No. ______

In the

Supreme Court of the United States

VIVIAN L. RADER and STEVEN R. RADER,
Petitioners,
v.

CITIBANK, N.A., as Successor Trustee to U.S. Bank National Association as Successor to Wachovia Bank National Association as Trustee for the Certificate holders of Mastr Alternative Loan Trust 2004-1 Mortgage Pass through Certificates Series 2004-1, *et al.*,
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Is Colorado's system of non-judicial foreclosure (Co. Rev. Stat. §38-38-101 (2016) in conjunction with Rule 120) unconstitutional under the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution because it provides no pre-taking means for a homeowner to discover facts and/or present relevant evidence to determine if the party foreclosing on the property is the holder of the note?

CORPORATE DISCLOSURE STATEMENT

Petitioners Vivian and Steven Rader are individual persons and have no parent corporation, and no publicly held company owns 10% or more of its stock.

LIST OF PARTIES

The Petitioners in this case are two individuals who own real property within the State of Colorado. The respondents in this case are Citibank, N.A. who foreclosed on Petitioner's home as Successor in interest trustee to U.S. Bank National Association who in turn claims to be a successor to Wachovia Bank N.A. who claims to serve as trustee for the certificate holders of Master Alternative Loan Trust 2004-1 and Mortgage Pass though Certificates Series 2004-1.

LIST OF PROCEEDINGS IN OTHER COURTS

Rader, et. Al. v. Citibank, N.A., No. 1:14-cv-00784, U.S. District Court for the District of Colorado, Judgment Entered: October 15, 2014.

Rader et. Al. v. Citibank, N.A.; No. 1:14-cv-01472; United States Court of Appeals for the Tenth Circuit, Judgment Entered: October 13, 2015.

Rader et. Al v. Citibank, N.A.; No. 1:14-cv-02736, U.S. District Court for the District of Colorado, Judgment Entered: August 30, 2016.

Rader et. Al. v. Citibank, N.A.; No. 1:16-cv-01379, United States Court of Appeals for the Tenth Circuit, Judgment Entered: July 7, 2017.

Rader et. Al. v. Citibank, N.A.; No. 1:14-cv-00784, U.S. District Court for the District of Colorado, Judgment Entered: May 4, 2018.

Rader et. Al. v. Citibank, N.A.; No. 1:18-cv-01208, United States Court of Appeals for the Tenth Circuit, Judgment Entered: March 18, 2019. Order Denying Petition for Rehearing entered on April 15, 2019.

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW i

CORPORATE DISCLOSURE STATEMENT ii

LIST OF PARTIES. ii

LIST OF PROCEEDINGS IN OTHER COURTS . . . ii

TABLE OF AUTHORITIES vii

OPINIONS BELOW. 1

JURISDICTION. 1

CONSTITUTIONAL AMENDMENTS AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

A. Factual Background 2

B. The Securitization Process Explained 3

C. Mortgage Documentation and the Securitization Process 5

D. Fraudulent Assignments. 6

REASONS FOR GRANTING THE WRIT. 8

I. THE WRIT OF CERTIORARI SHOULD BE GRANTED TO ENSURE THAT COLORADO RULES OF CIVIL PROCEDURE, RULE 120 COMPORTS WITH PROCEDURAL DUE PROCESS TO ENSURE THAT AN ERRONEOUS TAKING OF ONE'S PROPERTY DOES NOT OCCUR 8

II. THERE IS NO RATIONAL BASIS FOR COLORADO TO PREVENT HOMEOWNERS FROM CONDUCTING DISCOVERY IN FORECLOSURE CASES OR FOR TREATING HOMEOWNER LITIGANTS DIFFERENTLY FROM ANY OTHER CLASS OF LITIGANTS . 16

CONCLUSION. 18

APPENDIX

Appendix A Order and Judgment in the United States Court of Appeals for the Tenth Circuit (March 18, 2019) . . . . App. 1

Appendix B Order Denying Plaintiff's Motion to Re-Open Case in the United States District Court for the District of Colorado (May 4, 2018) . . . . App. 9

Appendix C Order and Judgment in the United States Court of Appeals for the Tenth Circuit (October 13, 2015). . . . . App. 12

