No. 19-____

In the Supreme Court of the United States

WAYNE A. POWE AND REGINA Y. POWE,

Petitioners,

v.

DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE FOR RESIDENTIAL ASSET SECURITIZATION TRUST SERIES 2004-A7 MORTGAGE PASS-THROUGH CERTIFICATES 2004-G,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

REGINA Y. POWE
WAYNE A. POWE
PETITIONERS ET UX. PRO SE
291 OAKWOOD TRAIL
FAIRVIEW, TX 75069
(214) 675-7141
REGINAPOWEDDS@YAHOO.COM

DECEMBER 30, 2019

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QUESTIONS PRESENTED

1. Whether Respondent Deutsche Bank National Trust Company, as Trustee for Residential Asset Securitization Trust Series 2004-A7 Mortgage Pass-Through Certificates 2004-G, should have been required to prove that it was appointed trustee of the trust, or that it formed the trust, in order to have standing to sue Petitioners for foreclosure, as long-standing precedent of this Court requires?

2. Whether Petitioners had standing to challenge the chain of assignments running from the original owner of the note and deed of trust to Deutsche Bank, as supported by well-settled law in Texas?

3. Whether an assignment of the subject note and deed of trust signed by IndyMac Bank, F.S.B., after it was placed in receivership by the F.D.I.C. under the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), 12 U.S.C. § 1821(d)(11)(A), was void? There is no clear precedent on this question.

PARTIES TO THE PROCEEDINGS

Petitioners and Appellants-Plaintiffs Below

- Regina Y. Powe and Wayne A. Powe, a married couple, filing here as Petitioners Pro Se

Respondent and Appellee-Defendant below

- Deutsche Bank National Trust Company, as Trustee for Residential Asset Securitization Trust Series 2004-A7 Mortgage Pass-Through Certificates 2004-G (hereinafter sometimes referred to as "Deutsche Bank").

LIST OF PROCEEDINGS

United States Fifth Circuit

No. 18-41070

Wayne A. Powe; Regina Y. Powe, Plaintiffs -Appellants v. *Deutsche Bank National Trust Company, as Trustee for Residential Asset Securitization Trust Series 2004-A7 Mortgage Pass-Through Certificates 2004-G*, Defendant-Appellee

Date of Final Opinion: October 1, 2019

United States Court of Appeals for the Eastern District of Texas

No. 4:15-cv-661

Wayne A. Powe et al. v. *Deutsche Bank National Trust Company, as Trustee for Residential Asset Securitization Trust Series 2004-A7 Mortgage Pass-Through Certificates 2004-G.*

Date of Final Judgment: April 24, 2018

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PETITION FOR A WRIT OF CERTIORARI

Petitioners (Appellants-Plaintiffs below) Regina Y. Powe and Wayne A. Powe respectfully petition this Honorable Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (App.1a) is unpublished at published at 778 Fed.Appx. 321 (5th Cir. 2019). The opinions of the District Court for the Eastern District of Texas (App.1a, 7a, and 18a) are unpublished but can also be found at at 2018 WL 1933970 (E.D. Tex. 2018) and 2016 WL 4054913 (E.D. Tex. 2016).

JURISDICTION

The Judgment of the Court of Appeals was entered on October 1, 2019. (App.1a). The due date for this Petition for Writ of Certiorari is December 30, 2019. The Clerk of Court provided Petitioner an additional 60 days to file this petition in accordance with Rule 33.1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISION

Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), 12 U.S.C. § 1821, et. seq.

12 U.S.C. § 1821(11)(A). Depositor preference

(A) In general. Subject to section 1815(e)(2)(C) of this title, amounts realized from the liquidation or other resolution of any insured depository institution by any receiver appointed for such institution shall be distributed to pay claims (other than secured claims to the extent of any such security) in the following order of priority:

(i) Administrative expenses of the receiver.

(ii) Any deposit liability of the institution.

(iii) Any other general or senior liability of the institution (which is not a liability described in clause (iv) or (v)).

(iv) Any obligation subordinated to depositors or general creditors (which is not an obligation described in clause (v)).

(v) Any obligation to shareholders or members arising as a result of their status as shareholders or members (including any depository institution holding company or any shareholder or creditor of such company).

