ORIGINAL

No. 19-7224

IN THE

SUPREME COURT OF THE UNITED STATES

Cheryl Jones — PETITIONER
(Your Name)

vs.

Stephen Goldberg, ET, AL — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Maryland Court of Appeals
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Cheryl Jones
(Your Name)

2954 Burnley ct
(Address)

Abingdon, M.D. 21009
(City, State, Zip Code)

443-787-6624
(Phone Number)

QUESTION(S) PRESENTED

1. WHEN A LENDER PRESENTS FALSE DOCUMENTS AND WINS A FINAL JUDGEMENT, DOES THIS VIOLATE THE RIGHTS OF THE BORROWER?

2. WHEN THE BORROWER IS NOT GIVEN THE RIGHT TO A DISCOVERY TIME TO REVIEW AND PRESENT EVIDENCE OF THIIS FRAUDULANT DOCUMENT IS THE COURT SUPPORTING BUSINESSES IN ILLEGAL PRACTICE?

3. DOES THE LENDER HAVE THE LEGAL RIGHT TO FILE FORCLOSURE PROCEEDDINGS WITH AN EXPIRED LEIN DOCUMENT?

4. IS THE LENDER OBLIGATED BY LAW TO NOTIFY THE BORROWER/OCCUPANTS OF THE PROPERTY BEING FORECLOSED?

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

TABLE OF CONTENTS

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[ ] For cases from **federal courts:**

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[X] For cases from **state courts:**

The opinion of the highest state court to review the merits appears at Appendix B to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

PETITION FOR A WRIT OF CERTIORARI

INTRODUCTION

In 2008, the United States suffered "the greatest economic meltdown since the Great Depression" and "[a]t the core of this crisis was the mortgage meltdown" caused by the securitization of subprime mortgages.[1] Securitization of mortgages was made possible largely through the expansive use of a private financial industry-created database system, Mortgage Electronic Registration Systems, Inc. ("MERS"), as a replacement for state recording laws. *See generally, In re Merscorp, Inc. v. Romaine*, 8 N.Y.3d 90, 96, 861 N.E.2d 81, 828 N.Y.S.2d 266 (2006).

Instead of lenders issuing mortgages under their names, mortgages would be issued (and recorded) under "MERS" acting as a "nominee" for the lenders, thereby allowing the mortgages to be "pooled" together

[1] Nelson, G.S., *Confronting the Mortgage Meltdown: A Brief for the Federalization of State Mortgage Foreclosure Law*, 37 PEPP. L. REV. 583, 583 (2010). *See generally* Lapidus, A.L., *What Really Happened: Ibanez and the Case for Using the Actual Transfer of Documents*, 41 STETSON L. REV. 817, 817-18 (Spring 2012) (citations omitted).

and marketed as securities using unrecorded notes and assignments. *See Pub. Emps.' Ret. Sys. of Miss. v. Merrill Lynch & Co.*, 277 F.R.D. 97, 102-03 (S.D.N.Y. 2011).[2] By 2007, approximately 60 percent of mortgage loan originations had been recorded under MERS's name. Peterson, 78 U. CIN. L. REV. at 1373-74 (citations omitted).

One of the nation's largest originators of residential mortgages was Countrywide Financial Corp., through its subsidiary Countrywide Home Loans, Inc. ("Countrywide"). Between 2003-2009, Countrywide originated billions of dollars worth of residential mortgages, a substantial portion of which were repackaged as securities and marketed to institutional investors. *See Comment: ARMS, but No Legs to Stand On: "Subprime" Solutions Plague the Subprime Mortgage Crisis*, 40 TEX. TECH. L. REV. 1089, 1101 (Summer 2008)

The nation's large mortgage servicers exploited the MERS system for a different purpose – the mass production of forged documents for use in foreclosures. One of these providers was Bank of America – the successor in interest to Countrywide. As the Office of Inspector General found in 2012, Bank of America

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[2] *See Bain v. Metropolitan Mortgage Group, Inc.*, 175 Wn. 83, 94-95, 285 P.3d 34 (2012) (en banc); Phyllis K. Slesinger & Daniel McLaughlin, *Mortgage Electronic Registration System*, 31 IDAHO L. REV. 805, 807 (1995); Peterson, C.L., *Foreclosure, Subprime Mortgage Lending, and the Mortgage Electronic Registration System*, 78 U. CIN. L. REV. 1359, 1361 (2010).

encouraged and financially rewarded employees to "robosign" affidavits and other documents needed to process foreclosures. R. 165-168.[3] The widespread misuse of MERS eventually led to state and federal investigations culminating in (1) a "Consent Order" between MERS and four federal agencies in 2011 and (2) a "Consent Judgment" between the five largest mortgage service companies in the United States and the U.S. Department of Justice, other federal agencies and the Attorneys General of 49 states in 2012. *See* pp. 8-11 *infra*.[4]

Nonetheless, state and federal courts have continued to be bombarded with foreclosure actions

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[3] *See* Office of the Inspector General, U.S. Department of Housing and Urban Development, *Bank of America Corporation Foreclosure and Claims Process Review, Charlotte, NC*, Memorandum of Review, No. 2012-FW-1802 (March 12, 2012), at pp. 5-12. R. 165-186. The OIG coined the term "robosigning" to mean routinely signing "legal documents, including affidavits, without the supporting documentation and without review[ing] and verifying the accuracy of the foreclosure information." *Id.* at p. 6. The OIG noted that "one notary testified that daily volume went from 60- to 200 documents per day to 20,000 documents per day. . . ." *Id.*

[4] On June 28, 2011, the Bank of New York Mellon, acting as Trustee for 530 trusts that had acquired billions of dollars worth of the pooled Countrywide securities entered into a separate $8.5 billion settlement with Bank of America. *See* Order Partially Approving Settlement, *In re The Bank of New York Mellon*, No. 651786/11, 2014 N.Y. Misc. LEXIS 452 (Sup. Ct. N.Y., N.Y. County Jan. 31, 2014). *See also Blackrock Financial Mgmt. v. Segregated Account of Ambac Assur. Corp.*, 673 F.3d 169 (2d Cir. 2012).

infected by the same types of fraudulent paperwork.[5] That fact, in turn, has led to a widespread split among state courts and federal bankruptcy courts about whether, or to what extent, borrowers can raise the fraudulent conduct as a defense to foreclosure. Petitioner asks that the Court grant the writ to both resolve this split and to vacate the judgment of foreclosure by holding that the Due Process Clause of the Fourteenth Amendment entitles borrowers to defend foreclosures by challenging the lenders' use of fraudulent documentation.