Appendix D Order Granting Defendants' Motion to Dismiss in the United States District Court for the District of Colorado (October 14, 2014). . . . . App. 17

Appendix E Final Judgment in the United States District Court for the District of Colorado (October 15, 2014). . . . . App. 28

Appendix F	Order Denying Petition for Rehearing in the United States Court of Appeals for the Tenth Circuit (April 15, 2019)	App. 30
Appendix G	U.S. Const. Amend. XIV, Sec. 1	App. 32
Appendix H	Colorado Rev. Stat. § 38-38-101	App. 33
Appendix I	Colorado Rule 120 (with changes tracked between 2016 and the 2018 amendment)	App. 45
Appendix J	Appendix to Rule 120	App. 66

TABLE OF AUTHORITIES

CASES

Boddie v. Connecticut,
401 U.S. 371 (1972). 17

Connecticut v. Doehr,
501 U.S. 1 (1991). 10

Department of Agriculture v. Moreno,
413 U.S. 528 (1973). 16

Douglas v. California,
372 U.S. 353 (1963). 16

Fuentes v. Shevin,
407 U.S. 67 (1972). 10, 13

Griffin v. Illinois,
351 U.S. 12 (1956). 16

Haitian Refugee Center v. Smith,
676 F.2d 1023 (5th Cir. 1982). 11

Harper v. State Board of Elections,
383 U.S. 663 (1966). 17

Matthews v. Eldridge,
424 U.S. 319 (1976). 10

M.L.B. v. S.L.J,
519 U.S. 102 (1996). 17

Morrissey v. Brewer,
408 U.S. 471 (1972). 10

Pater v. City of Casper,
646 F.3d 1290 (10th Cir. 2011). 9

Rader v. Citibank, N.A.,
616 F. App'x 383 (10th Cir. 2015) 3

United States v. James Daniel Good Real Property,
510 U.S. 43 (1993). 10

Yvanova v. New Century Mortgage,
62 Cal. 4th 919, 365 P. 3d 845, 199 Cal. Rptr.3d
66 (2016) 15

CONSTITUTION

U.S. Const. Amend XIV 1, 9

STATUTES AND RULES

28 U.S.C. § 1254(1). 1

Co. Rev. Stat. § 38-38-101 (2016) 1, 11, 12

Real Estate Settlement Procedures Act
("RESPA") 13

Truth In Lending Act ("TILA") 13

Colo. R. Civ. P. 120. . . . . *passim*

Colo. R. Civ. P. 120(c). 12

Colo. R. Civ. P. 120(d) 12

Fed. R. Civ. P. Rule 60(d)(3) 3

MISCELLANEOUS

Levitin & Twomey, *Mortgage Servicing,* 28 Yale J.
On Reg. 1 (2011) 5

Whitman, How Negotiability Has Fouled Up the Secondary Mortgage Market, and What to Do About It, 37 Pepp. L. Rev. 737 (2010) 6

Vivian and Steven Rader ("Rader") respectfully petition for a writ of certiorari to review the decisions of the United States Court of Appeals for the Tenth Circuit (En Banc) affirming district court Orders refusing to reopen a case with a judgment predicated on fraud resulting in the foreclosure of the Rader family home.

OPINIONS BELOW

The opinion of the court of appeals, dated March 18, 2019 and docketed as Case No. 18-1208 [Pet. App. A]. The district court's orders are unreported, and unpublished [Pet. App. B, D, E].

JURISDICTION

The decision of the Tenth Circuit Court of Appeals was entered on March 18, 2019. [Pet. App. A]. A petition for rehearing *en banc* was denied on April 15, 2019. [Pet. App. F]. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AMENDMENTS AND STATUTORY PROVISIONS INVOLVED

Relevant parts of Amendment XIV of the U.S. Constitution, Colorado Statute § 38-38-101(2016), Colorado Rule 120 (with changes tracked between 2016 and the 2018 Amendment), and the Appendix to Rule 120 handed to hearing defendants are reprinted in the accompanying Appendix. [Pet. App. G-J].

STATEMENT OF THE CASE

This Petition presents an issue of Constitutional interpretation of great importance to current and prospective homeowners, their creditors, and the national and international financial markets in which mortgages, deeds of trust, and promissory notes are freely securitized and traded.

