No. 20-112

IN THE

Supreme Court of the United States

SHERRY HERNANDEZ,
Petitioner

v.

PNMAC MORTGAGE OPPORTUNITY FUND INVESTORS, LLC; PENNYMAC LOAN SERVICES, LLC; and DOES 1-20, Inclusive,
Respondents

On Petition for a Writ of Certiorari to the California Court of tAppeal

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the California Superior Court and the Court of Appeal deprive Petitioner of her right to Due Process guaranteed by the Fourteenth Amendment, by Remanding to plead wrongful foreclosure based on fraudulent documents, and then violate the law of the case by reversing itself without notice?

2. Can PNMAC Mortgage Opportunity Fund Investors,LLC, as a purported member of the MERS System, direct its agent or employee to execute an instrument in the capacity of an Assistant Secretary of MERS assigning a property interest to itself, without giving consideration to the true beneficial owner of the property interest?

PARTIES TO THE PROCEEDING BELOW

The case caption contains the names of all parties who were parties in the California Court of Appeal, with the exception of MTC Financial, Inc. d.b.a. Trustee Corps, Defendant, who was dismissed in Case No. B258583 Opinion of the California Court of Appeal entered June 27, 2016.

Respondents PNMAC Mortgage Opportunity Fund Investors, LLC and PennyMac Loan Services, LLC are identified here as PMNAC and PennyMac, respectively.

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PETITION FOR WRIT OF CERTIORARI

Sherry Hernandez respectfully petitions this Court for a Writ of Certiorari to review two decisions of the California Court of Appeal together with the Judgment of the Superior Court of Los Angeles County, California.

OPINIONS BELOW

The Court of Appeal opinions are unpublished;, included in the Appendix (App) at App-1 and 3; and available at 2019 Cal. App. Unpub. LEXIS 7477, 2019 WL 5884370; and 2016 Cal. App. Unpub. LEXIS 5166. The judgment of the trial court is unpublished and included in the appendix at App-2.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257(a). On February 19, 2020 the California Supreme Court entered an order denying discretionary review. The time for filing this Petition was extended by this Court's March 19, 2020 order.

CONSTITUTIONAL PROVISION INVOLVED

This petition concerns the Due Process Clause of the Fourteenth Amendment, which states in relevant part, No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

INTRODUCTION

Petitioner was denied her right to due process guaranteed by the federal Constitution by the California Superior Court and the California Court of Appeal. The issues here were raised in the proceedings below and are in the record or Petitioner's pleadings. Two appellate opinions are at issue and will be cited here as the 2016 Opinion and 2019 Opinion; the judgment will be cited as the 2017 Judgment.

The trial court violated Petitioner's Due Process when ruling on Petitioner's third amended complaint: (1) the trial court, over Petitioner's objections, took judicial notice of documents the Court of Appeal had already ruled were not judicially noticeable;[1] 2) the trial court denied Petitioner Due

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[1] Beneficial ownership in the Note to Petitioner's home loan is the entire controversy at this point in the case. The Respondents' Request for Judicial Notice (RJN) included an allonge to Note with a limited power of attorney, and a declaration intended to authenticate those documents. The trial court granted this same RJN in its judgment of 2014, over Petitioner's objections. The issue was raised on appeal and denied:

> "The question of who the holder of a note is, however, is disputable (at least in this case), *and we will not assume the truth of facts asserted in the Garcia declaration to disregard the complaint's contrary allegations*. (*Yvanova*, supra, 62 Cal.4th at p. 924, fn. 1 [taking judicial notice of a recorded deed of trust and other documents but "not of disputed or disputable facts stated therein"].) Further, even if it were proper to take judicial notice of the truth of the facts to which Garcia attested in her declaration, *there is nothing in the declaration or on the second allonge to the Note itself—which is undated—that establishes when PNMAC came to be its holder.* Without a basis to conclude PNMAC was the holder at the time it instituted foreclosure proceedings, we are convinced there remains a reasonable possibility plaintiff can state a proper wrongful foreclosure claim." (2016 Op., 13) (emphasis added).

