No. 18-49

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/Plaintiff

On Writ of Certiorari to the Court of Appeals of the State of Washington, Division Three

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PETITION FOR REHEARING

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Petition for Writ of *Certiorari* Filed: July 2, 2018
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PETITION FOR REHEARING

Pursuant to Supreme Court Rule 44, the *Pro Se* Petitioners (the Plumbs) respectfully petition this Court for an order vacating its order entered October 1, 2018, which denied their petition for writ of certiorari filed on July 2, 2018. In the interest of justice and fairness, the Plumbs move this Court to grant this petition for rehearing based upon new, substantial and extraordinary factual circumstances and grounds for rehearing not previously presented, as stated below.

I. In The Interests Of Justice And Fairness, Rehearing Should Be Granted Because There Are New, Substantial Grounds Not Previously Considered.

This Court holds the following established doctrine regarding finality of litigation:

> *The interest in finality of litigation must yield where the interests of justice would make unfair the strict application of the rules of the U.S. Supreme Court. This policy finds expression in the manner in which the Court exercises its power over its own judgments, both in civil and criminal cases.*

United States v. Ohio Power Co., 353 U.S. 98, 77 S. Ct. 652, 1 L.Ed.2d 683 (1957).

The validity of the doctrine is evident, and directly applies to this present judicial foreclosure case.

The standard rule of judicial review for rehearing petitions for cases of this sort was clearly provided for and granted in the past by the majority of Justices in the U.S. Supreme Court in *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359, 85 S. Ct. 1012, 13 L.Ed.2d 895 (1965) (per curiam) (*finding exceptional facts and the rule of judicial review that the inferences drawn are to be accepted unless they are irrational or "unsupported by substantial evidence on the record . . . as a whole"* (emphasis added)).

Pursuant to the Court's ruling in *O'Keeffe,* Id. rehearing should be granted in this instant case because the amount of "*exceptional facts*" described below are overwhelming and clearly prove that the inferences drawn by the state appellate court in its analysis of the Plumbs' assignments of the lower court's errors and issues must not be accepted because they are extremely irrational, unfair and entirely unsupported by the evidence on the record.

In its analysis of the Plumbs' Assignment of Error Number One, the court of appeals stated the following, in pertinent part:

> *"The Plumbs' chief argument is U.S. Bank lacked standing to foreclose on their property because it did not possess the promissory note on the date it filed suit."* Pet. App. A, at 3a.
>
> "*As factual support for their possession claim, the Plumbs point to an item they refer to as the 'Note Location Determined' document . . . .*" Pet. App. A, at 3a.

"A threshold problem with the Plumbs' arguments in opposition to summary judgment is that the note location document is hearsay. ER 801(c)." Pet. App. A, at 4a.

"[T]here is no evidence Ocwen had authority to speak on behalf of U.S. Bank. ER 801(d)(2)(iii). Nor is there any evidence U.S. Bank ever adopted the note location document as its own or agreed to its truthfullness. ER 801(d)(2)(ii) . . . . The note location document does not qualify for a hearsay exception as a business record. ER 803(a)(6) . . . ." Pet. App. A, at 4a.

"The Plumbs also have not established admissibility of any statements in the note location document affecting an interest in property. ER 803(a)(15)." Pet. App. A, at 5a.

"The note location document does not . . . establish or impact an interest in the Plumbs' home or any other form of property. ER 803(a)(15) is inapplicable. Pet. App. A, at 5a.

"The Plumbs proffer of the note location document was not . . . sufficient to challeng[e] the facts set forth in U.S. Bank's motion for summary judgment." Pet. App. A, at 5a.

"Even if the note location document were admissible, it would not appear dispositive. The document does not show that, at the time of suit, U.S. Bank lacked at least constructive possession of the note. Pet. App. A, at 5a.