A. Factual Background

In 2003, Petitioner Steven Rader borrowed $630,000 from Greenpoint Mortgage Funding, Inc. The promissory note was secured by a recorded deed of trust on the real property that Steven owned with his wife, Vivian Rader, in Pagosa Springs, Colorado. In 2008, the petitioners stopped making payments because of alleged billing errors, causing the loan to go into default. [Pet. App. D].

U.S. Bank, which held the note at that time, initiated foreclosure actions in Colorado State Court in 2012. U.S. Bank later moved to substitute Citibank as the petitioner in the foreclosure action, stating that it had transferred its interest in the note to Citibank. The state court granted this motion at the foreclosure hearing and ordered the sale of the Rader's property. *Id.*

Prior to the foreclosure sale, the petitioners sued Citibank in federal court seeking declaratory and injunctive relief to quiet title and to prevent foreclosure. They contended that Citibank was not entitled to enforce the note because U.S. Bank had not lawfully transferred the note to Citibank – a fact Citibank later admitted was true. *Id.* In granting Citibank's motion to dismiss, the district court held that Citibank was the possessor and holder of the promissory note because the note was endorsed in blank. [Pet. App. D]. Thus, the court reasoned, Citibank had standing to enforce the note and to pursue foreclosure. The Tenth Circuit affirmed the District Court's ruling in *Rader v. Citibank, N.A.*, 616 F. App'x 383, 384 (10th Cir. 2015).

In February 2018, the petitioners filed a motion under Fed. R. Civ. P. Rule 60(d)(3) to reopen the lawsuit and to vacate the judgment per their argument that Citibank perpetrated a fraud on the court: Citibank stated under oath that it was the holder of the note but later admitted was not true. Still, the motion was denied and the Tenth Circuit affirmed the ruling.

B. The Securitization Process Explained

Foreclosure laws throughout the United States build off of real property, contract, and commercial laws and vary from state to state. Mortgage debt, however, is securitized and traded on national (and, in some cases, international) exchanges and other markets.

Generally, securitization is the process by which illiquid financial assets are transformed into tradable commodities. It is one of the most significant innovations of the financial world. Having originated in 1970 in mortgage markets in the United States, securitization has already converted over $90 trillion worth of non-tradable assets into marketable securities. As a powerful tool of liquidity and risk management, securitization has had a tremendous impact on the welfare of the world economy. In mortgage markets in many countries, securitization provides a cheaper source of financing and thus promotes the demand for housing. In the banking sector, securitization is widely used for allocating capital more efficiently, transforming risk into a tradable security, and reducing the overall cost of capital.

Securitization has enabled emerging markets, including developing nations, to raise their sovereign ratings ceilings and thereby tap international capital markets for lower-rate financing. Securitization also involves debts of smaller amounts, such as consumer debt, which, individually, generate relatively little income (in comparison to the amount of income typically generated by institutional investors), but which can be grouped together to make up a more valuable pool.

Therefore, one of the main purposes of securitization is to create a marketable asset by combining several assets that, individually, are not as readily bought or sold; in other words, it makes a market for such assets. Assets that can be securitized include:

- Residential mortgage loans; this category includes the infamous "subprime mortgages," which are home loans issued to individuals with a low credit rating
- Commercial mortgage loans
- Bank loans to businesses
- Commercial debt
- Student loans
- Credit-card debt
- Automobile loans

While securitization brings with it certain financial benefits, the process creates potential pitfalls with respect to due process, which must be considered by courts tasked with safeguarding the integrity of the truth-finding process. Chief among these pitfalls are the systematic problems with the foreclosure process, illustrating the need for meaningful judicial review.

C. Mortgage Documentation and the Securitization Process

Traditionally, when a borrower took out a mortgage, a local bank lent the borrower the money and then retained the original note and mortgage. Levitin & Twomey, *Mortgage Servicing,* 28 Yale J. On Reg. 1, 11 (2011). The borrower then submitted monthly payments to that bank. *Id*. In the age of mortgage securitization, however, the process became much more complicated. After a lender originates the mortgage, it usually sells the loan to another large institution. Subsequent holders of the note might deal directly with the borrower, but more often they hire servicing companies to collect on the notes while individual mortgages are bundled into trusts and packaged into residential mortgage-backed securities. *See Id.* at 13-14.