Process by reading the word "solely" into the instructions with remand of the 2016 Opinion, precluding any additional facts in support of the claim alleged, or adding new claims based on newly discovered evidence. (6CT1263).

The Court of Appeal violated Petitioner's right to due process: (1) when the authoring justice of the 2016 Opinion judicially noticed the documents rejected in 2016, reversed the ruling without notice or opportunity to be heard on the matter; (2) in so doing, the Court of Appeal accepted the material, disputed documents (2019 OP. p12) that Petitioner has been consistent in alleging are fraudulent; (3) affirming the judgment below violates the same Evidence Rule 452, Judicial Notice, as did the trial court.

The noticed documents, never subjected to the discovery process, permitted the Respondents to take Petitioner's home without just compensation. It occurring at the demurrer stage, a homeowner loses a home to a stranger to the note, then the courts deny the homeowner a meaningful opportunity to seek damages for the wrongful taking.

STATEMENT OF THE CASE

The nature of the protected interest at stake here is a property right: a cause of action for the unlawful taking of Petitioner's home. The underlying events began in 2011 with a wrongful nonjudicial foreclosure based on a void assignment of deed of trust (1CT51; 2CT266). Petitioner was *not* in default when the loan servicing rights transferred to PennyMac, as discussed below. (1CT48; 1CT226, 1CT232) PennyMac immediately claimed a significant past due, but never provided an accounting. When challenged,

Respondents declined to show PNMAC held an ownership interest in the Note at the relevant time. (2016 OP. p13). Respondents also did not provide Petitioner with an accounting of the past due balance, thus creating a system to accomplish the wrongful foreclosure by concealing the identity of owner of the claimed debt, a common practice facilitated with the MERS® System.

Petitioner has raised federal claim below, including wrongful foreclosure claim. "Several courts have recognized the existence of a valid cause of action for wrongful foreclosure where a party alleged not to be the true beneficiary instructs a trustee to file a Notice of Default and initiate nonjudicial foreclosure."[2] In her Petition for Review to the California Supreme Court, Petitioner re-urged her federal claim, "Allowing the Hernandezes to state such a cause of action [for wrongful foreclosure] would be consistent with the long line of authority which holds that the foreclosure is wrongful if initiated by a party which does not have the legal right to do so." (*Barrionuevo v. Chase Bank* (N.D. Cal. 2012) 885 F.Supp.2d 964, 972; *Glaski v. Bank of America* (2013) 219 Cal.App.4th 1079, 1094) (Petition for Review, January 26, 2016, p.10). Petitioner agrees.

Petitioner also raised the issue fraud. "The laws are very clear with regard to fraud: *8 U.S. Code § 1324c* - Penalties for document fraud."[3]. In the subsequent appeal Petitioner's

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[2] Citing *Barrionuevo v. Chase Bank,* 885 F.Supp.2d 964, 972 (N.D. Cal. 2012) (B258583 May 15, 2015 AOB, p. 34).

[3] The case was on appeal and the statement is in Appellant' Opening Brief, Case No. B258583, at p. 32), citing the statute verbatim.

Reply Brief cites to federal case law for the following claims: failure to allege tender [in a wrongful foreclosure] is not fatal where the sale is void;[4] promissory estoppel applies where a loan modification was in place;[5] third parties such as mortgagors could have standing to challenge the validity of an assignment;[6] tender is "not required where doing so would be inequitable;"[7] and "[b]anks are neither private attorneys general nor bounty hunters, armed with a roving commission to seek out defaulting homeowners and take away their homes in satisfaction of some other bank's deed of trust. *Miller v. Homecomings Financial, LLC* (S.D.Tex. 2012) 881 F. Supp. 2d 825, 832, (RB at p.29).

1. How financial institutions can foreclose on homes without holding the debt instruments.

Historically, real property interests were protected by a recordation system established hundreds of years ago. That system was circumvented when the financial institutions in this market created MERS in 1995 as an electronic database, designed to be a tracking system for the transfer of property rights among its membership institutions. The MERS® System sells memberships to institutions involved in

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[4] *Suntrust Mortg.,* No. C-11-2899 EMC, 2011 U.S. Dist. LEXIS 144442, 2011 WL 6294472, at 4 (N.D. Cal. 2011), found in Reply Brief (RB), January 21, 2020 p.29)

[5] *Alimena v. Vericrest Fin., Inc.*, 964 F. Supp. 2d 1200 (S.D. Cal. 2013) (RB, 40). Petitioner was days from qualifying for a permanent modification when the loan servicing transferred to PennyMac.