Contrary to the Court of Appeal's claims, the evidence overwhelmingly proves that Ocwen had authority to speak on behalf of U.S. Bank and that multiple hearsay exceptions existed for the Note Location Determined document. For example:

Ocwen is described by U.S. Bank as being U.S. Bank's loan servicing agent and attorney-in-fact. Apps.' Br., App., at 2. Both of U.S. Bank's affidavits made in support of summary judgment were generated by Ocwen.[1] Ocwen worked in tandem with U.S. Bank to produce all discovery responses. Ocwen's participation is specifically identified in U.S. Bank's discovery responses. The Note Location Determined document was included as part of a bundle of documents requested by U.S. Bank from Ocwen, which Ocwen sent to U.S. Bank. U.S. Bank then collected these documents and sent them to the Plumbs as part of "*Plaintiff's Responses to Defendants' First Set of Interrogatories and Request for Production of Documents.*" Apps.' Br., App.

U.S. Bank incorporated all of Ocwen's responses (which included the Note Location Determined document) under the umbrella term "Plaintiff's Responses" then sent them to the Plumbs as part of its official, authorized response. Plaintiff is U.S. Bank. Thus, they were "U.S. Bank's responses". U.S. Bank made no distinction between individual documents. It used a sweeping general term that

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[1] CP 781-823; CP 745-780;

covered everything included. U.S. Bank had the freedom to object to any unauthorized document or record that may have been inadvertently included. It never did so at the trial court level, despite multiple opportunities. Ocwen was also involved in responding (on U.S. Bank's behalf) to our *Defendants' First Set of Admissions.*

U.S. Bank cannot have it both ways: Using Ocwen's responses for other discovery answers and referencing them, plus using Ocwen's affidavits in support of summary judgment, but when it comes to an inconvenient document which U.S. Bank never previously objected to at the superior court level, the new attorney for U.S. Bank suddenly decides to represent Ocwen as being some unauthorized party for the first time on appeal.

Objections must be timely made.

"An issue raised and argued for the first time in a reply brief is too late to warrant consideration." Deutsche BankNat'l Tr. Co. v. Slotke, 192 Wn. App. 166, 367 P.3d 600 (2016).

U.S. Bank waived any such objection.

"Under ER 103, an objection must be made to preserve an evidentiary error for appeal. Defense counsel did not object to Closson's statement nor did he ask for 258 a continuing object to that line of inquiry...." State v. Power 893 P.2 615, 126 Wash. 2D 244 (1995).

U.S. Bank's own actions and their own self-

applied label provide sufficient evidence to conclude that Ocwen was authorized by U.S. Bank to produce the statements and documents in question. If they had not been, U.S. Bank would have stopped it or issued some timely objection to it. It is not rational to conclude otherwise.

The Note Location document also qualified for a hearsay exception as a business record pursuant to ER 803(a)(6), because it was specifically verified, identified and attested to as being a true and correct record by a qualified person: U.S. Bank's attorneys and its attorney-in-fact and loan servicing agent's (Ocwen) "Contract Manager." U.S. Bank authorized Mr. Owens to respond to all of the Plumbs' discovery requests and to make his responses specifically under penalty of perjury to be true and correct. He specifically attested to the record's identity and the mode of preparation and showed that it was made in the regular course of business, at or near the time of the act, condition or event by his stamping his name, handwriting the date "7/16/15", and signing his initials on the document, then swearing under penalty of perjury that the document was true and correct that same day. Apps.' Br., at 1, 4.

The same reasoning from the sections above applies to the (ER 801(d)(iv)) exception as well, which references a statement by the party's agent or servant acting within the scope of the authority to make the statement for the party. U.S. Bank specifically chose to include Ocwen as part of its authorized official reply and to label the answers and documents

produced by Ocwen as "Plaintiffs Responses". This, combined with U.S. Bank's failure to object to its own document at any time before the superior court, combined with U.S. Bank's description of Ocwen as being its attorney-in-fact, plus U.S. Bank's overall demeanor, is strong evidence for Ocwen's authorization by U.S. Bank. Further, Ocwen's documents and responses provided in discovery were made under penalty of perjury.

Also, contrary to the Court of Appeal's erroneous argument, the Plumbs established the admissibility of the Note Location Determined document pursuant to ER 803(a)(15) because the statements in the document were relevant and purported to establish and affect an interest in the Plumb's residential property. The actual complete document itself clearly shows at the bottom: the loan number, the Plumb name, the property address located at "*4902 Richey Rd. Yakima, WA 98908*". Strangely, the Court of Appeals did not include this relevant information in its description. No dealings with the property since the Note Location Determined document was made have been inconsistent with the truth of the statement or the purport of the document. Also, U.S. Bank's attorney and attorney-in-fact provided the document as a true and correct document in their responses to the Plumbs' request for production of documents.