STATEMENT OF THE CASE

A Preface

If the Court does not grant this petition, Petitioners will lose their home in foreclosure to a bank that failed to prove that it owned the note or deed of trust/security instrument. Neither the District Court nor the 5th Circuit Court of Appeals required Respondent Deutsche Bank to present evidence proving that it was the owner or holder of the note or deed of trust and security instrument in order to foreclose. In doing so, the District Court and Fifth Circuit failed to follow precedent from this Court and well-established Texas law.

On appeal, the Fifth Circuit issued a one-word "opinion" which simply stated: "Affirmed." Accordingly, without having the benefit of the Fifth Circuit's reasoning, Petitioners must presume that the Fifth Circuit fully agreed with the District Court's opinions and judgment.

B. The Underlying Events and Proceedings in the District Court

1. Introduction

This case is a judicial foreclosure action brought by Deutsche Bank to foreclose on Powes' residence pursuant to a promissory note secured by a deed of trust and security agreement. Deutsche Bank brought this foreclosure action in its alleged capacity as trustee of an alleged trust–the purported Residential

Asset Securitization Trust Series 2004-A7 Mortgage Pass-Through Certificates 2004-G (the "trust").

In their answer, the Powes denied that Deutsche Bank was the owner or holder of the note and deed of trust. The Powes further alleged in their answer that:

> Defendant ["Deutsche Bank"] also must prove with proper documentation that it was actually appointed Trustee for the Residential Asset Securitization Trust Series 2004–A7 Mortgage Pass Through Certificates 2004–G. Upon information and belief, Plaintiffs would show that Defendant cannot prove that with proper documentation or other probative evidence.

Deutsche Bank was not the original owner of the note and deed of trust. Deutsche Bank alleges that it obtained the note and deed of trust through a series of assignments. The original owner of the note and deed of trust was SMI Financial Services, LLC ("SMI"). SMI assigned the note and deed of trust to IndyMac Bank, F.S.B. ("IndyMac") on March 28, 2008. Deutsche Bank alleges that IndyMac assigned the note and deed of trust to OneWest Bank, F.S.B ("OneWest") on September 10, 2009, and that OneWest assigned the note to Deutsche Bank on December 27, 2010. However, on July 11, 2008, IndyMac was placed in receivership by the FDIC under the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), 12 U.S.C. § 1821(d)(11)(A). *MBIA Ins. Corp. v. F.D.I.C.,* 708 F.3d 234, 238 (D.C. Cir. 2013). The FDIC sold substantially all of IndyMac's assets on March 19, 2009. *Id.; Deutsche Bank Nat'l Trust Co., v. Burke,* 117 F.Supp.3d 953, 957 (S.D. Tex.

2015), *rev'd on other grounds,* 655 Fed.App. 251 (5th Cir. 2016).

For that reason, as further discussed below, the Powes disputed the validity of the purported September 10, 2009 assignment from IndyMac to OneWest.

2. Deutsche Bank's Motion to Dismiss the Powes' Counterclaims

In addition to filing an answer, the Powes also filed counterclaims against Deutsche Bank challenging the foreclosure. On November 19, 2015 Deutsche Bank filed a motion to dismiss the Powes' counterclaims. Deutsche Bank alleged and argued that OneWest assigned the note and deed of trust to Deutsche Bank in its capacity as trustee of the trust on December 27, 2010. One of the primary arguments made in the Powes' response to the motion to dismiss was that the purported September 10, 2009 assignment of the note and security instrument from IndyMac to OneWest was void and invalid because IndyMac was defunct at the time of the assignment. Because that assignment was invalid, the Powes argued that the subsequent assignment of the note and security instrument from OneWest to Deutsche Bank also was void and invalid.

In support of this argument, the Powes cited the U.S. District Court opinion in *Deutsche Bank Nat'l Trust Co., v. Burke,* 117 F.Supp.3d 953, *rev'd on other grounds,* 655 Fed.App. 251. Like this case, *Burke* involved a purported assignment of a note from IndyMac to Deutsche Bank after IndyMac was placed in receivership. The District Court held that the assignment was void and invalid because IndyMac was defunct at the time of assignment. As discussed in

detail below, *see infra* at pp. 19-20, the Fifth Circuit Court of Appeals in *Burke* reversed the District Court on completely different grounds. *Burke,* 655 Fed.App. 251.