[6] *Culhane v. Aurora Loan Servs.*, (2011) 826 F. Supp. 2d 352 (RB, 23)

[7] *Lester v. J.P. Morgan Chase Bank, N.A.*, 926 F. Supp. 2d 1081, 1092 (N.D. Cal. 2013)(RB, 29)

mortgage transactions. MERS has its own set of rules and guidelines for its transfer procedures, known as the MERS Rules.[8] Failure to follow its guidelines, which supplanted the existing real property statutes, in every state, led to a federal investigation involving Federal Deposit Insurance Company (FDIC), the office of the Comptroller of the Currency (OCC), and the Federal Reserve Board (FRB), which resulted in the MERS Consent Order of April 11, 2011. The consent order was an agreement that MERSCORP, Inc. ("MERSCORP"), which was originally named "Mortgage Electronic Registration Systems, Inc.", the parent company and owner of the electronic registry database, and its bankruptcy remote, name only subsidiary then using the name "Mortgage Electronic Registration Systems, Inc." collectively, the MERS® System would require MERS® System members to follow its guidelines and establish a training program and oversight system.

The legal authority under which MERS® operates has never been defined. There is no uniform body of law. This diversity of outcomes and its attendant litigation led to two national settlements, The National Mortgage Settlement and the MERSCORP Consent Orders, binding the financial institutions and MERSCORP. (There are several National Mortgage Settlements and numerous other regulatory Consent Orders.) The Settlement and Consent Orders exposed the practice of massive document creation for the sole purpose of foreclosing on real property.

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[8] https://www.scribd.com/document/21417441/MERS-RULES-OF-MEMBERSHIP

This case exemplifies the practices that have harmed and continue to harm homeowners and should be taken up by the Court to return stability to property rights.

2. The process of taking a home wrongfully

In 2008 Petitioner's husband refinanced their family home loan through Your-Best-Rate-Financial, LLC with CitiMortgage, Inc. (CMI) as the loan servicer, in the amount of $752,500.00. On the same day, Best-Rate-Financial executed an allonge to Note transferring ownership to CMI. The monthly payments were timely and above the minimum amount due. CMI then pressed the Homeowners to apply for a temporary payment plan (TPP) which was granted for the purpose of a permanent reduction in the principal and interest rate terms.

Days before the final payment was due on the TPP, the loan servicing transferred to PennyMac. The first notice from PennyMac stated the loan was seriously past due by $24,902.60. Petitioner balked and requested an itemization of that balance, which was never produced. Petitioner then requested information on the beneficial owner of the Note. PennyMac identified PNMAC as the note holder, but gave varying dates of acquisition, which are included as exhibits with the Third Amended Complaint (TAC) and are in the record on appeal. (1CT237; 2CT241, 2CT346).

The PennyMac letters are submitted here to show PNMAC did not have a beneficial interest in the Note at the time the foreclosure proceedings commenced. The documents are offered as admissions of a party opponent and admissible pursuant to USCS Fed. Rules Evid. R. 801(d)(2)(D). *See*

Blackburn v. UPS, Inc. (3d Cir. 1999) 179 F.3d 81, 97 (statements made by agents or employees concerning matters within the scope of the agency or employment are admissible as admission by party opponent). These letters are contradictory within themselves and with the allonge to Note, which is undated, but nonetheless offered by the Respondents with their RJN, and granted over Petitioner's objections. (4CT1003; RT603)

- PennyMac letter dated March 17, 2011: PNMAC acquired Note February 25, 2010 (App-5)
- PennyMac letter dated April 5, 2011: PNMAC acquired Note February 25, 2011(App-6)
- PennyMac letter dated August 28, 2012: PNMAC acquired Note August 2, 2012 (App.II-7)