During the assignment and re-assignment of mortgages and deeds of trust, banks often lose track of who actually holds the mortgage. It is for this reason that due process standards must be scrupulously observed and respected in all judicial forums.

Two documents are critical to a residential lending relationship, and therefore to foreclosure on a defaulting borrower's loan: the note and the mortgage (or deed of trust). It is well settled law that the mortgage or deed of trust must follow the note, even under Colorado law. Despite this basic requirement, however, "experience during the past several years has shown that, probably in countless cases, promissory notes were never delivered to secondary market investors or securitizers, and, in many cases, cannot presently be located at all." *See, Whitman, How Negotiability Has Fouled Up the Secondary Mortgage Market, and What to Do About It*, 37 Pepp. L. Rev. 737, 758 (2010). This is especially concerning since the Uniform Commercial Code is clear that the borrower's payment to a person not entitled to enforce the instrument does not satisfy the obligation — i.e., the borrower who pays the wrong party may still face foreclosure. Similarly, purchasers at a foreclosure sale need to know that the sale is conveying valid title to the real property. What further exacerbates matters is the ongoing systemic problem of fraudulent assignments, as addressed hereinbelow.

D. Fraudulent Assignments

Each time a mortgage changes hands in the securitization process, the bank must appoint an individual to execute an assignment of the mortgage. These assignments must be assigned by a corporate officer with proper authority and notarized. However, these procedural niceties were ignored as the assignment documents were discovered to be riddled with fraud, as discovered by various Attorneys General. For example, the Florida Attorney General, during its 2010 and 2011 investigation, discovered that banks and mortgage servicing companies routinely employ individuals who have no personal knowledge concerning the documents they were signing to execute thousands of mortgage assignments each day. Evidence discovered through these investigations shows "robosigners" like "Linda Green" whose "signature" appears on hundreds of thousands of mortgage documents, which list her as an officer of dozens of different banks and mortgage companies. *See Office of the Attorney General of Florida, Economics Crimes Div., Unfair, Deceptive and Unconscionable Acts in Foreclosure Cases* (App. 292). The report contains examples of five dramatically different signatures of "Linda Green" suggesting at least five people were signing documents under her name. *Id.* It also contains examples of forged signatures, stamped signatures, fraudulent notarizations, assignments dated "9/9/9999," documents with blank lines that have been witnessed and notarized, and assignments executed after the filing of a lis pendens. The distorted evidence is not only alarming but becomes an existential threat to the judicial process when the vast majority of foreclosures occur by default, whereby courts ignore these systematic issues in favor of quickly and efficiently clearing the docket, while paying scant, if any, attention to careful evaluation of the merits of each case. Colorado has exacerbated these problems by establishing procedural hurdles to undermine the ability of Defendants' ability to raise these concerns.

Such real world examples provide abundant evidence that clearly demonstrates how essential discovery is to due process and why due process in the foreclosure context cannot be said to exist without it. The pervasive fraud and disarray vividly illustrates the need for rigorous court procedures to ensure that judicial decisions are not contaminated by the systematic problems infecting the mortgage-financing and foreclosure processes, as well as to ensure the stability of the national and international markets in which the securities are traded are not infected by these highlighted problems.

REASONS FOR GRANTING THE WRIT

I. THE WRIT OF CERTIORARI SHOULD BE GRANTED TO ENSURE THAT COLORADO RULES OF CIVIL PROCEDURE, RULE 120 COMPORTS WITH PROCEDURAL DUE PROCESS TO ENSURE THAT AN ERRONEOUS TAKING OF ONE'S PROPERTY DOES NOT OCCUR

In Colorado, Rule 120 provides the procedural mechanism to foreclose on a home and to eventually evict the homeowner, all without discovery. [Pet. App. I]. As such, the methodology and procedural posture of foreclosure proceedings instituted pursuant to Rule 120 values efficiency over substantive fairness. Since discovery is not permitted in a Rule 120 hearing, borrowers who find themselves in this proceeding are deprived of meaningful evidentiary hearings to determine whether the foreclosure proceedings pass muster and thus comport with due process. If the homeowner does not file a formal opposition to a Motion for Order Authorizing Sale prior to the "hearing" date set forth in the Rule 120 Notice, the home may be taken without any further effort other than the Clerk issuing an Order Authorizing Sale.

