed in the state court of appeals.

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[9] *See*, CP., pp. 924-931; Verbatim Report of Proceeding (VRP).

[10] *See*, App. B, pp. 10a-12a; App. C., pp. 13a-19a.

On March 10, 2017, in its Respondent's Brief, U.S. Bank's new, substitute attorney falsely claimed that the "Note Location Determined" document, which was produced by the Bank in discovery, and which showed that Deutsche Bank held the note on the date the case was filed, was "excluded by the trial court" because it was "hearsay."[11] The Bank did not, nor could it ever, point to any place in the entire superior court record where the Bank objected to the Note Location Determined document, nor where the court had ever specifically excluded it as hearsay. The Bank had waived any objection to the conflicting document in the lower court, and the court had allowed the Note Location Determination document into the court record.

On December 14, 2017 the court of appeals affirmed the trial court's order of summary judgment and judgment of foreclosure in its unpublished opinion.[12]

On January 16, 2018, the Plumbs filed a petition for review in Washington's supreme court.

In its Answer to Petition for Review, the Bank never rebutted the Plumbs' argument that the Bank's affidavits were insufficient, and that it did not prove the Bank's standing. Instead, the Bank misled the court again, telling the supreme court, *"[T]he trial court ruled simply that the evidence petitioners held*

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[11] *See,* Resp. Br, pp. 17-19.

[12] *See,* App. A, p. 10a.

up in support of their defense is inadmissible hearsay and cannot create a material question of fact."[13]

On April 4, 2018 the state supreme court denied the Plumbs' petition for review.[14]

REASONS FOR GRANTING THE PETITION

I. THE STATE COURT UNJUSTLY AND SUBSTANTIALLY DEPRIVED THE PLUMBS OF THEIR HOME WITHOUT PROCEDURAL DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT

U.S. Bank failed to first prove its standing and the court's jurisdiction as of the date it filed the foreclosure complaint. The state court of appeals deliberately disregarded this fundamental failure, and deprived the Plumbs of their home when it affirmed the lower court's order granting the Bank summary judgment and judgment of foreclosure.

The state substantially deprived the Plumbs of their home without due process of law under Amendment XIV, Section 1, which states in pertinent part, "No State shall . . . deprive any person of . . . property, without due process of law . . . ." *See, also,* Wash. Const. art. I, § 3.

Regarding a citizen's personal rights under the Fourteenth Amendment, the Supreme Court holds

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[13] *See,* Ans. Pet. for Rev., p. 4

[14] *See,* App. D, p. 20a.

the following: (Fourteenth Amendment to Constitution of United States requires that state action shall be consistent with fundamental principles of liberty and justice which lie at basis of all our civil and political institutions.) *Hebert v. Louisiana*, 272 U.S. 312, 47 S. Ct. 103, 71 L.Ed. 270 (1926); (Fourteenth Amendment safeguards fundamental rights of persons and of property against arbitrary and oppressive state action.) *Thomas Cusack Co. v. Chicago*, 242 U.S. 526, 37 S. Ct. 190, 61 L.Ed. 472 (1917); (Constitutional protection against deprivation of property without due process of law is available to persons arbitrarily deprived of their private rights by state action whether under guise of legislative authority or otherwise.) *Phillip Wagner, Inc. v. Leser*, 239 U.S. 207, 36 S. Ct. 66, 60 L.Ed. 230 (1915): (Prohibition of Fourteenth Amendment of Federal Constitution against taking property without due process of law refers to all instrumentalities of state, and is therefore violated whenever any person, by virtue of public position under state government, deprives another of any right protected by that Amendment against deprivation by state.) *Chi., B. & Q. R. Co. v. Chicago*, 166 U.S. 226, 17 S. Ct. 581, 41 L.Ed. 979 (1897); (Violation of due process clause may be accomplished by state judiciary in course of construing otherwise valid state statute.) *Bouie v. Columbia*, 378 U.S. 347, 84 S. Ct. 1697, 12 L.Ed.2d 894 (1964); (Due process of law, within meaning of Fourteenth Amendment, is secured if laws operate on all alike, and do not subject individual to arbitrary

exercise of powers of government.) *Mo. P. R. Co. v. Mackey*, 127 U.S. 205, 8 S. Ct. 1161, 32 L.Ed. 107 (1888); (Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property.) *Carey v. Piphus*, 435 U.S. 247, 260, 98 S.Ct. 1042, 1050, 55 L.Ed.2d 252 (1978). *See also*, (Fourteenth Amendment is to be construed liberally, to carry out purposes of its framers.) *Strauder v. West Virginia*, 100 U.S. 303, 25 L.Ed. 664 (1879).