On January 18, 2012 the ADOT, purportedly from Your-Best-Rate-Financial, LLC (dissolved May 30, 2010; 1CT202) to PNMAC was recorded along with the Notice of Default, triggering the nonjudicial foreclosure process under California law. (*Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919, 927) (trustee starts nonjudicial foreclosure process by recording a notice of default and election to sell). By Respondents' own admission in their above mentioned letter of August 28, 2012, PNMAC did not have a beneficial interest in the Note in January 2012 and the trustee was without authority to execute the Notice of Default; therefore, PNMAC had no authority to substitute the trustee on July 10, 2012, the date the substitution was recorded, because the letter of August 28, 2012 purported they did not acquire an ownership interest until August 2, 2012.

Next, the bankruptcy court forced PNMAC to create the allonge to Note when co-borrower daughter sought bankruptcy protection in U.S. Bankruptcy Court, Central District of California, Los Angeles Division; Case No. 2:12-BK-43888-ER. PennyMac moved for lift of the automatic stay and Debtor objected on grounds of standing. PNMAC offered the 2008 note with deed of trust, and allonge from Best-Rate-Financial to CMI. Petitioner does not dispute these documents. The ADOT, the core of the claim for wrongful foreclosure, was also submitted; in its tentative ruling the bankruptcy court questioned PNMAC's party-in-interest standing and gave the Respondents time to provide additional evidence that PNMAC was entitled to enforce the terms of the Note. PennyMac submitted an amended declaration with a second allonge and a limited power of attorney—the three documents that migrated to this case through the RJN.

3. The Assignment of Deed of Trust is a self-assigned instrument, where the assignor is the agent of the assignee.

ADOT was executed by an admitted PennyMac employee and acknowledged by another admitted PennyMac employee.[9] The signatory executed the instrument as "Assistant Secretary of Mortgage Electronic Registration Systems," which purported to assign all beneficial interest under the original deed of trust to its principal, PNMAC.

On January 16, 2012 MTC Financial, Inc. d.b.a. Trustee Corps executed a Notice of Default and Intent to Foreclose,

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[9] The notary, during this time period was under investigation and later convicted of a crime of moral turpitude, felonious notary fraud, bringing her attestations into question.

although it was not the trustee of record. On January 18, 2012 PennyMac recorded the ADOT from MERS acting as nominee for Your Best Rate Financial, LLC to PNMAC Mortgage Opportunity Fund Investors, LLC, as well as the Notice of Default. On February 14, 2012, a disputed date, PNMAC executed a Substitution of Trustee appointing Trustee Corps as trustee of the ADOT. Substitution was acknowledged by a PennyMac employee (her notary's journal books for January 2012 had been submitted to the Secretary of State for investigation) whose notary license was revoked in the same time frame for failure to follow proper record keeping procedures. Her notary books were never surrendered as ordered by the State of California, barring validation of the disputed date.

On July 3, 2012 Trustee Corps executed a Notice of Trustee's Sale. On July 10, 2012 PennyMac recorded the Substitution of Trustee and a Notice of Trustee's Sale. The sale was noticed for August 6, 2012. By letter dated August 28, 2012, the third PennyMac letter referenced above, PennyMac purported that PNMAC acquired its ownership interest on August 2, 2012.

Subsequently, the foreclosure sale was held April 16, 2013, thirty days before the noticed sale date, without notice to Petitioner. PNMAC was the sole bidder. In November, 2014 Petitioner and her family were evicted from their home.

4. The wrongful foreclosure action begins during the bankruptcy proceeding

Prior to the bankruptcy court releasing the stay, on March 3, 2013 Petitioner filed suit in Superior Court of the

State of California, Los Angeles County Southwest District, Case No. YC068794. Defendants were PNMAC, PennyMac, and MTC Financial. Petitioner also filed a Lis Pendens with the county recorder's office at the same time (CT566).

On July 15, 2013, PennyMac filed an Unlawful Detainer (UD) action. Petitioner contested PNMAC's ownership interest in the Note and requested consolidation of the two actions with the case in Superior Court. The request was denied. On December 6, 2013, the day of trial, the UD court entered judgment in favor of PNMAC without allowing Petitioner to call witnesses or present evidence.