On July 29, 2016, the District Court in the present case granted Deutsche Bank's motion to dismiss, holding that the September 10, 2009 assignment was not void or invalid. Unbeknownst to the Powes, the Fifth Circuit had reversed the District Court's judgment in *Burke* and remanded the case just ten days prior to the trial court's granting of Deutsche Bank's motion to dismiss in the present case, albeit for reasons not applicable in the present case. Nevertheless, in its opinion granting the motion to dismiss, the District Court in the present case relied on the fact that the Fifth Circuit in *Burke* had reversed the District Court in that case.

3. Deutsche Bank's Motion for Summary Judgment on its Foreclosure Claims

On May 12, 2017, Deutsche Bank filed a motion for summary judgment on its foreclosure claims. The Powes filed a response to the motion, a motion for continuance and a motion to compel. In their response, the Powes argued that because Deutsche Bank brought this action in its alleged capacity as trustee of the trust, it had the burden to prove it was actually and properly appointed trustee of this Residential Asset Securitization Trust, or that it was the entity that formed this trust. Because Deutsche Bank failed to prove that it was appointed trustee or that it formed the trust, it had no standing to bring this lawsuit as trustee of the trust.

Deutsche Bank has never asserted in this case that it presented any proof of such facts.

In their motion to compel and motion for continuance, the Powes argued that Deutsche Bank had failed to produce the following documents that the Powes had requested in discovery:

> All documents comprising, showing or containing any information regarding the appointment of Defendant as Trustee of Residential Asset Securitization
>
> Trust Series 2004–A-7 Mortgage Pass Through Certificates 2004-G.

Deutsche Bank did not at any point in this lawsuit produce any documents in response to this request.

The District Court refused to compel Deutsche Bank to produce the requested documents.

On October 24, 2017, the District Court granted Deutsche Bank's motion for summary judgment, and in granting the motion, did not require Deutsche Bank to submit any proof that it was actually appointed trustee of the trust, or that it was the entity that formed this trust.

The District Court entered a final judgment on April 24, 2018.

C. The Appellate Proceedings

The Powes timely appealed the judgment of the District Court to a panel of the Fifth Circuit Court of Appeals. Neither party requested oral argument, and the Fifth Circuit did not hear oral argument.

On October 1, 2019 the Fifth Circuit entered a judgment affirming the judgment of the District Court. It issued a one-word opinion, stating: "AFFIRMED." Thus, the Powes did not receive the benefit of the Fifth Circuit's reasoning.

REASONS FOR GRANTING THE PETITION

I. THE DISTRICT COURT OPINION AND FIFTH CIRCUIT AFFIRMANCE IGNORE AND FAIL TO FOLLOW THIS COURT'S PRECEDENT

This Court in *Prevost v. Gratz,* 19 U.S. 481, 484, 494, 5 L.Ed. 311, 6 Wheat. 481 (1821) held that the plaintiff asserting a trust has the burden to prove the existence of the trust. More recent federal courts have cited *Prevost* for this fundamental proposition. *In re Moss,* 258 B.R. 405, 423 (Bankr. W.D. Mo. 2001), *affirmed,* 267 B.R. 839 (8th Cir. 2001); *In re Associated Enterprises, Inc.,* 234 B.R. 718, 720 (Bankr. W.D. Wisc. 1999) (The burden of proof to show the existence of a valid trust is on the party asserting the existence of the trust. The party must show that the acts of the settlor were sufficient to create a trust).

Other federal courts have reached the same conclusion without attribution to *Prevost. Matter of Shulman Transport Enterprises, Inc.,* 21 B.R. 548, 552 (Bankr. S.D.N.Y. 1982), *affirmed,* 744 F.2d 293 (2nd Cir. 1984)("The burden of proof is on Pan Am [the party asserting the trust] to establish the existence of a trust."); *In re Davis,* 476 B.R. 191, 196 (Bankr. W.D. Pa. 2012) ("The burden of proving the existence of an express trust is on the party asserting its existence.").