Most states have adopted Article Three of the Uniform Commercial Code, which pertains to negotiable instruments or written promissory notes evidencing home loans. Washington's Uniform Commercial Code Statute states the following in pertinent part:

> *This Article applies to negotiable instruments.* Wash. Rev. Code § 62A.3-102(a). *When a note is indorsed in blank, it is payable to a bearer and may be negotiated by transfer of possession alone.* Wash. Rev. Code § 62A.3-205(b). *An instrument is transferred when it is delivered by a person other than its issuer for the purposes of giving to the person receiving delivery the right to enforce the instrument.* Wash. Rev. Code § 62A.3-203(a). *"Person entitled to enforce" an instrument means (i) the holder of the instrument, (ii) a nonholder in possession of the instrument who has the rights of a holder, or (iii) a person not in possession of the instrument who is entitled to enforce the instrument*

> *pursuant to RCW 62A.3-309 or 62A.3-418(d). A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument.* Wash. Rev. Code § 62A.3-301.

See, App. E, pp. 24a-26a.

U.S. Bank's note is a blank indorsed note. A plaintiff or bank that files a case without being the holder of a blank indorsed promissory note in actual possession lacks standing to enforce the note, is improperly invoking the jurisdiction of the court when it has suffered no actual "injury in fact," and foreclosing when it has no right to do so. *See, e.g. Whitmore v. Arkansas*, 495 U.S. 149, 110 S. Ct. 1717, 109 L.Ed.2d 135, 58 U.S.L.W. 4495 (1990) at 156 (holding to establish an Art. III case or controversy, a litigant first must clearly demonstrate that he has suffered an 'injury in fact'"); *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State,* 454 U.S. 464, 102 S. Ct. 752, 70 L.Ed.2d 700 (1982) at 709, 710, and 712 (the Court reversed a judgment because respondents had failed to prove standing under Article III and to identify a personal, distinct and palpable injury to be addressed); *Lujan v. Defs. of Wildlife,* 504 U.S. 555, 112 S. Ct. 2130, 119 L.Ed.2d 351 (1992) at 364, 365 holding that over the years the Court's cases have established that the irreducible constitutional minimum of standing is that the plaintiff must have suffered an "injury in fact"); *Davis v. Fed. Election Comm'n,* 554 U.S. 724,

734, 128 S. Ct. 2759, 171 L. Ed. 2d 737 (2008) (holding the Court's standing inquiry is "focused on whether the party invoking jurisdiction had the requisite stake in the outcome when the suit was filed"). *See also, Allen v. Wright*, 468 U.S. 737, 751, 82 L. Ed. 2d 556, 104 S. Ct. 3315 (1984), at 756.

The state court directly violated Article III of the Constitution, and the above Supreme Court's holdings regarding standing under Art. III. U.S. Bank did not clearly demonstrate that, at the time it filed its case, it had suffered an actual "injury in fact," and that it had standing to foreclose.

The state courts in this instant case, arbitrarily and unlawfully failed to comply with the above-cited controlling sections of Article Three of the U.C.C. statute, and precedent foreclosure case law decisions based upon the U.C.C. sections.

As mentioned above, several state supreme courts across this country have recently addressed this very issue of standing under Article Three of the U.C.C. in home foreclosure cases, ruling that when a bank did not prove it had actual possession the note when it filed the case, even though it later acquired the note, the bank lacked standing and the case must be dismissed.

See, e.g. Bank of Am., N.A. v. Reyes-Toledo, 139 Haw. 361, 368-69, 390 P.3d 1248, 1255-56 (2017) (holding despite its Uniform Commercial Code Statute, blank-indorsed note when it sought summary judgment, there was a fact issue as to whether the

bank held the note when the case was filed and thus had standing and the judgment was reversed. The requirement that a foreclosing plaintiff prove its entitlement to enforce the note at the commencement of the proceedings provides strong and necessary incentives to help ensure that a note holder will not proceed with a foreclosure action before confirming that it has a right to do so).

Deutsche Bank Nat. Trust Co. v. Johnston, 2016-NMSC 013, 369 P.3d 1046, 1052 (N.M. 2016) (holding that "standing must be established as of the time of filing suit in mortgage foreclosure cases" and the holder of a note indorsed in blank may, as a general matter, enforce the note. Uniform Commercial Code, N.M. Stat. Ann. §§ 55-3-301 and 55-3-205(b).