Meanwhile, on June 25, 2013 the Homeowner's original Complaint was amended and Respondents demurred. The demurrer was sustained with leave to amend. The minute ruling noted that Plaintiff's complaint sounded in fraud. (YC068794 ruling on submitted manners 8-19–2014) The Second Amended Complaint alleged causes of action for: violation of California Commercial Code; fraudulent assignment; quiet title; wrongful foreclosure; and cancellation of instruments. Respondents demurred, alleging homeowners lacked standing to challenge title taken by the nonjudicial foreclosure sale statutes. The demurrer was sustained without leave to amend.

Petitioner appealed to the California Court of Appeal, in Case No. B258583. The judgment was affirmed and MTC Financial was dismissed from the case. Petitioner petitioned the California Supreme Court for discretionary review. A few months later, in *Yvanova v. New Century Mortgage Corporation*, (2016) 62 Cal. 4th 919, the California Supreme Court ruled that a borrower *does* have standing to challenge assignments that are allegedly void, not merely voidable.

The case was remanded to the Court of Appeal for reconsideration in light of *Yvanova*. Rebriefing was requested and Respondents submitted their RJN with the disputed documents: the ADOT, second allonge to Note, a limited power of attorney, and a declaration attesting to their authenticity. The Court of Appeal denied the request on grounds that the documents could not establish that PNMAC held the Note at the relevant time. (See Fn. 1) The case was remanded with instructions to give Petitioner an opportunity to plead wrongful foreclosure based on void assignment.

Petitioner's TAC with its 51 exhibits alleged wrongful foreclosure based on a void assignment of deed of trust and provided the details in support thereof: the ADOT was a self-assignment, therefore void; the Note was not in default; PNMAC did not hold a beneficial interest in the Note; the trustee's sale was void in that title was not perfected before recording as well as the chain of title broken; Respondents committed fraud on the court with their fraudulent, fabricated documents; multiple claimants presented as being the holder of the note.

Throughout the proceedings Petitioner has not wavered from alleging the ADOT is void. Furthermore, the trial court violated the law of the case doctrine when it judicially noticed the disputed documents rejected by the Court of Appeal; the RJN violated the express instructions of the Court of Appeal and it was error to grant it; the break in the chain of title renders void the ADOT and trustee's deed of trust; Respondents committed fraud on the court.

Upon the final ruling in sustaining the demurrer and dismissing the TAC with prejudice, Petitioner moved to vacate the judgment. The motion includes exhibits from the ongoing discovery process, which indicate CMI has been

transferred the 2008 allonge to lender/investor other than PNMAC. The motion was pending since 2017, but orally denied on July 15, 2020 (the written order is pending).

On appeal, Petitioner raised the following issues: PNMAC does not hold a beneficial interest in the Note at the relevant time; the ADOT in part because the assignor is the agent of the assignee; the trial court was silent on allegations that PNMAC did not hold an ownership interest in the Note; the trial court was silent on exhibits showing Appellant was not in default when PennyMac acquired servicing rights; the trial court was silent on the issue of multiple concurrent claimants to the Note; the trial court violated the law of the case doctrine by granting the Respondents' RJN.

REASONS FOR GRANTING THE PETITION

A. Procedural Due Process Violations Can Occur Where A State Court Takes Judicial Notice of Material Disputed Facts, Violate the Law of the Case Doctrine, and Consider Fabricated Evidence In Making Its Decisions

1. The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.

A Fourteenth Amendment procedural due process claim has three elements: (1) a deprivation of a constitutionally-protected liberty or property interest; (2) state action; and (3) constitutionally-inadequate process. *Arrington v. Helms* (11th Cir. 2006) 438 F.3d 1336, 1337 (procedural due process rules

are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property); *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) (fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner).