The Court of Appeals further greatly erred in claiming:

> *"Even if the note location document were admissible, it would not appear dispositive. The document does not show that, at the time of suit, U.S. Bank lacked at least constructive possession of the note."* Pet. App. A, at 5a.

Here, the Court of Appeals failed to consider a very important admission by the Bank. In its *Respondent's Brief to the Court of Appeals* at 13-14, U.S. Bank's attorney admitted that "if" Deutsche Bank held the note on the date this lawsuit was filed, that U.S. Bank would not have been the true party of interest in this case. The Bank's attorney highlights this as a defect needing to be cured, thus removing the possibility that Deutsche Bank could hold possession of the note at the same time that U.S. Bank had constructive possession of the note. Thus, the Bank closed down that avenue of reasoning explored by the Court of Appeals and clarified that issue for the court. For the Court of Appeal to reach its conclusion above, in light of the Bank's admission, is bewildering.

No fair-minded, reasonable person can conclude that the Court of Appeals was correct in the illogical conclusions which it relied upon to ignore the Note Location Determined document and to affirm summary judgment in favor of the Bank. We were denied due process based upon the Court of Appeals' irrational conclusions. The Bank and its loan servicer were subsequently allowed to escape scrutiny regarding evidence of extreme dishonesty (including multiple instances of sworn perjury) and foreclosure

was wrongfully imposed.

Clearly, an incentive exists for some banks and/or servicers to file foreclosure lawsuits prematurely, before being authorized to do so. Shortcutting this important step regarding standing means a higher volume of foreclosures and increased profits for the bank. However, a bank that files a foreclosure complaint prior to being the holder of the note must embrace fundamental dishonesty in order to file and maintain its case, since it is necessary for the bank to represent from the very outset that it is the holder of the note in order to invoke the jurisdiction of the court. The bank must further maintain this deception throughout the course of its lawsuit in order to prevent its case from being subsequently dismissed. If banks are allowed to file a foreclosure case prior to being a holder of the note, then to cure this standing defect by obtaining the note at some point afterwards, this removes any incentive for a plaintiff to have standing when a foreclosure lawsuit is filed.

The courts and the public do not benefit from a deluge of bad filings and dishonest claims, which is why each of the seven state supreme courts that have ruled on this issue (as cited in the Petition for Writ of Certiorari) have ruled against the offending banks and in favor of the homeowners.

However, some lower courts in other states (as in our case) have expressed confusion on the matter. The vast majority of other state supreme courts have not yet ruled on this matter at all. The U.S. Supreme

Court can clarify and resolve this issue for the whole nation, whilst at the same time averting an impending catastrophic injustice from being enacted against our innocent family. We are in danger of having our only home sold by the Bank, then being evicted and made homeless. Georgia Plumb is an elderly widow minister whose sole income is from social security. One of her sons is disabled and unable to work, the other is recovering from an illness that has rendered him unable to work. Forcing us onto the streets at this time, in our current physical and financial condition, would be extremely unjust and is shocking to the conscience, particularly in light of the extremely unreasonable and illogical grounds these decisions were based on. This would destroy our family if left unchanged.

Short-term judicial economy does not outweigh the greater principle of requiring foreclosing parties to have standing when they file their cases.

The foreclosing Bank's own records, provided by the Bank in discovery, reveals the Bank filed this judicial foreclosure action against us prior to it (or it's agent Ocwen) being in possession of the note. The Bank has not once attempted to explain this discrepancy between its records provided in discovery and its sworn testimony provided in discovery.

The superior court irrationally ruled that it did not matter if the Bank did not have standing when it filed the case nor that it made any difference whether the Bank committed perjury, nor did it matter if

fraud was committed against us from the inception of the loan to present.

The superior court took the position that even if the Bank did not have the note when it filed the case, as long as U.S. Bank had the note before summary judgment, that is all that mattered.