Deutsche Bank failed to offer any evidence that it was appointed trustee of the trust or that it formed the trust. In granting Deutsche Bank's motion for summary judgment, the District Court did not require Deutsche Bank to submit such evidence, and the Fifth Circuit affirmed the summary judgment without requiring such evidence. For this reason, both the District Court's and the Fifth Circuit judgments conflicted with this Court's holding in *Prevost* that the plaintiff has the burden to prove the existence of a trust.

II. THE DISTRICT COURT OPINION AND FIFTH CIRCUIT AFFIRMANCE IGNORE AND FAIL TO FOLLOW WELL SETTLED TEXAS LAW REGARDING THE POWES' STANDING TO CHALLENGE THE ALLEGED CHAIN OF ASSIGNMENTS IN THIS CASE.

Under well settled Texas law, Texas courts routinely allow a homeowner to challenge the chain of assignments by which a party claims the right to foreclose. *Miller v. Homecomings Fin., LLC,* 881 F.Supp.2d 825, 832 (S.D. Tex. 2012), citing *Martin v. New Century Mortgage Co.,* 377 S.W.3d 79 (Tex.App.-Houston [1st Dist.] 2012); *Austin v. Countrywide Homes Loans,* 261 S.W.3d 68 (Tex.App.-[1st Dist.] 2008); *Leavings v. Mills,* 175 S.W.3d 301 (Tex.App.-Houston [1st Dist.] 2004, no pet.); *Shepard v. Boone,* 99 S.W.3d 263 (Tex.App.-Eastland 2003, no pet.); *Priesmeyer v. Pacific Southwest Bank, F.S.B.,* 917 S.W.2d 937 (Tex.App.-Austin 1996, no pet.); *see also Evergreen, N.A. Seedergy Ventures, Inc.,* 499 S.W.3 534, 539-42 (Tex.App.–Houston [14th Dist.] 2016, no pet). A homeowner has standing to challenge the assignment on grounds that would render the assignment void. *Id.* A homeowner does not have standing

if the assignment is merely voidable. *Id.* Examples of voidable defenses to an assignment include the statute of frauds, fraud in the inducement, lack of capacity of a minor, and mutual mistake. *Miller,* 881 F.Supp.2d at 832.

The Powes argued that one of the assignments in the chain of assignments funning from the original owner of the note to Deutsche Bank was void. The Powes argued that the September 10, 2009 assignment from IndyMac to OneWest was void because IndyMac had been placed in receivership by the FDIC in 2008. If that assignment was void, then the subsequent assignment from OneWest to Deutsche Bank also was void. If the IndyMac assignment was void, then under Texas law the Powes had standing to challenge it.

The District Court held that the IndyMac assignment was merely voidable, and not void, and that the Powes had no standing to challenge it for that reason. However, if the IndyMac assignment was void, as the Powes contend, then the District Court and the Fifth Circuit failed to follow well-established Texas law.

The question of whether the IndyMac assignment was void is addressed in the next section.

III. THE PURPORTED INDYMAC ASSIGNMENT TO ONEWEST THAT OCCURRED AFTER INDYMAC WAS PLACED IN RECEIVERSHIP UNDER FIRREA WAS VOID, AS WAS THE PURPORTED SUBSEQUENT ASSIGNMENT FROM ONEWEST TO DEUTSCHE BANK.

On July 11, 2008, IndyMac was placed in receivership by the FDIC under Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"),

12 U.S.C. § 1821(d)(11)(A). *MBIA Ins.Corp. v. F.D.I.C.,* 708 F.3d 234, 238. The FDIC sold substantially all of IndyMac's assets on March 19, 2009. *Id.; Deutsche Bank Nat'l Trust Co., v. Burke,* 117 F.Supp.3d 953, 957, *rev'd on other grounds,* 655 Fed.Appx. 251.

The purported assignment that Deutsche Bank relies on in its chain of title argument is the purported September 10, 2009 assignment from IndyMac to OneWest, which allegedly occurred more than a year after IndyMac was placed in receivership by the FDIC.

In their response to IndyMac's motion to dismiss; the Powes argued that this assignment was void and invalid, citing the first District Court opinion in *Burke.* The facts in *Burke* were very similar to the facts in the present case, and involved assignments to and from three of the same entities (Deutsche Bank, IndyMac and OneWest) that were part of the chain of assignments in the present case.