FV-I, Inc. v. Kallevig, 306 Kan. 204, 392 P.3d 1248 (2017) (holding, in order for a plaintiff to prevail in its mortgage foreclosure proceeding, it must establish both that it possessed enforcement rights in the note under Article 3 of the UCC and that those rights existed at the time it filed the action).

U.S. Bank Nat. Ass'n v. Kimball, 190 Vt. 210, 27 A.3d 1087, 1092 (Vt. 2011) (affirming the circuit court's granting of summary judgment with prejudice for the homeowner where the bank could not prove it was the holder of the note when the case was filed).

Deutsche Bank Nat. Trust v. Brumbaugh, 2012 OK 3, 270 P.3d 151, 154 (Okla. 2012) ("Being a person entitled to enforce the note is an essential requirement to initiate a foreclosure lawsuit. There is

a question of fact as to when Appellee became a holder, and thus, a person entitled to enforce the note. Therefore, summary judgment is not appropriate.").

U.S. Bank Nat'l Ass'n v. Steinberg, 2013 NY Slip Op 52167(U), 42 Misc. 3d 1201(A), 984 N.Y.S.2d 635 (Sup. Ct.) (holding that "Plaintiff is not entitled to the relief it seeks because it has failed to proffer any evidence of its standing to foreclose under the . . . Note at the time of commencement").

Fed. Home Loan Mtge. Corp. v. Schwartzwald, 134 Ohio St. 3d 13, 2012-Ohio-5017, 979 N.E. 2d 1214 (2012) (holding standing is determined as of the filing of the complaint).

In addition to U.S. Const. amend. XIV, § 1 and Wash. Const. art. I, § 3, the Plumbs' property interests are also created by statutes or regulations, as well as the common law. Wash. Rev. Code § 4.04.010 (2008) provides the following:

> *The common law, so far as it is not inconsistent with the Constitution and laws of the United States, or of the state of Washington nor incompatible with the institutions and condition of society in this state, shall be the rule of decision in all the courts of this state.*

The Plumbs' due process protections apply to both permanent and temporary deprivation of property. *Reilly v. State*, 18 Wn. App. 245, 566 P.2d 1283 (1977). The Plumbs' "deprivation of property" protections of due process are applicable whenever

any significant property interest is at stake. *Olympic v. Chaussee Corp.*, 82 Wn.2d 418, 511 P.2d 1002 (1973).

The state arbitrarily disregarded relevant common law and substantially violated the Plumbs' property interest created by the common law.

See, e.g. Bank of Am., N.A. v. Reyes-Toledo, supra; Deutsche Bank Nat. Trust Co. v. Johnston, supra; FV-I, Inc. v. Kallevig, supra; U.S. Bank Nat. Ass'n v. Kimball, supra; Deutsche Bank Nat. Trust v. Brumbaugh, supra; U.S. Bank Nat'l Ass'n v. Steinberg, supra; Fed. Home Loan Mtge. Corp. v. Schwartzwald, supra.

The state court arbitrarily ignored and substantially violated the requirements of Wash. Super. Ct. Civ. R. 56(e) for supporting declarations on summary judgment.

Wash. Super. Ct. Civ. R. 56(e), which is equivalent to Fed. R. Civ. P. 56(e), provides in part:

> *Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith.*

U.S. Bank's affidavits in support failed to proffer any evidence that the Bank had standing to foreclose under its note indorsed in blank at the time of commencement.[15]

The Bank's affiants did not show "affirmatively" that they were competent to testify to the matters stated therein. They did not declare, or show any evidence of personal knowledge admissible as evidence that the disputed note was "indorsed in blank," "negotiated," "delivered," or "transferred of possession" to U.S. Bank or its agent on or before the date the foreclosure complaint was filed as is plainly required by Article Three of the U.C.C. cited above.[16]

The Bank's conclusory affidavits in support were insufficient and irrelevant to support U.S. Bank's allegations. They presented no fact or documentation that showed U.S. Bank was the holder of the note as of the commencement of the suit. They were conclusory assertions, rather than factual allegations. The affidavits were inadmissible evidence as a matter of law. The state courts should have excluded U.S. Bank's affidavits, because the statements were not made on actual personal knowledge by the affiant(s) and were not admissible in evidence. They did not show that U.S. Bank had standing on the date of suit.

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15 *See,* Clerk's Papers (CP), pp. 745-780; 781-823.

16 *See,* CP., pp. 745-780; 781-823.