OPINIONS BELOW

The opinion of the highest state court to review the merits appears at App. 1 to this Petition and is unpublished. The opinion of the trial court of the Eleventh Judicial Circuit, in and for Miami-Dade County, Florida, appear at App. 2 and are unpublished.

STATEMENT OF JURISDICTION

On December 4, 2013, the Third District Court of Appeal ("DCA") for the State of Florida rendered a *per curiam* order without a written opinion, affirming

[5] In Miami-Dade County alone, 56,656 foreclosure cases were filed during 2008. *See* Nelson, 37 PEPP. L. REV. at 586, n. 18.

the trial court's rulings. The Order is attached at App. 1. When no petition for rehearing was filed, on December 20, 2013, the Mandate, attached at App. 12, was issued.

Because the Third DCA affirmed the trial court's (1) issuance of a Final Judgment of Foreclosure and (2) order denying Petitioner's motion to vacate that order due to fraud without opinion or explanation, the Florida Supreme Court lacked jurisdiction to review the Third DCA's Order. *See R.J. Reynolds Tobacco Co. v. Kenyon*, 882 So.2d 986, 989-90 (Fla. 2004). Therefore, the Third DCA was the state court of last resort from which Petitioner could seek review. *See, e.g., Williams v. Florida*, 399 U.S. 78, 79 n. 5 (1970) (where the Florida Supreme Court was without jurisdiction to entertain an appeal, "the District Court of Appeal became the highest court from which a decision could be had."). *Accord The Florida Star v. B.J.F.*, 530 So.2d 286, 288 n. 3 (Fla. 1988) ("A district court decision rendered without an opinion or citation constitutes a decision from the highest state court empowered to hear the case."). *See also* Gerald B. Cope, Jr., *Discretionary Review of the Decisions of Intermediate Appellate Courts: A Comparison of Florida's System with Those of the Other States and the Federal System*, 45 FLA. L. REV. 21, 80-81 (1993) (citing cases). Therefore, the Court's jurisdiction is invoked under 28 U.S.C. §1257(a).

endorsed or made payable to BNYM. R. 48-51. BNYM did not file a response and the motion remained unresolved. On October 26, 2009, BNYM filed a motion for summary judgment claiming that it had lost the original Note but the supporting affidavit attached to the motion said nothing about the lost Note. R. 54-74. A few days later, on November 2, 2009, BNYM filed a Notice of Filing Loan Documents, attaching a copy of a back-dated assignment of mortgage. R. 76-78.[8] No further record activity occurred until 2012.

B. The Government Enters Into Consent Agreements with MERS and Bank of America

On April 13, 2011, MERS entered into a "Consent Order" with four federal agencies. *See* Consent Order, *In re Merscorp, Inc.*, OCC EA No. 210-044, 2011 OCC Enf. Dec. LEXIS 80, 2011 WL 2411344 (April 13, 2011).[9] Two months later, Bank of America and BNYM also entered into a settlement that was only recently approved. *See* p. 3, n. 4 *supra*. A year later, on April 4, 2012, the five largest servicing companies

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[8] On April 18, 2012, BNYM also filed a Request For Admissions but attached as an exhibit a copy of the original *unendorsed* Note that had been attached to the Complaint. AX-1.

[9] The four agencies were the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of Thrift Supervision and the Federal Housing Finance Agency. Petitioner requests that the Court take judicial notice of the Consent Order with MERS.

in the United States, including Bank of America,[10] entered into a Consent Judgment with the U.S. Department of Justice, several other federal agencies, and Attorneys General of 49 states based on allegations that they had knowingly committed numerous abuses in the servicing and foreclosing of residential mortgages.[11]

As part of the settlement, Bank of America was required to pay $8.5 billion ($7.6 billion of which was designated for borrowers), and to abide by a comprehensive list of conditions set forth in Exhibit A, which was attached and expressly incorporated into the Consent Judgment.[12] The requirements of Exhibit A were designed to both prohibit past abuses (including the robo-signing and surrogate signing of thousands of documents)[13] and to provide a mechanism for consumers

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[10] The other four Defendants were Wells Fargo & Company and Wells Fargo Bank, N.A., Citigroup, J.P. Morgan-Chase, and Ally/GMAC.

[11] *See United States v. Bank of America*, 922 F. Supp. 2d 1, 4 (D. D.C. 2013), citing *United States v. Bank of America, et al.*, No. 12-0361 (ECF No. 14), 2012 WL 1440437, 2012 U.S. Dist. LEXIS 188892 (D. D.C. April 4, 2012).

[12] Although, as discussed *infra*, BNYM filed the Consent Judgment with the trial court, it did not include a copy of Exhibit A. Petitioner requests that the Court take judicial notice of the entire Consent Judgment. *See Mitchell v. Wells Fargo Bank, N.A.*, CV 13-04017-KAW, 2014 U.S. Dist. LEXIS 7803, at *10 (N.D. Cal. Jan. 21, 2014) (taking judicial notice of the Consent Judgment).

[13] While the Consent Judgment did not require Bank of America to explicitly admit that Countrywide had engaged in the fraudulent practices prohibited by Exhibit A, the ameliorative

(Continued on following page)

to obtain meaningful relief for Bank of America's fraudulent foreclosure practices. Among other things, Exhibit A required Bank of America (or other "servicer" of the loan) to:

- Ensure that factual assertions made in all foreclosure-related documents and filings be "accurate and complete and . . . supported by competent and reliable evidence."
- Ensure that all affidavits and sworn statements be "based on the affiant's review and personal knowledge of the accuracy and completeness of the assertions" therein to ensure that the affiant would be "competent to testify on the matters stated."
- Ensure that all notarized documents comply with all applicable state law requirements.
- Ensure that all affiants be individuals, not entities, and that all "affidavits, sworn statements and Declarations . . . be signed by hand signature of the affiant (except for electronically filed court documents)."