In the *Burke* case the homeowners executed a note for a home equity loan to IndyMac Bank, F.S.B. ("IndyMac") in 2007, which was secured by a deed of trust on their home. The District Court found that IndyMac was closed by the Office of Thrift Supervision on July 11, 2008, and substantially all of its assets were transferred to IndyMac Federal Bank, F.S.B. *See also MBIA Ins.Corp. v. F.D.I.C.,* 708 F.3d 234, 238 ("On July 11, 2008, the Office of Thrift Supervision ("OTS") appointed the FDIC to act as receiver for IndyMac Bank because it was "likely to be unable to pay its obligations or meet its depositors demands in the normal course of business.").

The District Court in *Burke* found that on March 19, 2009, IndyMac Federal was placed in receivership by the FDIC and substantially all of its assets were sold to OneWest Bank, FSB. *See also MBIA,* 708 F.3d at 238 ("By March 2009, the FDIC . . . sold a substantial portion of IndyMac Federal's assets and transferred all deposits to a newly chartered federal savings bank —OneWest Bank."). The District Court in *Burke* found that on January 20, 2011, Mortgage Electronic Registration System, Inc. ("MERS"), acting as nominee for IndyMac Bank, F.S.B., its successors and assigns, executed a document entitled "Assignment of Deed of Trust," purporting to assign all rights under the Burkes' loan agreement to Deutsche Bank. The assignment was backdated to April 9, 2010. Subsequently OneWest Bank, FSB, acting as mortgage servicer for Deutsche Bank initiated foreclosure proceedings against the Burkes.

The District Court in *Burke* held that the purported assignment from IndyMac Bank, F.S.B. to Deutsche Bank was void and invalid for the following reasons:

a. The putative assignor IndyMac Bank, F.S.B. had been defunct since July 2008, more than two years prior to the time of the purported execution of the assignment;

b. The party executing the assignment, MERS acted solely in its capacity as "nominee for IndyMac Bank, F.S.B., its successors and assigns;"

c. The assignment did not specify who the successors and assigns might be, whether they had any rights under the Burkes' note and if so, how they obtained those rights; and

d. A proper chain of title inquiry requires proof of an unbroken chain of assignments from the original mortgagee to the party claiming the right to foreclose.

For these reasons, the District Court in *Burke* held that Deutsche Bank did not possess any right, title or interest in the Burkes' note and deed of trust.

a. The same situation existed in the present case, where the purported chain of assignments were as follows: the original note and deed of trust was allegedly between Plaintiffs and SMI Financial Services, LLC dba SMI Mortgage;

b. SMI allegedly assigned the note and deed of trust to IndyMac Bank, FSB on March 28, 2008;

c. IndyMac Bank, FSB its successors and assigns, purportedly assigned the note to OneWest Bank, FSB on September 10, 2009; and

d. OneWest Bank, FSB signed a purported assignment of the note to Deutsche Bank.

The Powes argued that the September 10, 2009 assignment from IndyMac Bank, FSB to OneWest Bank, FSB was void and invalid for the same reason stated in the *Burke* opinion–IndyMac Bank was defunct at the time of the assignment. Because that link in the chain of assignments was void and invalid, there was not an unbroken chain of assignments from original lender SMI to Deutsche Bank. For that reason, Deutsche Bank did not possess any right,

title or interest in the Plaintiffs' note and deed of trust.

Unbeknownst to the Powes, the Fifth Circuit had reversed the District Court's judgment in *Burke* and remanded the case just ten days prior to the trial court's granting of Deutsche Bank's motion to dismiss in the present case, albeit for reasons not applicable to the present case. *Deutsche Bank Nat'l Trust Co., v. Burke,* 655 Fed.Appx. 251 (5th Cir 2016). The Fifth Circuit determined that when MERS made the assignment in question from IndyMac Bank to One-West, it was acting not only in its capacity as nominee for IndyMac, but also in its capacity as a beneficiary under the original deed of trust. *Id.* at 254. The assignment by MERS in its capacity as beneficiary was not invalid. *Id.*

Unlike *Burke,* however, in the present case MERS did not make the September 10, 2009 assignment in question, nor did any beneficiary or party named in the original deed of trust. For that reason, the Fifth Circuit's reasoning in its 2016 decision in *Burke* had no application to the present case.