See, e.g., (Trial court did not abuse its discretion by excluding an affidavit because it contained conclusory assertions rather than factual allegations.) *McBride v. Walla Walla County*, 95 Wn. App. 33, 975 P.2d 1029 (1999); *Trujillo v. Nw. Tr. Servs., Inc.*, 355 P.3d 1100, 1106 (2015) at 1107 (on its face, it is ambiguous whether the declaration proves the bank is the holder or whether the bank is a nonholder in possession or person not in possession who is entitled to enforce the provision under Wash. Rev. Code § 62A.3-301); *Lyons v. U.S. Bank Nat'l Ass'n,* 181 Wn.2d 775, 336 P.3d 1142 (2014) (evidence that the trustee improperly relied on the beneficiary's declaration as proof of ownership of the promissory note could be sufficient to establish the unfair or deceptive act or practice element of a [Consumer Protection Act] action).

The state court arbitrarily disregarded and substantially violated Wash. Super. Ct. Civ. R. 56(c), which pertains to summary judgment motion and proceedings. Wash. Super. Ct. Civ. R. 56(c) provides in relevant part:

> *The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.*

U.S. Bank's motion for summary judgment could not be granted because it's pleadings, answers to interrogatories, and admissions on file, together with the affidavits, did not prove, by uncontroverted facts that no genuine issue as to any material fact existed and that the moving party (U.S. Bank) is entitled to a judgment as a matter of law. The Bank did not initially satisfy its burden of demonstrating the absence of a genuine issue of material fact; the court did not resolve all ambiguities and draw all reasonable inferences and facts in the light most favorable to the Plumbs who were opposing summary judgment; the court lacked jurisdiction because the Bank's affiants did not first prove the Bank's standing and that it or its agent held actual possession of the note at issue as of the date the case was file.

See, e.g., (The moving party must initially satisfy a burden of demonstrating the absence of a genuine issue of material fact.) *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-25, 91 L. Ed 2d 265, 106 S. Ct. 2548 (1986); (The court must resolve all ambiguities and draw all reasonable inferences in favor of the party defending against the motion.) *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59, 26 L. Ed. 2d 143, 90 S. Ct. 1598 (1970); (Motion for summary judgment should be denied as to claim over which court lacks jurisdiction.) *Pierce v. Submarine Signal Co.*, 25 F. Supp. 862 (D. Mass. 1939); (Summary judgment is proper only when facts are viewed in the light most favorable to party opposing summary judgment and

there is no genuine issue of material fact.) *Neiffer v. Flaming,* 17 Wn. App. 440, 563 P.2d 1298 (1977); (Rule 56 is sufficiently broad to justify challenge to jurisdiction of court.) *W. Mercantile Co. v. United States,* 111 F. Supp. 799 (W.D. Mo. 1953); (Where a court had no jurisdiction over subject matter of action, it should have dismissed it for want of jurisdiction instead of granting defendant's motion for summary judgment.) *Jones v. Brush,* 143 F.2d 733 (9th Cir. 1944); (In seeking summary judgment, the movant always has the burden of proving, by uncontroverted facts that no genuine issue as to any material fact exists.) *State ex re. Bond v. State,* 62 Wn.2d 487, 383 P.2d 288 (1963) (The burden is on the moving party to establish its right to judgment as a matter of law, and facts and reasonable inferences from the facts are considered in favor of the nonmoving party.) *Goad v. Hambridge,* 85 Wn. App. 98, 931 P.2d 200, review denied, 132 Wn.2d 1010, 940 P.2d 654 (1997).

As mentioned before, the Plumbs received a "Note Location Determined" which was included by the Bank as part of its official discovery response.[17] This document shows the specific names of each party that ever held actual possession of the subject note, who that party received it from, on which date, how long that party held it for, and who that party sent it to. It shows that Deutsche Bank (not U.S. Bank, nor its servicing agent, Ocwen) held the disputed note on the date when this case was filed, and for several months

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[17] *See,* Appellants' Brief (Appls'. Br.), App., p. 1.

afterwards. U.S. Bank never objected to this conflicting Note Location Determined document before the superior court.

The Bank issued an untimely objection to this document for the first time on appeal, when a new, substitute attorney representing the Bank called it "hearsay," and misled the appeals court, claiming that the superior court had "excluded" the document and ruled that it was "inadmissible hearsay." The Bank's new attorney never cited to any example of this happening in the court record (since it never happened), but continued to repeat this falsehood multiple times to both the appeals court and the state supreme court in the Bank's opposition to the Plumbs' appeal and to their petition for review.

The state court of appeals arbitrarily disregarded the fact that in addition to the Bank's insufficient affidavits, the "Note Location Determined" Document provides a reasonable basis to question the Bank's standing to foreclose in this case.

Standing is an issue of material fact, which was in dispute at the time of summary judgment. Despite this and other material facts being in dispute, the superior court arbitrarily ruled that it did not matter if the Bank was not a holder of the note when the case

was filed,[18] and that it did not matter if there was fraud in the origination of the loan.