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provisions implicitly acknowledge that they had occurred. *See also* Office of the Inspector General, Memorandum of Review, *supra*, at pp. 5-12 (making extensive findings of misconduct by Bank of America); *Pino v. Bank of New York Mellon*, 57 So.3d 950, 954 (Fla. 4th DCA 2011), *certified question answered*, 121 So.3d 23 (Fla. 2013) (acknowledging the widespread problem of financial institutions filing fraudulent documents to support foreclosures).

- Prohibiting foreclosure referrals "while the borrower's complete application for any loan modification program is pending. . . ."

Bank of America, 2012 U.S. Dist. LEXIS 188892, at **24-30, 54.

Exhibit A also barred Bank of America and other servicers of the loans from benefitting from Countrywide's *prior* fraudulent activities by:

- Prohibiting the servicer from relying on "an affidavit of indebtedness or similar affidavit, sworn statement or Declaration filed in a pending pre-judgment judicial foreclosure . . . proceeding which (a) was required to be based on the affiant's review and personal knowledge of its accuracy but was not, (b) was not, when so required, properly notarized, or (c) contained materially inaccurate information in order to obtain a judgment of foreclosure, order of sale. . . ."
- Requiring the servicer in "pending cases in which such affidavits, sworn statements or Declarations may have been filed" to "take appropriate action . . . to substitute such affidavits with new affidavits and provide appropriate written notice to the borrower or borrower's counsel."
- Requiring the servicer in "pending post-judgment, pre-sale cases in judicial foreclosure proceedings in which an affidavit or sworn statement was filed which was required to be based on the affiant's review and personal knowledge of its accuracy but may

not have been, or that may not have, when so required, been properly notarized, and such affidavit or sworn statement has not been re-filed, . . . to provide written notice to borrower . . . or borrower's counsel prior to proceeding with a foreclosure sale or eviction proceeding."

- Requiring the servicer to "offer and facilitate loan modifications for borrowers rather than initiate foreclosure" and to "notify potentially eligible borrowers of currently available loss mitigation options prior to foreclosure referral" and thereafter to "facilitate the submission and review of loss mitigation applications."

Id. at **29-30, 52-54, 67-70.

C. The Foreclosure Trial

On May 11, 2012, the trial court issued a uniform order setting the case for non-jury trial. R. 80-87. On June 21, 2012, that trial allegedly occurred[14] at which BNYM produced for the first time a document it claimed was the original Note – the one it had alleged in the Complaint was "lost or destroyed." R. 111-120.

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[14] Although not relevant here, there was a dispute below as to whether a trial occurred, since there is no transcript and no clerk's notes reflecting the admission of any exhibits into evidence. The only record proof that a trial occurred is a sentence in the trial court's foreclosure order stating that Petitioner "was represented by counsel at the hearing for final judgment." R. 107-110.

However, contrary to the express terms of Countrywide's/Bank of America's 2012 Consent Judgment with federal and state authorities, this supposedly newly found Note was not endorsed by a human hand but contained only an undated rubber-stamped "signature" of Michelle Sjolander, Executive Vice President of Countrywide, on a blank endorsement. Nor did BNYM introduce any evidence to support any claim that BNYM held the allegedly newly found Note at the time the foreclosure Complaint was filed.[15] Nonetheless, the trial court entered a final foreclosure judgment and set the foreclosure sale for July 27, 2012, marking the original unendorsed Note as "cancelled." R. 182-184. R. 107-110.

D. BNYM's Motion to Cancel and Vacate

On July 5, 2012, BNYM – apparently realizing it had acted in violation of the Consent Judgment – filed a motion to cancel any sale and/or to vacate the Final Judgment, pursuant to Fla. R. Civ. P. 1.540(b). R. 121-129.[16] The motion acknowledged that BNYM

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[15] *See Zimmerman v. JPMorgan Chase Bank*, No. 4D12-2190, 2014 Fla. App. LEXIS 1832, 2014 WL 537559 (Fla. 4th DCA Feb. 12, 2014) (per curiam) (reversing foreclosure order, holding that on remand "Chase must show that it was the holder of the endorsed note on the date the complaint was filed" and that without such proof "Chase had no standing" to file the complaint).

[16] Fla. R. Civ. P. 1.540(b) provides:

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc. On motion and upon

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was required to file the motion by the Consent Judgment but stated that the motion should be granted only so that "foreclosure avoidance opportunities" could be "evaluated" (R. 124) – not so they could be "offer[ed]" or "facilitate[d]" as required by Exhibit A to the Consent Judgment. However, BNYM's motion attached *only* the Consent Judgment and *not* Exhibit A, which, as previously discussed, included these and other extensive requirements. Moreover, at no time thereafter did BNYM ever state what steps it took, if any, to comply with Exhibit A's requirements.

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such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, decree, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial or rehearing; (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) that the judgment or decree is void; or (5) that the judgment or decree has been satisfied, released, or discharged, or a prior judgment or decree upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment or decree should have prospective application. The motion shall be filed within a reasonable time, and for reasons (1), (2), and (3) not more than 1 year after the judgment, decree, order, or proceeding was entered or taken. A motion under this subdivision does not affect the finality of a judgment or decree or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, decree, order, or proceeding or to set aside a judgment or decree for fraud upon the court.

Fed. Nat'l Mortg. Ass'n v. Bradbury, 32 A.3d 1014, 1016 (Me. 2011). *See also Kemp v. Countrywide Home Loans, Inc.*, 440 B.R. 624 (Bankr. D. N.J. 2010) (refusing to recognize as legitimate Countrywide's attempted transfer of a note and mortgage that had not been properly endorsed); *U.S. Bank Nat'l Ass'n v. Ibanez*, 458 Mass. 637, 655, 941 N.E.2d 40, 55 (2011) (Cordy, J., concurring) ("I concur fully in the opinion of the court, and write separately only to underscore that what is surprising about these cases is not the statement of principles articulated by the court regarding title law and the law of foreclosure in Massachusetts, but rather the utter carelessness with which the plaintiff banks documented the titles to their assets."). *In re Hill*, 437 B.R. 503 (Bankr. W.D. Pa. 2010) (issuing a "public censure" against Countrywide and its counsel for fabricating evidence).[18] The Court should grant this Petition to resolve this split in authority and to hold that if due process means anything, it means the resolution of disputes without the use of fraud.