In a somewhat bizarre turn of events, on remand to the District Court, the Magistrate who issued the original judgment in *Burke* found that the Fifth Circuit opinion was clearly erroneous because it contradicted long-settled Texas law and several published Fifth Circuit opinions, and that "it will work a manifest injustice on the Burkes' as well as other Texas residents who might be turned out of their homes in similar circumstances." *Deutsche Bank Nat'l Trust Co., v. Burke,* 286 F.Supp.3d 802, 809 (S.D. Tex. 2017), *rev'd on other grounds,* 902 F.3d 548 (5th Cir. 2017).

The District Court in *Burke* did not follow the Fifth Circuit's instructions on remand and issued essentially the same judgment after remand. The Fifth Circuit reversed and rendered judgment in favor of Deutsche Bank for the same reasons it reversed the first District Court judgment. *Deutsche Bank Nat'l Trust Co., v. Burke,* 902 F.3d 548.

In its second opinion in *Burke*, the Fifth Circuit in *dicta* discussed an additional alternative ground for its decision that was not in the first opinion. The Fifth Circuit stated:

> Even if MERS were acting only as a nominee, as the magistrate judge purports, it still would not be clearly erroneous to conclude that MERS validly assigned the deed of trust on behalf of an existing successor of IndyMac Bank [FDIC]. Because the FDIC could sell "all the real and personal property" of IndyMac Federal Bank, *see* 12 U.S.C. § 192, it necessarily had power to assign the rights under the note, including the foreclosure rights ...

Id. at 551-52. What is puzzling about this statement is the fact that the FDIC *could sell* all of IndyMac's assets does not mean that it *did sell* all of those assets.

In fact, both the District Court and the Fifth Circuit indicated that the FDIC did not sell all of IndyMac's assets. In the second District Court opinion in *Burke,* the court made the following finding of fact:

> On March 19, 2009, IndyMac Federal was placed in receivership by the FDIC and substantially all of its assets were sold. (P.Ex.

> 6, p. 4). All deposits were transferred to OneWest Bank, F.S.B., but there is no indication whether OneWest acquired any other assets of IndyMac Federal, in particular the Burke Note or Deed of Trust. (P.Ex. 6).

Deutsche Bank Nat'l Trust Co., v. Burke, 2017 WL 6523592, at p. 2 (S.D. Tex. 2017), *rev'd on other grounds,* 902 F.3d 548 (5th Cir. 2017).

Based on this finding the trial court made the following conclusion of law:

> IndyMac Bank was closed in 2008. Its successor was IndyMac Federal Bank, but that entity was likewise placed in receivership in March 2009, nearly two years before the 2011 assignment. Substantially all of its assets were sold, but to whom they were sold, and whether the Burke note was among those assets, are matters of sheer speculation on this record.

Id. at p. 5.

In the first District Court opinion in the *Burke* case prior to the first appeal, the trial court stated:

> Elsewhere the FDIC notice states that all deposits of IndyMac Federal were transferred to OneWest Bank FSB. But the record is silent whether OneWest bought any other assets of IndyMac Bank, in particular the Burke Note or Deed of Trust.

117 F.3d at 957, n. 5.

The Fifth Circuit presumably agreed with these findings in its second opinion in *Burke,* where it stated:

> In the summer of 2008, the Office of Thrift Supervision closed IndyMac Bank and transferred *substantially all of IndyMac Bank's assets* to IndyMac Federal Bank, FSB. In the spring of 2009, the Federal Deposit Insurance Corporation [("FDIC")] placed IndyMac Federal in receivership, selling *substantially all of its assets* to OneWest Bank, FSB.

902 F.3d at 550.

Although MERS could have assigned FDIC-owned assets as successor to IndyMac Bank, there was nothing in this Court's second opinion addressing the question raised by the District Court in *Burke* of whether there was any evidence in the record that the note in question was part of "substantially all of IndyMac Bank's assets" sold by the FDIC to OneWest.

In the present case, there is no evidence in the record showing that the person who signed the September 10, 2009 assignment from IndyMac to OneWest, Erica A. Johnson-Seck, signed the document on behalf of the FDIC. Indeed, there was no mention whatsoever of the FDIC in any of the evidence in the record.