The nature of the protected interest at stake here is a property right: a cause of action for the unlawful taking of petitioner's home. *Mathews v. Eldridge* (1976) 424 U.S. 319, 333 (right to be heard before being condemned to suffer grievous loss of any kind is a principle basic to our society); *Grayden v. Rhodes*, 345 F.3d 1225, 1232 (11th Cir. 2003) (the government must provide the requisite notice and opportunity for a hearing "at a meaningful time and in a meaningful manner;" (citing *Fuentes v. Shevin*, (1972) 407 U.S. 67, 80). (*Logan v. Zimmerman Brush Co.* (1982) 455 U.S. 422, 428 ("a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause"); citing *Mullane v. Cent. Hanover Bank & Trust Co.* (1950) 339 U.S. 306, 313; see also *Martinez v. Cal.* (1980) 444 U.S. 277, 281-282 (the Court noted that "[arguably]," a state tort claim is a "species of 'property' protected by the Due Process Clause.").

Failure of state officials to follow the law and maintain procedural safeguards is a denial of due process. The trial court violated the Rules of Evidence (C.R.Evid 452(h) and the law of the case doctrine. In affirming the judgment below, the Court of Appeal also violated Cal. Rule of Evid. 452 as well as the sound principles of adjudication upon which Petitioner is entitled to rely. Where a partial adjudication has occurred in an ongoing claim, and without notice, the

decision is reversed by the same authoring justice without comment, thus ending the claim; this rises to a violation of due process. *Armstrong v. Manzo* (1965) 380 U.S. 545, 550, 552 (1965) ("An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections") citing *Milliken v. Meyer*, 311 U.S. 457 (1940); *Grannis v. Ordean*, 311 U.S. 457 (1914); *Priest v. Board of Trustees of Town of Las Vegas*, 232 U.S. 604 (1914).

The state's trial court and Court of Appeal violated Petitioner's constitutional right to due process by failing to follow its own rules without notice to Petitioner. "[T]he action of the States to which the [14th] Amendment has reference includes action of state courts and state judicial officials." *Shelley v. Kraemer,* (1948) 334 U.S. 1, 18 (state court action is not immunized from 14th Amendment simply because the act is of the judicial branch of government); *O'Brien v. Bd. of Educ. of the City Sch. Dist. of N.Y.*, No. 76 Civ. 660 (PNL), 1982 U.S. Dist. LEXIS 13924, 17 (S.D.N.Y. July 1, 1982) (state law procedures were adequate; it was the failure of the state officials to follow them which denied plaintiffs due process).

The process that is due is not specified in the Constitution. "The Framers were content to leave the extent of governmental obligation . . . to the democratic process." DeShaney at 196. "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Matthews* at 335 (citing *Morrissey v. Brewer*, 408

U.S. 471, 481; *Jones v. State*, 170 Wn. 2d 338, 349-350 (2010) (Fourteenth Amendment grants the right to due process of law to a person facing a deprivation of his or her property by the State).

The test for balancing competing interests was set forth in Matthews. "[I]identification of the specific dictates of due process generally requires consideration of three distinct factors:

> (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 procedural 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."
>
> *Matthews* at 335.

Availing Petitioner of her right to due process meets the *Matthews* test:

(1) The private interest affected by the official action is the opportunity for Petitioner to recover her home or to seek damages for the unlawful taking of her property. When government action depriving a person of life, liberty, or property survives substantive due process scrutiny, it must still be implemented in a fair manner. This requirement has traditionally been referred to as "procedural" due process." *United States v. Salerno*, 481 U.S. 739, 741, 107 S. Ct. 2095,

2098 (1987). Here, the deprivation of procedural due process results in an absolute bar to pursue a claim for the unlawful taking of Petitioner's property. The procedures used were not absent or inadequate; they were misapplied.

(2) An erroneous deprivation of Petitioner's constitutional right to due process is significant. If Petitioner cannot bring this action, she cannot pursue the recovery of her home unlawfully taken from her.

(3) The burden on government here is nonexistent; it has a constitutional obligation to give adequate due process. Petitioner does not seek new procedures or modification of existing procedures. Petitioner seeks to have the government afford her the process she is due.

2. State action deprived petitioner of due process when the trial court and the Court of Appeal judicially noticed facts which were material but not undisputed

Petitioner was deprived of her property interest without adequate due process at the demurrer stage of the litigation. The trial court took judicial notice of documents containing facts that were material and assiduously disputed by Petitioner. The Court of Appeal affirmed the taking of judicial notice of material disputed facts.