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[18] The rampant use of fraudulent documents in mortgage foreclosures has also been universally condemned by commentators. *See* Renuart, E., *Property Title Troubles in Nonjudicial Foreclosure States: The Ibanez Time Bomb?*, 4 WM. & MARY BUS. L. REV. 111, 119-28 (2013); White, A., *Losing the Paper – Mortgage Assignments, Note Transfers and Consumer Protection*, 24 LOY. CONSUMER L. REV. 468, 486-87 (2012); Shaun Barnes, Kathleen G. Cully & Steven L. Schwarz, *In-House Counsel's Role in the Structuring of Mortgage-Backed Securities*, 2012 WIS. L. REV. 521, 528 (2012).

II. The Due Process Test

This Court has established what is essentially a two-tiered analysis for due process challenges to conduct which, like the one in this case, involves property rather than liberty interests. The first "tier" involves a two-fold inquiry: (1) an examination of whether there has been a significant deprivation or threat of a deprivation of a property right, *see Fuentes v. Shevin*, 407 U.S. 67 (1972), and (2) an examination of whether there is sufficient state involvement of that deprivation to trigger the Due Process Clause, *see Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974).

If there is state action and if that action amounts to the deprivation or threat of a deprivation of a cognizable property interest, the Court proceeds to the second "tier" to then determine what procedural safeguards are required to protect that interest. *Connecticut v. Doehr*, 501 U.S. 1 (1991). The Court traditionally uses the three-factor test first discussed in *Mathews v. Eldridge*, 424 U.S. 319 (1976), to assess what safeguards are necessary to pass muster under the Due Process Clauses of the Fifth and Fourteenth Amendments. The *Mathews* analysis weighs (1) "the private interest that will be affected by the official action"; (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute safeguards"; and (3) "the Government's interest, including the function involved and the fiscal and

administrative burdens that the additional or substitute procedural requirement would entail." 424 U.S. at 335; *see also Doehr*, 501 U.S. at 26-28.

A. The Significance of the Deprivation

There can be no serious question that Petitioner satisfied the first tier requirement. This Court has been a steadfast guardian of due process rights when what is at stake is a person's right "to maintain control over [her] home" because loss of one's home is "a far greater deprivation than the loss of furniture." *United States v. James Daniel Good Real Property*, 510 U.S. 43, 53-54 (1993). Courts have held that even "a small bank account" is sufficient to trigger due process protections. *See Nat'l Council of Resistance of Iran v. Dept. of State*, 251 F.3d 192, 202-205 (D.C. Cir. 2001) (citing *Russian Volunteer Fleet v. United States*, 282 U.S. 481, 489-92 (1931)).

B. State Action

Since foreclosures in Florida require judicial supervision from beginning to end, Petitioner also plainly satisfied the second tier. This Court has set out two elements that must be met in order to establish state action under the Fourteenth Amendment: "First, the deprivation must be caused by the exercise of some right or privilege created by the State. . . . Second, the party charged with the deprivation must be a person who may fairly be said to be a state

actor." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982).

The first requirement was met in this case by the foreclosure process chosen by the Florida Legislature.[19] Unlike some states which permit *non*-judicial foreclosures, Florida has required that mortgage foreclosure actions be supervised by the judiciary for 190 years. *See Daniels v. Henderson*, 5 Fla. 452 (1854) (construing Fla. Acts of 1824). Today, foreclosures in Florida are regulated by Fla. R. Civ. P. 1.110(b), which requires verification of foreclosure complaints. *See* p. 6 *supra*.[20]

To meet the second requirement, a borrower must show that the "private actor operate[d] as a 'willful participant in joint activity with the State or its agents.'" *Brentwood Academy v. Tennessee Secondary*

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[19] This Court has declined to review due process challenges to foreclosures in states that allow non-judicial foreclosures and, therefore, lack state action as defined by the Court in *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978). *See, e.g., Gomes v. Countrywide Home Loans, Inc.*, 192 Cal. App. 4th 1149, 121 Cal. Rptr. 3d 819, *cert. denied*, 132 S.Ct. 419 (2011); *Apao v. Bank of New York*, 324 F.3d 1091 (9th Cir. 2003), *cert. denied*, 540 U.S. 948 (2003).

[20] The Florida Supreme Court has explained that "[o]ne of the primary purposes of this amendment was to ensure the plaintiff and plaintiffs' counsel do their 'due diligence' and appropriately investigate and verify ownership of the note or right to enforce the note and ensure the allegations in the complaint are accurate." *In re Amends to The Fla. Rules of Civ. Pro.-Form 1.996 (Final Judgment of Foreclosure)*, 51 So.3d 1140 (Fla. 2010).

School Athletic Association, 531 U.S. 288, 296 (2001) (quoting *Lugar,* 457 U.S. at 941). This means that the private actor must have received the "significant assistance of state officials." *Tulsa Professional Collection Services, Inc. v. Pope,* 485 U.S. 478, 486 (1988).

In judicial-foreclosure states such as Florida,[21] the use of the state's courts (and the use of all the state officials who work for those courts) to pursue the foreclosure is mandatory; the foreclosing entity does not possess the right of self-help. In *Shelley v. Kraemer,* 334 U.S. 1 (1948), this Court held that the use of a court to enforce a restrictive covenant could be state action because the court was essentially participating in the discrimination by enforcing the facially discriminatory covenant. Similarly, in *Doehr,* the Court recognized that although prejudgment remedy statutes ordinarily involve disputes between private parties, there is significant governmental assistance by state officials and through state procedures. Specifically, the Court acknowledged that prejudgment remedy statutes "are designed to enable one of the parties to 'make use of state procedures with the overt, significant assistance of state officials,' and they undoubtedly involve state action 'substantial enough to implicate the Due Process Clause.'" *Doehr,* 501 U.S. at 11 (quoting *Pope,* 485 U.S. at 486.

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[21] *See* Nelson, 37 PEPP. L. REV. at 588 (stating that "about forty percent" of the states require foreclosures only by judicial action) (citation omitted).

See also Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673 (1930).