On appeal, the appellate court completely avoided addressing the issue of standing by irrationally concluding that the Bank's own Note Location Determined document was inadmissible hearsay, and that there was no evidence that Ocwen was authorized to speak on U.S. Bank's behalf. Again, this was based on bewilderingly irrational logic and failure to consider relevant testimony by the Bank's attorney that directly precluded the conclusions of the appeals court. As a result of the appellate court's decision, this issue was prevented from being addressed for the first time in the state of Washington, we were prevented from being given the opportunity to defend our home at trial, and now find ourselves facing catastrophic financial ruin.

If summary judgment is reversed and our case is allowed to proceed to trial, we will finally have the due process necessary for us to defend our property and ultimately win our case. We will establish through further discovery, testimony and cross-examination the extent of perjury committed by the bank and their lack of standing at the outset of the case, in addition to establishing our other defenses, which we were unable to detail before this court due

to limitations in space.

We implore this court to hear our case and correct the errors of the appellate court, reversing summary judgment and allowing this case to go to trial. Please give us the opportunity to defend our only home at trial, to defend our home from wrongful foreclosure, sale and our eviction, to defend our family from the permanent devastation that will occur if you choose not to hear this case.

The repercussions of allowing this judgment to stand are more severe and call for hearing more than other cases of merit which have less consequences on the line.

We would be happy to update the wording of our original question to better fit the style of other questions presented to the Supreme Court:

Whether a homeowner's procedural due process rights under the Fourteenth Amendment is violated by the state in a judicial foreclosure proceeding, when final summary judgment and judgment of foreclosure is granted to the foreclosing entity, despite the foreclosing entity'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 homeowner.

In summary:

The facts of this instant case are substantial and extraordinary. We have shown there is a solid basis and foundation for the creation of an exception to the

rule and a reason why the petition for rehearing should be granted in this case based on substantial facts.

See e.g., *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359, 85 S. Ct. 1012, 13 L.Ed.2d 895 (1965) (per curiam) (***finding exceptional facts and the rule of judicial review that the inferences drawn are to be accepted unless they are irrational or "unsupported by substantial evidence on the record . . . as a whole***" (emphasis added)); *Gondeck v. Pan American World Airways Inc.*, 382 U.S. 25, 26-27, 86 S. Ct. 153, 15 L. Ed. 2d 21 (1965) (per curiam) (*granting post-judgment relief on rehearing, in the interest of justice* to remedy a misinterpretation of the law).

The Plumbs have proven the fact that *substantial evidence on the record as a whole* shows that all of the inferences that the appellate court drew on the issue of the Bank's lack of standing, are not to be accepted because they were not true.

The appellate court fundamentally, manifestly, substantially, and unjustly deprived the Plumbs of their rights and their home without due process of law under U.S. Const. amend. XIV, § 1.

It is critical that this Court grant certiorari to prevent gross judicial travesty and miscarriage of justice.

This Court should conclude that its interest in finality of litigation must yield in this very unusual,

extraordinary foreclosure case, as a strict application of the rules of the U.S. Supreme Court would be extremely unfair and unjust. In the interests of justice, relief and full briefing and argument before all nine Justices is warranted and appropriate.

CONCLUSION

For the foregoing meritorious, substantial and extraordinary factual grounds the Plumbs pray that this Court grant this petition for rehearing of the order of denial, vacate the order of denial, and grant the petition for writ of certiorari.

Respectfully submitted,

By /s/ Georgia A. Plumb
Georgia A. Plumb

By /s/ Joshua C. Plumb
Joshua C. Plumb

By /s/ Kameron F. Plumb
Kameron F. Plumb

By /s/ Rev. Georgia A. Plumb
The Word Church
(a/k/a Rev. Georgia A. Plumb)

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Dated: October 23, 2018

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We/I hereby certify under penalty of perjury that this petition for rehearing is restricted to the grounds specified in Rule 44 and presented in good faith and not for delay.

By /s/ Georgia A. Plumb Georgia A. Plumb
Georgia A. Plumb

By /s/ Joshua C. Plumb Joshua C. Plumb
Joshua C. Plumb

By /s/ Kameron F. Plumb
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Executed on October 23, 2018