If the homeowner timely files an opposition to the Rule 120 Motion and requests a hearing, a "probable cause" hearing is held without the availability of any discovery and with the presumption that the foreclosing party has the legal ability to institute the foreclosure (has "standing"). The borrower then has to attempt to challenge standing, and challenge whether the foreclosing party is the "PETE" (person entitled to enforce [the note]) without any discovery.[1] The facts here highlight the devastating consequences of such a procedure, where it was not discovered until years after the initiation of the foreclosure, and in fact at the eviction stage, that Respondent Citibank never had an enforceable interest in the Petitioner's Note or Deed of Trust as testified to under oath by Citibank's designated representative.

The Fourteenth Amendment's due process clause provides that no State may "deprive any person of life, liberty, or property, without due process of law." U.S. Const. Amend XIV, § 1. "Under the Due Process Clause's requirements, procedural due process ensures the state will not deprive a party of property without engaging fair procedures to reach a decision, while substantive due process ensures the state will not deprive a party of property for an arbitrary reason." *Pater v. City of Casper*, 646 F.3d 1290, 1293 (10th Cir. 2011) (internal quotation marks omitted). 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 [his] home" because loss of one's home is

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[1] The phrase "person entitled to enforce" is very commonly used in foreclosure litigation.

such a great deprivation. *United States v. James Daniel Good Real Property*, 510 U.S. 43, 5354 (1993). The core demand of procedural due process is that an individual facing deprivation of a protected [property] interest is entitled to fundamental fairness. This, unfortunately, is not the case for homeowners in Colorado.

The U.S. Supreme Court has consistently held that some form of hearing is required before an individual is finally deprived of a property interest by governmental action such that the "opportunity to be heard at a meaningful time and in a meaningful manner" is indispensable. *Matthews v. Eldridge*, 424 U.S. 319, 333 (1976). Indeed, due process requires procedures designed to "minimize substantively unfair or mistaken deprivations of property, a danger that is especially great when the State seizes goods simply upon the application of and for the benefit of a private party." *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972).

Such expedited procedures would be disturbing under any circumstances. More importantly, however, the due process implications of these diminished procedures must be assessed in the particular context in which they are being applied. *See, Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) ("[D]ue process is flexible and calls for such procedural protections as the particular situation demands.")

Resolving a foreclosure case requires more than merely "determining the existence of a debt or delinquent payment." *Connecticut v. Doehr*, 501 U.S. 1, 14 (1991). Technical and potentially complex issues arising from mortgage securitization often makes it difficult to determine the threshold question of whether a plaintiff has standing to prosecute a foreclosure case. For example, in situations like the present case, in which an affidavit or declaration purporting to document conveyance of a note is undercut by deposition testimony, courts must make credibility determinations or resolve conflicting factual allegations. Similarly, in many cases, homeowners point to evidence that the documents underlying a foreclosure are fraudulent, or that the signature purporting to verify the allegations in a complaint is faulty. This will require the court to examine the ongoing relationship between homeowner, lender, and servicer. The due process requirements need to take into account the procedural deficiencies of these post-foreclosure proceedings, such as the Rule 120 proceeding.

In analyzing the due process implications of accelerated and expedited trial proceedings, such as the Rule 120 proceedings, the closely analogous Fifth Circuit decision in *Haitian Refugee Center v. Smith,* 676 F.2d 1023 (5th Cir. 1982) is instructive wherein the court tackled high case volume leading to an emphasis on speed over reliability. Like the INS policies invalidated in *Haitian Refugee Center*, the massive Rule 120 hearing docket arising from foreclosures achieves its goal of radically increasing its case disposition rate by sharply limiting the homeowner's (borrower's) defenses, all at the expense of the citizen's exercise of his constitutional due process rights.