For the same reason, Florida's requirement of strict supervision of Florida's foreclosure proceedings[22] is enough "substantial" involvement to trigger state action. *See Dieffenbach v. Attorney General*, 604 F.2d 187, 194 (2d Cir. 1979) (finding that the use of Vermont's strict foreclosure statute, which required the mortgagee to go to court to obtain a foreclosure, granted the court discretionary power to change the statutory period of redemption, obligated the creditor to obtain a writ of possession after the redemption period expired, and generally "directly engage[d] the state's judicial power in effectuating foreclosure," was enough to show that there was state action in the foreclosure process). *See also Turner v. Blackburn*, 389 F. Supp. 1250 (W.D.N.C. 1975); *Valley Dev. at Vail v. Warder*, 192 Colo. 316, 557 P.2d 1180 (Colo. 1976); *New Destiny Dev. Corp. v. Piccione*, 802 F. Supp. 692 (D. Conn. 1992).

C. The Mathews Test

1. The private interest

The "private interest" prong of the *Mathews* test weighs heavily in Petitioner's favor. As *Daniel Good*

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[22] *See, e.g., Batchin v. Barnett Bank of Southwest Florida*, 647 So.2d 211 (Fla. 2d DCA 1994); *DeMars v. Village of Sandalwood Lakes Homeowners Assoc., Inc.*, 625 So.2d 1219 (Fla. 4th DCA 1993).

again underscores, Petitioner had an enormous interest in retaining her and her family's home.

2. The Risk of Erroneous Deprivation

The risk of an erroneous deprivation when the decision rests on fraudulent evidence manufactured by the opposing party should be self-evident. Using false or fraudulent evidence "involve[s] a corruption of the truth-seeking function of the trial process." *United States v. Agurs*, 427 U.S. 97, 107 (1976). *See also Miller v. Pate*, 386 U.S. 1 (1967) (finding that a deliberate misrepresentation of truth to a jury is a violation of due process); *Caldwell v. Mississippi*, 472 U.S. 320 (1985) (finding that an uncorrected, misleading statement of law to a jury violated due process); *Darden v. Wainwright*, 477 U.S. 168, 181-82 (1986) (improper argument and manipulation or misstatement of evidence violates Due Process). *Cf. Mesarosh v. United States*, 352 U.S. 1, 14 (1956) (reversing convictions based on Solicitor General's disclosure that an important government witness had committed perjury in other proceedings, stating that the Court had a duty "to see that the waters of justice are not polluted").

3. The governmental interest

While requiring plaintiffs in foreclosure actions to prove legal ownership of the underlying note and mortgage would create an administrative burden, it is

a burden that is basic to all civil litigation – standing to sue. *See Warth v. Seldin*, 422 U.S. 490, 498 (1975) (standing "is [a] threshold question in every federal case, determining the power of the court to entertain the suit"). The same principle holds true in federal bankruptcy proceedings involving foreclosure disputes. As one district court bluntly put it: "This Court possesses the independent obligations to preserve the judicial integrity of the federal court and to jealously guard federal jurisdiction. Neither the fluidity of the secondary mortgage market, nor monetary or economic considerations of the parties, nor the convenience of litigants supersede these obligations." *In re Foreclosure Cases I*, Nos. I:07CV2282 et al., 2007 U.S. Dist. LEXIS 84011, at *6, 2007 WL 3232430, at *2 (N.D. Ohio Oct. 31, 2007). *See also CPT Asset Backed Certificates, Series 2004-EC1 v. Kham*, 278 P.3d 586, 591 (Okla. 2012) ("Because the note is a negotiable instrument, it is subject to the requirements of the UCC. Thus, a foreclosing entity has the burden of proving it is a 'person entitled to enforce the instrument.'"); *Eaton v. Fed. Nat'l Mortg. Ass'n*, 969 N.E.2d 1118, 1121, 1132 (Mass. 2011) (holding, in a decision with prospective effect only, that a party conducting a foreclosure sale pursuant to a power of sale in a mortgage must hold not only the mortgage, but also the note); *In re Foreclosure Cases*, 521 F. Supp. 2d 650, 653-54 (S.D. Ohio 2007) (requiring plaintiffs in twenty seven foreclosure actions to show that they were the holders of the notes and mortgages at the time the complaints were filed). *See generally*

RESTATEMENT (THIRD) OF PROP. MORTGS. § 5.4(c) (1997) ("A mortgage may be enforced only by, or on behalf of, a person who is entitled to enforce the obligation the mortgage secures."); 18 William B. Stoebuck & John W. Weaver, *Washington Practice: Real Estate: Transactions* § 18.18, at 334 (2d ed. 2004) ("A general axiom of mortgage law is that obligation and mortgage cannot be split, meaning that the person who can foreclose the mortgage must be the one to whom the obligation is due."), quoted in *Bain v. Metropolitan Mortgage Group, Inc.*, 285 P.3d 34 (2012).

III. The Need For Supreme Court Intervention

If this Court does not grant writ in this case, the corruption of foreclosure proceedings in Florida will effectively be rendered immune from challenge. By refusing to issue an opinion, the Third DCA insulated its views from challenge in the Florida Supreme Court, despite the fact that its holding is irreconcilable – on virtually identical facts – with one of its sister courts. *See Pino v. Bank of New York Mellon*, 57 So.3d 950 (Fla. 4th DCA 2011), *certified question answered*, 121 So.3d 23 (Fla. 2013).

Federal court review, in turn, is limited by the *Rooker-Feldman* doctrine, which deprives "lower federal courts" of "subject matter jurisdiction" to review state court decisions on foreclosure matters, even as to due process/fraud claims similar to Petitioner's. *See, e.g., Warriner v. Fink*, 307 F.2d 933 (5th Cir.

1962); *Moncrief v. Chase Manhattan Mortgage Corp.*, 275 Fed. Appx. 149 (3d Cir. 2008); *Pennington v. Equifirst Corp.*, No. 10-1344-RDR, 2011 U.S. Dist. LEXIS 9226 (D. Kan. Jan. 31, 2011). *See also Glaviano v. JPMorgan Chase Bank, N.A.*, No. 13-2049 (RMC), 2013 U.S. Dist. LEXIS 180582 (D. D.C. Dec. 27, 2013); *Hahn v. GMAC Mortgage LLC*, No. 11-cv-02978-BNB, 2011 U.S. Dist. LEXIS 144535 (D. Colo. Dec. 15, 2011). Courts also held that borrowers lack standing to challenge violations of the 2012 Consent Judgment. *See Conant v. Wells Fargo Bank, N.A.*, No. 13-572 (CKK), 2014 U.S. Dist. LEXIS 19154, at **37-39 (D. D.C. Feb. 14, 2014) (collecting cases). Review of the Third DCA's conduct, therefore, can only be accomplished by this Court through a Petition such as this one.