The superior court recklessly disregarded relevant case law, U.C.C. requirements, the clear conflict between the un-objected-to Note Location Determined document and the Bank's complaint, ignored Wash. Super. Ct. Civ. R. 56(c) and 56(e) regarding summary judgment and supporting affidavits, and wrongfully granted summary judgment and judgment of foreclosure in favor of the Bank.

On appeal, the appellate court unjustly failed to overturn the previous erroneous rulings of the superior court and affirmed the summary judgment

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[18] *See, e.g.*, "Whether somebody had the Note at one particular point in time or didn't have the Note really doesn't matter, because they have the Note now." *See,* VRP, p. 99, ll. 6-8. "This is not a U.C.C. transaction." *See,* VRP, p. 102, l. 3. "They have the Note now. I'm finding that's all they need." *See,* VRP, p. 102, ll. 17, 18. "[T]hey since got the Note so it doesn't make any difference whether they had it at the time." *See,* VRP, p. 103, ll. 7, 8. "It doesn't matter [if the Bank lied about possessing the Note when it filed the case] with regard to the question of whether or not they're entitled to the foreclosure." *See,* VRP, p. 103, ll. 16-20. [As to whether or not the Bank was even entitled to foreclose at the time they filed the complaint], "I'm saying it doesn't matter now . . . ." *See,* VRP, p. 103, ll. 21-23."[I]n a notice pleading state, once the lawsuit is filed, there can still be things that happen afterwards so they're allowed to perfect their claim afterwards." *See,* VRP, p. 104, ll. 3-6. "[If they didn't have the Note or their agent didn't have the Note, that doesn't matter because] "They have the Note now . . . ." *See also,* VRP, p. 108, ll. 8-10.

and decree of foreclosure. The appellate court unfairly and arbitrarily ignored that genuine issues of material fact were in dispute at the superior court level, and relied upon untenable grounds to further deny the Plumbs access to a trial. The Plumbs appealed to the state supreme court, and the state supreme court declined to hear the case. The court of appeals recklessly disallowed the Plumbs their right to call expert witnesses to establish their defenses of fraud in a trial setting. The appeals court astonishingly required the Plumbs to have conclusively proven each element of fraud *prior* to summary judgment, without access to a trial. It further failed to properly consider the Bank's own appraisal which contradicted the appeals court's conclusions. It failed to reverse the wrongful decision of the trial court and in so doing, it continued a denial of the Plumbs' right to due process.

The appeals court relied on incorrect reasoning in labeling the "Note Location Determined" document "inadmissible hearsay" (*see*, App. A, pp. 4a, 5a; *see also*, Petition for Review, pp. 11-18); it also failed to consider relevant testimony by the Bank which precluded its conclusions regarding Deutsche Bank possibly holding "constructive" possession of the note on the date the lawsuit was filed (*see,* Petition for Review, pp. 22-23); it completely ignored the issue of the Bank's affidavits being insufficient to prove that the Bank or its agent held the note when the case was filed, failing to respond to that material fact issue at all.

Even if the Note Location Determined document did not exist, with the Bank's standing in question, the Bank failure to prove through its affidavits that it was the holder of the note on the date the complaint was filed, as required by the plain U.C.C. sections quoted above, is fatal to their case. The above cited court rules and the controlling U.C.C. Statute sections require higher standards than the superior court and the appeals court allowed.

The state courts arbitrarily violated due process. State procedures were inadequate.

It was unreasonable for the state courts to ignore applicable rules and laws, requiring the Plumbs to prove each element of fraud (that they pled with particularity in their affirmative defenses) prior to summary judgment, without access to a trial. No process was given by the state to the Plumbs wherein the Plumbs were afforded the opportunity to call witnesses or to elicit expert testimony which was essential to the Plumbs' proving their defenses regarding the fraud in the origination of the loan and forgeries in the note and deed of trust instruments. No legitimate basis existed for the state to grant summary judgment and deny the Plumbs access to a trial, with genuine issues of material fact being in dispute. A trial was absolutely essential for the Plumbs to defend themselves in this case.

The superior court's decisions at the summary judgment hearing were so reckless, indefensibly arbitrary and deliberately indifferent to applicable

rules and regulations and that the summary judgment hearing did not constitute a meaningful hearing.

In *Pena v. Mattox* 84 F.3d 894 (7th Cir. 1996) the principle is established that if the state is itself taking action to prevent use of the state remedies, then adequate state remedies are not available. In the Plumbs' case, the state (the courts) unfairly took action to prevent use of the state remedies (a trial) without adequate justification.