Affirming the trial court's ruling was a reversal of authoring justice's prior 2016 Opinion, which deprived Petitioner of due process.

Judicial notice of disputed documents would be fundamentally unjust; Petitioner's cause of action be barred. Without the allonge, the ADOT is of no value to PNMAC

"because the deed of trust automatically transfers with the Note it secures—even without a separate assignment." (2016 Op., 12). Without the documents PNMAC did not have standing to foreclose. (*Id.* 13)

The 2016 Opinion also analyzed Petitioner's likelihood of succeeding on the merits that the ADOT is void:

> But our reading of the operative complaint along with the additional facts plaintiff now represents she can plead establishes a reasonable possibility plaintiff can go beyond mere allegations and present a specific wrongful foreclosure theory on which she intends to rely, namely, that the person who ostensibly executed the Assignment, Graves, in fact had no authority to act on MERS's behalf; or if he did, he did not in fact execute the Assignment because the notary, Castillo, who has since apparently been convicted (not just indicted) for misuse of her notary seal falsely verified his signature; and that just months before the Assignment was ostensibly executed *there were competing claimants on the beneficial interest in the Note. Id. at* 12 (emphasis added)

Appellant alleged competing claimants to the beneficial interest in the note, along with accompanying exhibits. The reconveyance was recorded by a Bank of America loan servicer (1CT42; 1CT126); the MERS website showed the investor as Bank of America; Petitioner received a letter from Bank of America dated September 11, 2011 stating that loan servicing had been transferred to Real Time Mortgage, (1CT63; 2CT548) CMI sent a letter, after the servicing

transferred to PennyMac, qualifying Petitioner for their TPP plan. (1CT51; 2CT294).

3. The California Court of Appeal's ruling in upholding the nonjudicial foreclosure, by surprise and without notice, and contrary to the law of the case, was unconstitutional because it violated the Homeowners' federal due process rights protecting their home.

The surprise ruling allowing judicial notice of the disputed documents, after the prior ruling denied judicial notice, was a violation of the Homeowners' constitutional guaranty against the taking of their home without due process of law.

A specific due process claim was not made in the proceedings below; the element of surprise in this context could not be anticipated and Petitioner's remedy of last resort is discretionary review with this Court. As *Pena* viewed it, "Likewise, federal law looks to the "substance" of claims made on direct appeal; if any of the claims can be said to "fairly present[]," expressly or by clear implication, a federal constitutional claim then exhaustion requirements have been satisfied as to those claims. *Pena v. Hartley* (10th Cir. 2014) 576 F. App'x 749, 6; (*see Picard v. Connor*, 404 U.S. 275, 278 (1971).

Taking judicial notice of documents not only highly disputed but on which the case pivots, is so highly prejudicial to Petitioner's claims as to constitute a clear violation of due process as guaranteed by the Fourteenth Amendment. As the

Pena court found, "In the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief."; *Id.;* see also *Ochoa v. Workman*, 669 F.3d 1130, 1144 (10th Cir. 2012).

4. The Law of the Case Doctrine

Declining to take judicial notice of the documents by applying a reasoned principle of law establishes the law of the case as to those documents. *Logan v. Matveevskii* (175 F. Supp. 3d 209, 229 [S.D.N.Y. 2016]) (summarizing the law of the case doctrine, "As a general matter, "[w]hen a court has ruled on an issue, that decision should generally be adhered to by that court in subsequent stages in the same case unless cogent and compelling reasons militate otherwise" (citing *Grimes v. Fremont Gen. Corp.,* 933 F. Supp. 2d 584, 608 (S.D.N.Y. 2013) (internal quotation marks omitted); see also *Musacchio v. United States,* 136 S. Ct. 709, 716 (2016) (when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case).

Musacchio and that line of cases, Petitioner was entitled to rely on the 2016 Opinion: the disputed documents did not substantiate Respondents' position, still in the same case; no new evidence favoring admissibility has been put forward; the issues remained the same as to these documents. Yet, without comment, the same authoring justice of both opinions, stated in 2019, "A second allonge to the Note

indicates "CitiMortgage, Inc. [b]y and through its Attorney in Fact PNMAC Capital Management, LLC" endorsed the note in blank, which would operate to assign its interest to whoever actually holds the Note." (2019 Op. at 3).