CONCLUSION

This case involves the widespread use of fraudulent documents in foreclosure proceedings brought in state courts and federal bankruptcy courts across the Nation. The implications of such conduct on the Due Process rights of borrowers in Florida, however, will

APPENDICES

TABLE OF AUTHORITIES

CASES

JURISDICTION

[X] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was 9/30/2019

[X] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts:**

The date on which the highest state court decided my case was 11/20/2019
A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

JURISDICTION

this Court has jurisdiction over this appeal under 28 U.S.C. §1253. The district court issued its judgment on January 21, 2018. Appellants filed their notice of appeal on December, 2019. App. 0154

The Equal Protection Clause and relevant provisions of the state constitution are reproduced at App. 121-122.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. V, ci. 3 & 4, state: "...nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." Accordingly, U.S. Const. amend. XIV, §1, ci. 2, provides in part: "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. Article III, § 2, ci. 1: "The judicial Power shall extend to all Cases, in Law and Equity, arising 2 under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority.., to Controversies to which the United States shall be a Party...". Concurring, 28 U.S.C. § 1345 states: "the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress." (June 25, 1948, ch. 646, 62 Stat. 933.). U.S. Const. art. VI, d. 2: "the Laws of the United States... shall he the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Fed- R. Civ. P. 17: "An action must be prosecuted in the name of the real party in interest." Substantiating the Real-Party-In-Interest-Doctrine, while conflicting with Fl. R. Civ. P 1.210: "Every action may be prosecuted in the name of the real party in interest." Fed.. R Civ. P. 19(a)(1): Required Party. A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if: (A) in that person's absence, the court cannot accord complete relief among existing parties; or (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may: (i) as a practical matter impair or impede the person's ability to protect the interest; or (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

STATEMENT OF THE CASE

The records indicate that Ms. Jones abandon the allegations of fraud regarding her case. But the facts are, that the court and her previous lawyer abandoned the idea. Ms. Jones was not given the right to discovery to present the glaring Fraudulent evidence in the case.

Further the servicing process was violated by the lender by improperly serving an individual on the "lawn" of her property and not an occupant of the property. The lender used this process of service to win the judgement against the borrower.

Ms. Jones was not not given the right to mediation or modification on her mortgage. The lender improperly served her, used fraudulent documents and won the judgement in lower court.

The lender started the foreclosure procedure in February 2013 during this time the lender held an expired lien release and had no right to the property or Foreclosure.

The record contains a letter from Ms. Jones to the lender requesting correspondence with her at a new address. The lender and the lower court ignored this document, while the borrower met her obligation to notify the Lender that she had moved giving the lender the address to correspond with her, yet the lender continued to send all notifications to an address where

Ms. Jones was no longer receiving mail.

Ms. Jones was also restricted by not allowing discovery in this case to show Evidence of the breaks in title, the securities instruments and the MERVS system making this foreclosure illegal.

The courts are compelled to hear any evidence possibly proving fraudulent activity of a business. Hower, in this case the fraudulent activity of this Business was ignored and won favorable judgement in the lower court.

Ms Jones appeals the Appeals Court decision to deny a writ of certiorari without assuring that the laws of the State and its citizens has not been violated.

REASONS FOR GRANTING A WRIT

REASONS FOR GRANTING THE WRIT The lower court in this case blatantly disregarded applicable Supreme Court precedent in denying Petitioner recourse despite this Court's unanimous Jesinoski decision. The United States Supreme Court, in its Jesinoski ruling, settled a Circuit split regarding the act of invoking a TILA rescission, relying on the plain language of the TILA statute. The Court did not, however, completely address the effect of a TILA rescission. Though the effect is also unambiguously spelled out in 15 U.S.C. § 1635(b), courts are inconsistently ruling on this important consumer protection law. Because the result in the case at bar directly conflicts with this Court's unanimous Jesinoski decision and federal consumer protection law, this Court should resolve the conflict and provide clear 11 guidance to lower courts on this important matter of federal consumer protection law impacting consumers across the country. The protections afforded by TILA must be allowed where, as here, the consumer effectively rescinded the loan yet lost his home by invalid foreclosure, in which the lender's right to foreclose was extinguished as a matter of law by the borrower's rescission. I. The Fourth Circuit's Decision in this Case is Directly in Conflict with the Supreme Court's Jesinoski Decision, Which Interpreted One of Our Nation's Most Important Consumer Protection Laws, and Rendered Res Judicata Inapplicable To a Void Foreclosure Judgment Where the Lender Lacked Authority to Foreclose. The decision below ignores and is contrary to this Court's unanimous decision in Jesinoski. Without a hearing, the District Court issued a Memorandum Opinion and Order on March 7, 2016, dismissing Mr. Jones's complaint because "...a change in case law 'almost never warrants an exception to the application of res judicata.'" The Fourth Circuit affirmed in a per curiam opinion, to circumvent the substantive issue--the important implication of the Jesinoski decision in a case where a lender lacked authority to foreclose and an invalid foreclosure judgment occurred. Without a hearing, the Fourth Circuit opined that Mr. Jones did not challenge the district court's determination that the doctrine of res judicata bars his claim and, therefore, abandoned his claim that the district court erred. That is