This resulted in the lack of adequate pre-deprivation due process. Since the state court of last resort has declined to hear the case, there is no adequate post-deprivation remedy provided by the state to compensate the Plumbs for the loss of their home. When a state court deprives access to the appropriate remedy, the state remedies are considered to have been exhausted. No post-deprivation remedy exists against the court, apart from this petition to the U.S. Supreme Court, which seeks a reversal of the judgment.

What procedures are required when there has been a deprivation of life, liberty or property.

The Supreme Court in *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L.Ed.2d 18 (1976), established a three-part balancing test to determine what procedures are required when there has been a deprivation of life, liberty or property.

(1) First, the court says to balance the importance of the interest to the individual (stating that the first part of the test is "*the private interest that will be affected by the official action*"). The more important the interest is to the individual, the more procedural protections the court is going to require. (*supra*, at 451) Here, the Plumbs' interest is enormous. The difference between them having a home and being homeless is truly life-altering. Thus, greater procedural safeguards need to be required.

(2) Second, the court must balance the ability of additional procedures to increase the accuracy of the fact finding. [*Mathews*, 424 U.S. at 335] (setting out the second part of the test as "the risk of any erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards"). The ability of additional procedures to increase the accuracy of the fact finding asks how likely is it that the additional procedures will reduce the risk of an erroneous deprivation [*supra*, at 451] (explaining that "[t]he more the Court believes that the additional procedures will lead to better, more accurate, less erroneous decisions, the more likely it is that the Court will require them").

Here, additional procedures would greatly increase the accuracy of the fact finding regarding whether the Bank held possession of the note on the date it filed the lawsuit (thus, whether it had standing), plus, the establishing of other facts directly related to the Plumbs' affirmative defenses of fraud in

connection to the loan (which triggers a burden on the Bank of proving that it received the loan without knowledge of this fraud,[19] which the Plumbs assert the Bank had via its agent Ocwen who had been notified of the fraud connected to this loan long before U.S. Bank received the note), plus forgeries in the note and deed of trust (potentially affecting its enforceability), plus bad faith and misconduct engaged in by the Bank (affecting its credibility and potentially triggering correctional measures against the Bank).

(3) Third, the Court says it is going to balance the government's interest in administrative efficiency. [*Mathews*, 424 U.S. at 335 (setting out the third part of the test as "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail"). The government's interest in administrative efficiency is such that the more expensive the procedures would be, the less likely it is that a court will require them (*supra*, at 451).

Here, in this instant case, the procedure of a standard trial would be no more costly than is commonly encountered by superior courts across the nation in similar judicial foreclosure trials.

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[19] *Spokane Sec. Fin Co. v. De Lano*, 168 Wash. 546, 12 P.2d 924 (1932).

The Supreme Court says the issue of what procedures are required is a matter of United States constitutional law. *See, Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 105 S. Ct. 1487, 84 L.Ed.2d 494 (1985). *See,* infra, note 153. Once there is a property interest, there is entirely for the courts under the Constitution to decide what due process requires. Explaining that "once it is determined that the Due Process Clause applies 'the question remains what process is due.'"

The state courts arbitrarily and unfairly did not hold the Plumbs' allegations to less stringent standards than formal pleadings drafted by lawyers.

It is well settled law that the allegations of *pro se* litigants, "however inartfully pleaded" are held "to less stringent standards than formal pleadings drafted by lawyers" pursuant to the Supreme Court's unanimous holding in *Haines v. Kerner*, 404 U.S. 519, 92 S. Ct. 594, 30 L.Ed.2d 652 (1972) (per curiam) at 654. *See also, Boag v. MacDougall*, 454 U.S. 364, 102 S. Ct. 700, 70 L.Ed.2d 551 (1982) (per curiam) at 553; *Erickson v. Pardu* 551 U.S. 89, 94, 127 S. Ct. 2197, 167 L. Ed 2d 1081 (2007).

Here, in this instant case, the state did not treat the Plumbs' filings with an equal hand compared to the Bank's filings. There was not "equal consideration." The state decided against the Plumbs on every issue, repeatedly ignoring applicable court rules, controlling regulations and case law, etc. The

state adopted untenable arguments as a basis to rule in favor of the Bank on key issues. The state refused to require that the Bank first meet its burden of proving standing, failing to focus on the Bank's insufficient affidavits in support of summary judgment and whether or not the Bank's affidavits established that U.S. Bank had the requisite stake in the outcome when the suit was filed.