The Colorado foreclosure statute (Colorado Statute § 38-38-101(2016)) in conjunction with Colorado Rule of Civil Procedure 120, as currently constituted, permits a summary foreclosure process depriving homeowners of due process because discovery is not permitted and because a homeowner has no reasonable alternate means of discovering who is the true holder of their mortgage note.

Pursuant to Colorado Statute § 38-38-101, an alleged creditor only needs copies of a deed of trust and promissory note, and an unsworn Statement of Qualified Holder from the alleged creditor or the attorney, stating that the creditor was the real party in interest, or submission of a purported original note, and the court will, by statute, conclusively establish standing, holder, holder in due course, and therefore the real party in interest. The homeowner is allowed no discovery which, given the complexity of the mortgage securitization process, totally eliminates homeowners' ability to dispute a creditor's entitlement to foreclose. Colo. R. Civ. P. 120(c). An eviction typically follows as a proceeding to further enforce the Rule 120 Order and the aggrieved homeowners are evicted from their homes, before they can pursue a lawsuit in a court of competent jurisdiction. Cf., Colo. R. Civ. P. 120(d).

While it is true that the homeowners are permitted to raise a standing defense, this represents at best a pyric victory for a homeowner because, without discovery, the homeowners are effectively prevented from asserting any such defense: establishing basis is impossible given the totally opaque securitization process. There is rarely any transparency as to what entity holds a mortgage or promissory note at any point in time.[2] The complexity in determining whether the entity enforcing the security interest is a valid holder (i.e., of both the promissory note and the mortgage security interest) is highlighted by the present case, wherein it was not determined that Plaintiff was not the holder of the promissory note at the time of foreclosure, but rather years after litigation in this matter commenced. In fact, the fraudulent nature of the affidavit submitted to prove standing to foreclose would never have been discovered were it not for the honesty and admission of the Respondents.

In Colorado the exclusive remedy (and exclusive means for obtaining any discovery) is to file a post-taking collateral action, however, this schema is in direct conflict the Supreme Court's holding in *Fuentes v. Shevin*, 407 U.S. 67 (1972), that statutes allowing recovery provisions after a temporary, non-final deprivation of non-essential personal property, were nonetheless "deprivations" in terms of the 14th Amendment, and that before a state takes a person's property, a fair hearing must be held.

The facts here highlight the unconstitutional infirmities of Colorado Rule 120. In 2012, Citibank filed a summary foreclosure proceeding in Archuleta County, Colorado. Standing was conclusively

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[2] At this time, no states require the public recording of transfers of promissory notes secured by real property, and the two federal statutes that require disclosure of information about ownership of mortgage loans to consumers are the Real Estate Settlement Procedures Act ("RESPA") and the Truth in Lending Act ("TILA"), which provide no more information than is available in the affidavit provided under the Colorado Rules.

established based on an affidavit that Respondent Citibank was the holder. After a Rule 120 hearing, the court granted Citibank's request and a sale date was set. Although the hearing was technically contested, no discovery was permitted. Therefore, the petitioner homeowners had no reasonable basis (and no means for discovering a reasonable basis after diligent inquiry) to oppose Citibank's affirmation it was the holder of the note.

However, in a deposition in October 2017, the first chance Petitioners were permitted discovery, questioning by counsel led to Citibank's admission it was not the holder of the note at the time of the Rule 120 hearing and that Citibank's statement supporting the foreclosure was false. Unfortunately, this fraud was not uncovered (and not admitted to) until this case was on appeal in the 10th Circuit. Despite the fact that it is not disputed that the Citibank did not have standing to enforce the note at the time of the original foreclosure, the bank has been allowed to continue its argument that the judgment of the foreclosure court should stand. Due process requires Colorado to address the systematic procedural deficiencies of foreclosure proceedings, which presently allow for non-holders without standing to litigate to foreclose on a home based on an unsworn form.

The unconstitutional amendment and application of Colorado's foreclosure law has resulted in such matters being handled in a manner that routinely denies Colorado homeowners' due process rights. Foreclosure and eviction proceedings conducted pursuant to a foreclosure statute that eliminates defenses and deprives homeowners of their property without a fair and meaningful hearing does not fulfill the requirements of due process and fundamental fairness. These proceedings are reminiscent of Star Chamber proceedings that do nothing to achieve justice but represent an obnoxious assault on the quality of justice and fundamental fairness without examining the underlying merits of these cases.