simply not the case. Mr. Jones's argument was that the doctrine of res judicata 12 does not apply here because the underlying foreclosure judgment was illegal and void. There was no waiver of any argument, just as there was no proper judgment that would preclude a court from considering the effect of Mr. Jones's rescission in this case. In Mr. Jones's brief to the Fourth Circuit, he argued: This court should review de novo a Fed. R. Civ. P. 12(b)(6) dismissal based on principles of res judicata. Brooks v. Arthur, 626 F.3d 194, 200 (4th Cir. 2010). The lower court erred in failing to declare that by operation of law on April 15, 2008, plaintiff's that debt and security instruments were extinguished. Plaintiff's debt and security instruments were extinguished by operation of law on April 15, 2008. The lower court in dismissing this matter on a motion to dismiss committed reversible error by failing to follow the unanimous Supreme Court holding in Jesinoski v. Countrywide Home Loans, Inc., 135 S. Ct. 790 (2015). Mr. Jones's arguments in the Fourth Circuit were not, as that court claimed, on the merits of his underlying claim. His arguments directly addressed why res judicata was not applicable to this case: There was no valid foreclosure judgment from which res judicata would arise. The lender's right to foreclose was extinguished by operation of law on April 15, 2008, when Mr. Jones rescinded the loan. No party could obtain any rights 13 or interest to enforce contracts that were made void after this date. Pursuant to the TILA statute, rescission is effective by operation of law unless a court of competent jurisdiction vacates it: When an obligor exercises his right to rescind under subsection (a) of this section, he is not liable for any finance or other charge, and any security interest given by the obligor, including any such interest arising by operation of law, becomes void upon such a rescission. 15 U.S.C. § 1635(b) (emphasis added). Rescission cannot be ignored, as was the case here by the lender and the lower court. Mailing of the rescission is the only act required of the borrower to cancel the loan contract and render the note and mortgage void by operation of law. 135 S. Ct. at 792 ("Section 1635(a) explains in unequivocal terms how the right to rescind is to be exercised: It provides that a borrower "shall have the right to rescind ... by notifying the creditor, in accordance with regulations of the Board, of his intention to do so" (emphasis added). The language leaves no doubt that rescission is

effected when the borrower notifies the creditor of his intention to rescind.").

Thus, the lender in this case had no standing to foreclose. A party cannot have standing based on being a purported holder of an instrument that is void. The TILA rescission statute and this Court's opinion in Jesinoski declare the note and mortgage void upon mailing of the rescission. It is the lender who then must challenge the rescission, lest it be in 14 violation of the three TILA rescission duties: Return of the canceled note, cancel lien and return money paid by the borrower. 15 U.S.C. § 1635(b) ("Within 20 days after receipt of a notice of rescission, the creditor shall return to the obligor any money or property given as earnest money, down payment, or otherwise, and shall take any action necessary or appropriate to reflect the termination of any security interest created under the transaction.") (emphasis added). Based on this Court's clarification of TILA rescissions' effect, the mortgage contracts became void as of April 15, 2008. Regardless of whether the lender fulfilled its legal requirement to return all funds paid on the loan and reflect the termination of the security interest, the loan no longer exists; the contracts are void and any acts by any party based on the loan or contracts are illegal.2 One of the first federal courts to address the implications of the Jesinoski found that the Supreme Court's decision mandated non-dismissal of a borrower's rescission claim, even though foreclosure had occurred. Paatalo v. JP Morgan Chase Bank, Case No. AA 6:15-cv-01420 (D. OR. Nov. 12, 2015). The court in Paatalo did not circumvent the borrower's claims by improperly applying res judicata to avoid them. The homeowners here and in Paatalo previously litigated in state court over alleged numerous violations of TILA and did not assert a TILA

2 Even in the case of a disputed rescission, this Court made clea r that there is no distinction between disputed and undisputed rescissions. 135 S. Ct. at 792 ("Section 1635(a) nowhere suggests a distinction between disputed and undisputed rescissions, much less that a lawsuit would be required for the latter."). 15 rescission claim at that time. The court dismissed the plaintiffs' objections in each case and the banks foreclosed in each case. Post-Jesinoski, each filed complaints seeking declaratory relief. The court in Paatalo correctly noted that: It is undisputed more than three years have passed since the consummation of plaintiff's 2006 loans and plaintiff's right to rescind, if not yet exercised, has

expired. Thus, the viability of plaintiff's claim that WaMu's security interest in his property was voided in March 2008 hinges on the effect of the notices of rescission to WaMu. Taking the allegations in the complaint as true, if those notices actually rescinded the loan, plaintiff's complaint will survive the motion to dismiss. If, on the other hand, notice of intent to exercise the conditional right of rescission did not actually effect the rescission, defendant is entitled to dismissal. The Supreme Court answered this question in Jesinoski. A unanimous Court declared "rescission is effected when the borrower notifies the creditor of his intention to rescind." Jesinoski, 135 S. Ct. at 7 92 (emphasis added). Thus, if – as plaintiff alleges - WaMu failed to provide the required disclosures and plaintiff delivered written notice of rescission in March 2008, the rescission was effected and the security interest in plaintiff's property voided at that time. Jesinoski, 135 S. Ct. at 791. The Court had to determine when rescission actually occurred in order to answer that question: The language of [the statute] leaves no doubt that rescission is effected when the borrower notifies the creditor of his intention to rescind. It follows that, so long as the borrower notifies within three years after the transaction is consummated, his rescission is timely. Thus, the Jesinoski holding rested on the Court's determination, as a matter of statutory interpretation, that written notice actually effects the rescission. The question here is what happens when the unwinding process is not completed and neither party files suit within the TILA statute of limitations.3 Jesinoski directs that the rescission and voiding of the security interest are effective as a matter of law as of the date of the notice. Paatalo v. JP Morgan Chase Bank, Case No. AA 6:15-cv-01420 (D. OR. Nov. 12, 2015). Res judicata was not a bar, in light of the Jesinoski decision. The federal court for the Eastern District of Michigan cited Paatalo's interpretation of Jesinoski with approval:

3 "After WaMu received plaintiff's notice of rescission, it had two options. It could have begun the unwinding process by returning plaintiff's down payment or earnest money and taking action to 'reflect the termination of [the] security interest,' pursuant to 15 U.S.C. § 1635(b). Those actions would, in turn, have triggered plaintiff's obligation to tender a payoff of the remaining loan