Based on the court of appeals' unsubstantiated conclusion, the court of appeals arbitrarily deprived the Plumbs of their home without due process of law.

The state courts recklessly exercised authority over the case without jurisdiction. The order of summary judgment and judgment of foreclosure are void.

Absent sufficient proof of standing, the state courts lacked jurisdiction to judge in this case.

Subject matter jurisdiction concerns a court's very power to hear a case, and because it "can never be forfeited or waived," the lack of subject matter jurisdiction can be raised at any time. *United States v. Cotton*, 535 U.S. 625, 630, 122 S. Ct. 1781, 152 L. Ed. 2d 860 (2002).

It is well established, and the Supreme Court of the United States has long instructed, that purported judgments entered by a court without jurisdiction over the subject matter "are not voidable, but simply void" and as such are subject to collateral attack. Federal law is applicable to all states and to this

present case. The Supreme Court stated the following in pertinent part in *Elliott v. Lessee of Peirsol*, 26 U.S. 328, 7 L.Ed. 164 (1828) at 341.

> *[I]f [a court] act without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void; and form no bar to a recovery sought, even prior to a reversal, in opposition to them. They constitute no justification; and all persons concerned in executing such judgments or sentences, are considered, in law, as trespassers.*
>
> *This distinction runs through all the cases on the subject; and it proves, that the jurisdiction of any Court exercising authority over a subject, may be inquired into in every Court, when the proceedings of the former are relied on and brought before the latter by the party claiming the benefit of such proceedings.*

Here, in this instant case, the state courts usurped authority and deprived the Plumbs of their property despite the fact that the Bank failed to clearly demonstrate that it had suffered the required actual "injury in fact" and that it or its agent held actual or constructive possession of the note as of the date it filed the complaint. The state's order granting U.S. Bank's motion for summary judgment and judgment of foreclosure are void judgments because the court lacked jurisdiction. ("A void judgment is a 'judgment, decree, or order entered by a court which lacks jurisdiction of the parties or of the subject matter, or

which lacks the inherent power to make or enter the particular order involved.'") *State ex rel. Turner v. Briggs,* 94 Wn. App. 299, 302-03, 971 P.2d 581 (1999) (internal quotation marks omitted) (quoting *Dike v. Dike,* 75 Wn.2d 1, 7, 448 P.2d 490 (1968)). *See, also, Clark Cty. v. Darby,* No. 49023-4-II, 2017 Wash. App. LEXIS 1958 (Ct. App. Aug. 15, 2017).[20]

The Supreme Court needs to review this case. Certiorari is an appropriate remedy to get rid of a void judgment, one which there is no evidence to sustain.[21]

II. THIS CASE PRESENTS A GENUINE ISSUE OF SIGNIFICANT PUBLIC INTEREST AND A RECURRING QUESTION OF STANDING IN RESIDENTIAL FORECLOSURE ACTIONS WARRANTING THE COURT'S IMMEDIATE RESOLUTION. THE QUESTIONS PRESENTED ARE RIPE FOR

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[20] *See also, e.g., Sierra Life Ins. Co. v. Granata,* 99 Idaho 624, 586 P.2d 1068, 1070 (Idaho 1978) (citing RESTATEMENT (FIRST) OF JUDGMENTS § 7 (1942)); *Bell Helicopter Textron, Inc. v. Islamic Republic of Iran,* 734 F.3d 1175, 1180, 407 U.S. App. D.C. 133 (D.C. Cir. 2013); *Da Silva v. Kinsho Int'l Corp.,* 229 F.3d 358, 362 (2d Cir. 2000) ("[A] judgment rendered by a court lacking subject matter jurisdiction is subject to collateral attack as void.") (citing RESTATEMENT (SECOND) OF JUDGMENTS § 69 (1980)); *Bryan v. Fawkes,* 61 V.I. 416 (2014); *Logan v. WMC Mortg. Corp. (In re Gray),* 410 B.R. 270 (Bankr. S.D. Ohio 2009); *Williams v. Richey,* 948 A.2d 564, 567 n.1 (D.C. Cir. 2008).

[21] *Lake Shore & M. S. R. Co. v. Hunt,* 39 Mich. 469 (1878).

THE COURT'S REVIEW, AND THIS CASE IS AN IDEAL VEHICLE FOR RESOLVING THEM.

But for the state's denial of due process, the Plumbs would have won their case. The citizens of the state of Washington have been deprived of an answer on this subject. A unique opportunity is presented to this Court wherein a single decision can resolve a serious due process issue facing homeowners, for the entire country at once. This issue will continue to confound some lower courts and devastate many homeowners who would have otherwise won their cases, until this Court weighs in.