In addition, in the present case, there was no evidence in record demonstrating that the Powes' note was part of the IndyMac assets that the FDIC sold to OneWest on March 19, 2009. The fact that Deutsche Bank argued that it obtained the note through a chain of assignments that included the purported September 10, 2009 assignment from IndyMac to One-

West indicates that the Powes' note was not part of the March 19, 2009 sale. Otherwise, the purported September 10, 2009 assignment would not have been necessary.

It also is significant to point out that Deutsche Bank made no argument in connection with its motion to dismiss or motion for summary judgment that the March 19, 2009 FDIC sale of IndyMac assets to OneWest was effective to transfer the Powes' note to OneWest. Instead, Deutsche Bank relied on the purported September 10, 2009 assignment from a defunct IndyMac to OneWest.

Finally, in the Fifth Circuit's second opinion in *Burke,* it also is significant what the court did not hold. The Fifth Circuit did not hold that IndyMac itself, after it was shut down by the FDIC, still had the power or ability to assign a note that it had owned prior to being shut down. That is what Deutsche Bank alleged happened in the present case–IndyMac itself assigned the note after it had been shut down. In fact, the underlying assumption in both of the District Court's and both of the Fifth Circuit's holdings in *Burke* was that IndyMac did not have the power to assign the note after it was shut down. If it did still have the power after the shutdown, then it would have been completely unnecessary for the Fifth Circuit to find other reasons, as it did, to validate the assignment.

If IndyMac did not have the power to assign the Powes' note on September 10, 2009, then the purported assignment from IndyMac to OneWest was void and invalid. Because OneWest never received a valid assignment of the note from IndyMac, OneWest's purported

December 27, 2010 assignment of the note to Deutsche Bank was void and invalid.

In its opinion granting Deutsche Bank's motion to dismiss in the present case, the District Court relied on and cited In *Casterline* the District Court reviewed, quoted from and took judicial notice of records from the FDIC's web site relating to the FDIC's sale of IndyMac Bank assets to OneWest Bank, F.S.B. Without citing any specific evidence that the note in that case was part of the IndyMac assets sold to OneWest by the FDIC, the court in *Casterline* apparently concluded that the FDIC sold all of IndyMac's assets to OneWest on March 19, 2009, and for that reason, held that the borrower had no standing to challenge a purported assignment of the note by MERS to OneWest in 2011. This opinion is not factually consistent with the Fifth Circuit's and the District Court's findings in *Burke* that the FDIC only sold *substantially all* of IndyMac's assets to OneWest. For that reason, *Casterline* does not support the validity of the assignment by IndyMac in the present case.

IV. The Questions Presented Are of Fundamental Importance.

There are very likely thousands if not tens of thousands of residential mortgages owned by Deutsche Bank in its capacity as the alleged trustee of various securitization trusts. If Deutsche Bank skipped a critical step in the foreclosure process in this case–proving that it was actually appointed trustee or actually formed the trust in question–it likely will continue to skip the same step in future cases and thereby violate the property rights of homeowners facing

potential foreclosures. No other court has yet stepped in and stopped this practice. This practice needs to be stopped, and Deutsche Bank must be required to comply with its fundamental burden of proof in order to foreclose on homeowners.

In addition, there are likely thousands if not tens of thousands of mortgages that were at one time owned by IndyMac before it was shut down by the FDIC under FIRREA. If any of those mortgagors are presently facing foreclosure proceedings, or were to face such proceedings in the future, they need to know the answer to question raised in this petition-whether any assignments of their notes made by IndyMac after it was shut down were valid. The Fifth Circuit found a circuitous way to avoid answering that question in *Burke.* However, the reasons for that avoidance are not present in the Powes' case, and may not be present in other existing or future similar cases. This question needs to be answered not only for the Powes bur for other persons in the same position.

The present case is the appropriate vehicle for resolving these questions.

CONCLUSION

For the reasons set forth above, a Writ of Certiorari should be granted.

Respectfully submitted,

/S/ REGINA Y. POWE
/S/ WAYNE A. POWE
PETITIONERS ET UX. PRO SE
291 OAKWOOD TRAIL
FAIRVIEW, TX 75069
(214) 675-7141
REGINAPOWEDDS@YAHOO.COM

DECEMBER 30, 2019

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