amount. See Lippner v. Deutsche Bank Nat'l Trust Co., 544 F. Supp. 2d 695, 702 (N.D. Ill. 2008) ("The issue of whether [the borrower] can satisfy her rescission obligations [does] not arise until [the lender] ha[s] completed [its] obligations pursuant to TILA.") In the alternative, WaMu could have filed a lawsuit to dispute plaintiff's right to rescind the loan. Plaintiff alleges WaMu did neither of those things." Paatalo v. JP Morgan Chase Bank, Case No. AA 6:15-cv-01420 (D. OR. Nov. 12, 2015) Upon notice of rescission, the burden shifts to the lender to "return to the obligor any money or property given as earnest money, down payment, or otherwise" and to "take any action necessary or appropriate to reflect the termination of any security interest created under the transaction." 15 U.S.C. § 1635(b). Once the lender fulfills those obligations, the borrower must tender the property to the lender or, if that would be impracticable or inequitable, must tender the property's "reasonable value." Id. And for the reasons noted in the Paatalo decision, the lender's failure to fulfill its obligations and failure to bring a lawsuit seeking to adjudge the rescission void would render the rescission effective as a matter of law as of the date of the notice, and would void the lender's security interest in the property. See Paatalo, 146 F. Supp. 3d at 1245. Johnson-El v. JP Morgan Chase Bank National Asso., Civil No. 15-13954 (E.D. Mich. 2016) (emphasis added). The court properly noted that, "[i]f the lender does not fulfill its § 1635(b) obligations, the rescission takes effect as of the date of notice and voids any security interest created by the transaction." Id. The Paatalo court acknowledged, but did not shrink from, the difficulty that would ensue if the foreclosure were found to be in error. Jesinoski made clear "[t]he loan and contracts were void as of the date of the rescission notice and must be cancelled as a matter of law." Paatalo v. JP Morgan Chase Bank, Case No. AA 6:15-cv-01420 (D. OR. Nov. 12, 2015 at p.18). 18 TILA provides "[w]hen an obligor exercises his right to rescind, he is not liable for any finance or other charge, and any security interest given by the obligor, including any interest arising by operation of law, becomes void upon such a rescission." 15 U.S.C. § 1635(b). Within 20 days after "receipt of notice of rescission, the lender must return to the obligor any money or property given as earnest money, down payment, or otherwise, and shall take any action necessary . . . to reflect the termination of any

security interest created under the transaction." Id. At that point, the borrower is required to "tender the property to the creditor[.]" Id. According to the court in Paatalo: "[a]s a practical consequence of [the Jesinoski] ruling, a lender now bears the burden of filing a lawsuit to contest the borrower's ability to rescind. Alexandra P. Everhart Sickler, And the Truth Shall Set You Free: Explaining Judicial Hostility to the Truth in Lending Act's Right to Rescind a Mortgage Loan, 12 Rutgers J.L. & Pub. Pol'y 463, 481 (Summer 2015)." Id. The foreclosure sale that occurred in this case was illegal and void. The lender lacked legal authority to foreclose. The foreclosure judgment was not a valid judgment. Res judicata is inapplicable to a void foreclosure judgment. Res Judicata derives immediately from the larger jurisprudential demand that properly entered judgments be regarded as final. 46 Am. Jur. 2d Judgments, § 397 (emphasis added). There was no properly entered judgment here. In addition, had Mr. Jones made the arguments he now makes at the time of the trustee's sale, they would have been foreclosed by Circuit precedent. 19 Paatalo v. JP Morgan Chase Bank, Case No. AA 6:15-cv-01420 (D. OR. Nov. 12, 2015 at p.18). See also Alvear-Velez v. Mukasey, 540 F.3d 672 (7th Cir. 2008). Indeed, courts consistently have refused to apply res judicata to preclude a second suit that is based on a claim that could not have been asserted in the first suit. See Mass. Sch. of Law at Andover, Inc. v. Am. Bar Ass'n, 142 F.3d 26, 38 (1st Cir. 1998) ("Of course, res judicata will not attach if the claim asserted in the second suit could not have been asserted in the first."); Computer Assoc. Int'l, Inc. v. Altai, Inc., 126 F.3d 365, 370 (2d Cir. 1997) ("Even where a second action arises from some of the same factual circumstances that gave rise to a prior action, res judicata is inapplicable if formal jurisdictional or statutory barriers precluded the plaintiff from asserting its claims in the first action."); Clark v. Bear Stearns & Co., 966 F.2d 1318, 1321 (9th Cir. 1992) ("If a claim could not have been asserted in prior litigation, no interests are served by precluding that claim in later litigation."); Kale v. Combined Ins. Co., 924 F.2d 1161, 1167 (1st Cir. 1991) ("In general, the rule requiring all claims arising from a single cause of action to be asserted in a single lawsuit will not apply if the plaintiff was unable to assert a particular claim or theory in the original case `because of

the limitations on the subject matter jurisdiction of the courts.'" (quoting Restatement (Second) of Judgments § 26(1)(c) (1982))); Browning v. Navarro, 887 F.2d 553, 558 (5th Cir. 1989) ("It is black-letter law that a claim is not barred by res judicata if it could not have been brought. If the court rendering judgment lacked subject-matter jurisdiction over a claim or if the procedural rules of the court made it impossible to raise a claim, then it is not precluded."); 18 Charles Alan Wright, Arthur R. 20 Miller & Edward H. Cooper, Federal Practice and Procedure § 4412, at 276 (2d ed. 2002) ("Limitations on the jurisdiction or the nature of the proceedings brought in a first court may justify relaxation of the general requirement that all parts of a single claim or cause of action be advanced."). Moreover, the foreclosure sale was illegal. Res judicata also is inapplicable because of the illegality of the foreclosure sale, where the lender lacked legal authority to sell. See Manigan v. Burson, 862 A.2d 1037, 1041 (Md. Ct. Spec. App. 2004) ("[o]n motion of any party filed at any time, the court may exercise revisory power and control over the judgment in case of fraud, mistake, or irregularity") (quoting Md. Rule 2-535(b)); Ed Jacobsen, Jr., Inc. v. Barrick, 252 Md. 507, 511, 250 A.2d 646, 648 (1969) ('"[T]he law is firmly established in Maryland that the final ratification of the sale of property in foreclosure is res judicata as to the validity of such sale, except in case of fraud or illegality....'"). Res judicata is not applicable in this case. The lender's debt and security instruments were extinguished by operation of law prior to the foreclosure sale. The foreclosure judgment was invalid, as was the sale, because of Mr. Jones's rescission. Both TILA and this Court's holding in Jesinoski are clear on this point. The lower court's opinion is in direct conflict.

CONCLUSION

this Court should summarily reverse this courts decision in the interest of the appellate and the public. The court should seek to find justice and truth by reviewing the fraudulant claims in this foreclosure proceedings and grant the petition for Ceroiati

Respectfully submitted,

Cheryl Jones

I respectfully Submit this Motion 12/14/2019