In the meantime, the banks will continue to have an incentive to file deceptive cases in states where definitive decisions on this matter have not been reached. Decisions by lower courts such as the ones involved in this case threatens to deprive additional defenseless homeowners of their due process protections. The vast majority of foreclosures involve people who are in their predicament due to financial difficulty. *Pro se* homeowners make up the majority of defendants in judicial foreclosure actions, not by choice, but as in the Plumb's case, they lack the funds to hire an attorney to represent them in court. Pro se defendants are particularly vulnerable to abusive tactics by the banks. If state courts are allowed to arbitrarily rule against *pro se* defendants in a manner that violates the homeowner's constitutional due process rights, this makes an already difficult job of defending one's self impossible. Leaving this issue to

be resolved on its own throughout the states would result in years of further due process violations by lower courts and abusive filings by banks will inevitably occur.

When state courts overstep their constitutional bounds and separate citizens from their inalienable constitutional rights of procedural due process (which means fair hearings and access to the appropriate process), this needs the correction of the Supreme Court.

See, e.g., Owings v. Hull, 34 U.S. 607, 9 L.Ed. 246 (1835); (Exercise of jurisdiction by Supreme Court to protect constitutional rights cannot be declined when it is plain that fair result of decision is to deny rights.) *Rogers v. Alabama*, 192 U.S. 226, 24 S. Ct. 257, 48 L.Ed. 417 (1904).

The state's procedures, if applied as they were originally intended, are proper. However, a denial of access to those proper procedures is an issue that is of the gravest concern to homeowners across this nation who are at risk of losing their homes absent access to adequate process required to defend themselves. Most *pro se* homeowners defending against a judicial foreclosure action come to court at a significant experiential disadvantage. But to then add to this a deprivation of due process, when the homeowner has legitimate defenses, runs contrary to any notion of equality under the law and justice. This country benefits when the rule of law is upheld and the

defenseless are protected from abuse, whether that abuse comes from a bank, or the state.

The banks are relying upon confusion of lower courts in states that have not yet decided this issue of standing. This issue is not going anywhere. The Court's clarification on this matter will serve to protect defenseless homeowners, erase confusion in the lower courts and dissuade banks from engaging further in this kind of behavior. Review is warranted.

This case is the ideal vehicle for clarifying this important issue. The question stated is simple and clear.

Petitioners' pertinent allegations in support of their single question are straightforward. The Plumbs have identified an issue faced not only by themselves, but homeowners who are defending themselves in judicial foreclosure actions. The actions by the bank are representative of similar actions encountered by homeowners across the nation, as evidenced by the state supreme court decisions from other states addressing this very issue.

This question regarding standing and due process is alone, teed up for decision.

Here, the case is final and the only mechanism for relief is reversing on the question presented. The question itself is ideally presented. Further percolation promises nothing but additional conflicts, wasteful litigation and many years of further denial of due process of defenseless homeowners who will

experience the devastating effect of losing their homes unjustly. If the Court were to wait to address this issue, much avoidable harm will come to homeowners across this nation. This issue cries out for a definitive decision from this Court. Please reverse the order of summary judgment and judgment of foreclosure, that came about by the denial of due process suffered by the Plumbs. In so doing, the Court will protect many similarly situated vulnerable homeowners.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

/s/ Georgia Plumb
Georgia Plumb

/s/ Joshua Plumb
Joshua Plumb

/s/ Kameron Plumb
Kameron Plumb

/s/ Rev. Georgia Plumb
The Word Church (aka Rev. Georgia Plumb)
Petitioners, *Pro Se*
4902 Richey Rd.
Yakima, WA 98908
Tel. (509) 965-4304;
Email: georgia@plumbsafety.com

June 26, 2018

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

GEORGIA PLUMB, JOSHUA PLUMB, KAMERON PLUMB, AND THE WORD CHURCH, PETITIONERS, *PRO SE*,

v.

U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE SUCCESSOR IN INTEREST TO WILMINGTON TRUST COMPANY, AS TRUSTEE SUCCESSOR IN INTEREST TO BANK OF AMERICA, NATIONAL ASSOCIATION, AS TRUSTEE FOR STRUCTURED ASSET INVESTMENT LOAN TRUST MORTGAGE PASS-THROUGH CERTIFICATES SERIES 2005, RESPONDENT.

On Petition For Writ Of Certiorari
To The Court Of Appeals Of The State Of Washington

APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI

Georgia Plumb, Joshua Plumb,
Kameron Plumb, and The Word Church
4902 Richey Rd.
Yakima, WA 98908
Tel. 509-965-4304

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