In the present action, a party with absolutely no interest in a home promptly foreclosed over the objections of the homeowners and, to date, has been able to proceed with impunity. This case is a perfect example of the very real effects of the shortcomings of foreclosure procedure in Colorado and provides an exceptional foundation for the court to address the wider national issue while continuing its record of protecting the right to due process under the law.[3]

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[3] Consider, the California Supreme Court decision in *Yvanova v. New Century Mortgage*, 62 Cal. 4th 919, 926, 365 P. 3d 845, 199 Cal. Rptr.3d 66 (2016) recognizing the precise and inevitable borrower's nightmare and criticized banks for acting like "bounty hunters" in recognizing that for the eight years prior to the ruling in *Yvanova*, the majority of the judges in California took it upon themselves to determine that if a borrower owed money to someone, anyone could foreclose. Such a contention would lead to the result that anyone, even a stranger to the debt, could declare a default and order a trustee's sale, and the borrower would be left with no recourse because he owed the debt to someone, though not to the foreclosing entity.

II. THERE IS NO RATIONAL BASIS FOR COLORADO TO PREVENT HOMEOWNERS FROM CONDUCTING DISCOVERY IN FORECLOSURE CASES OR FOR TREATING HOMEOWNER LITIGANTS DIFFERENTLY FROM ANY OTHER CLASS OF LITIGANTS

Rule 120 violates the Equal Protection Clause of the 14th Amendment to the Constitution because persons alleged to have past-due loans secured by real property are treated differently than all other classes of litigants. Specifically, in enacting and implementing Rule 120, the state of Colorado interferes with any person's ability to defend themselves upon a mere allegation that the person is behind on any loan secured by real property. While the purpose of the Rule 120 proceeding may be legitimate — namely, efficiently foreclosing on borrowers who cannot afford their homes — Rule 120 may similarly be treated as a form of bias and prejudice against litigants who are merely alleged to be unable to afford owning property. The Supreme Court has invalidated such laws using a rational basis "with a bite" standard, and such treatment may even be subject to enhanced scrutiny under the Equal Protection Clause of the 14th Amendment.

The Supreme Court has an established record of invalidating laws that classify persons into arbitrary groups of litigants, depriving them of various rights solely on the basis of economic status. *Griffin v. Illinois*, 351 U.S. 12 (1956); *Douglas v. California*, 372 U.S. 353 (1963); *See also*, *Department of Agriculture v. Moreno*, 413 U.S. 528 (1973)(Attacking arbitrary government classifications and invalidating portions of the Food Stamp Act, which prohibited people who live in households with unrelated individuals from obtaining food stamps); *Harper v. State Board of Elections*, 383 U.S. 663 (1966)(Invalidating poll taxes); *Boddie v. Connecticut*, 401 U.S. 371 (1972)(invalidating record preparation fees for a parent seeking judicial review of a decision to terminate her parental rights); *M.L.B. v. S.L.J*, 519 U.S. 102 (1996).

Here the issue is even more concerning. The mere allegation made in a court document that a person is not current on their loan is sufficient to remove the Defendant's rights in Colorado's judicial process. There is simply no rational basis to abrogate the procedural discovery rights of litigants merely because they are alleged to be behind in a loan secured by real property.

It is beyond dispute that Rule 120 has one purpose: to swiftly foreclose and evict anyone who is alleged to no longer be able to afford to live in their property. Per such defendants' alleged economic condition, Colorado state courts immediately treat these "120 Track" defendants differently, not only undermining their right to defend themselves but also destroying public confidence in the integrity of the judicial system. This all but assures foreclosure and further perpetuates prejudice against those homeowners who are alleged to lack the financial means at the moment in time to afford a share of the American dream of home ownership.

To refuse to recognize the Equal Protection violations by the State of Colorado not only undermines public confidence in the judicial system but also creates further instability in the financial national and international markets.

Therefore, on the grounds set forth herein, Colorado Rule 120 must be invalidated under the Equal Protection Clause of the 14th Amendment.

CONCLUSION

For the reasons addressed above, the Petitioners request that the Court grant the petition for a Writ of Certiorari.

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