B. Financial Institutions Have Used The Mers® Database To Serve Themselves By Concealing Their Lack Of Ownership Interest As Members Self-Assign Notes And Debt Instruments To Themselves At The Expense Of The Homeowners

1. The Financial Institutions created MERS® to promote efficiency in the transfer of real property interests while reducing costs, theoretically, for the benefit of the Borrowers

Financial Institutions originally created MERS® as a database to track transfers of property rights between its members without recording those transfers in the official land records of the situs of the property. (*Yvanova* at 931 fn.7) (MERS was formed by a consortium of residential mortgage lenders and investors to streamline the transfer of mortgage loans and thereby facilitate their securitization).

In practice, MERS has taken on the powers of a separate entity on par with the lenders, servicers and trustees in foreclosure proceedings.

To many courts it remains unclear what MERS actually is. At the basic level, MERS is a Delaware corporation that provides mortgage loan related services. But even MERS' own contracts, attorneys, and spokespersons present a muddled account of MERS' identity in relationship to the

mortgage loans registered on its database. Interestingly, the company tends to argue it is an actual mortgagee or assignee when it brings foreclosure actions. However, when sued in cases alleging fraud, deceptive practices, or other statutory consumer protection claims associated with loans registered on its system, MERS argues it is merely an agent without exposure to liability. Compare *Landmark Nat. Bank v. Kesler*, No. 98,489, 2008 WL 4180346, at 1-2 (Kan. Ct. App., Sept. 12, 2008) ("What is MERS's interest? MERS claims that it holds the title to the second mortgage . . . . MERS objects to its characterization as an agent ... ") with *In re Escher*, 369 B.R. 862 (E.D. Pa. 2007) ("'MERS' as nominee leads the Court to conclude that it cannot be liable on any of the Plaintiffs [Truth in Lending or Pennsylvania consumer protection] claims. A nominee is understood to be an agent for another ... Therefore MERS will be dismissed from this action and no further reference to MERS will be made."); *Hartman v. Deutsche Bank Nat. Trust Co.*, No. 07-5407, 2008 WL 2996515, 2 (E.D.Pa. Aug. 1, 2008) (accepting MERS' argument that it could not be liable under the Truth in Lending Act because there was no colorable allegation "that ... [the plaintiff's] mortgage loan was assigned to MERS, or that MERS was ever the owner of that obligation."); *King v. Ocwen*, Civil Action No. 07-11359, 2008 WL 2063553 (E.D.Mich, April 14, 2008) (arguing that MERS could not be liable for Fair Debt Collection Practices Act violations because "HSBC was the mortgagee for the property. Ocwen is the servicer for the property. [And,] MERS acted solely as the nominee for the original mortgagee of the property.")

Ambiguity in the limits of authority of the MERS® system was noted in a case brought by a Pennsylvania county recorder for the same reasons as other county recorders, the detrimental effect on land titles in counties across the States:

> The creators of MERS did not lobby Congress for a uniform, electronic mortgage system that could have retained the public recording system's transparency and reduced costs. Rather, without judicially or statutorily recognized legal authority, they independently launched MERS as a private system, and created legal theories to legitimate the system post facto. *Montgomery County v. MERSCORP*, Inc. (E.D.Pa. Sep. 8, 2014, No. 11-CV-6968) 2014 U.S.Dist.LEXIS 129096; Amicus brief of Legal Services Center of Harvard Law School.

The conflict among the courts is exemplified here. The 2019 Opinion relies on *L'Amoreaux v. Wells Fargo Bank* to validate the ADOT, executed by a PennyMac employee. "[T]there is persuasive authority that MERS still would have the power to execute the Assignment in that circumstance. (See, e.g., *L'Amoreaux v. Wells Fargo Bank,* N.A. (5th Cir. 2014) 755 F.3d 748, 750 ["Although [the lender] had ceased to exist at the time of the assignment, the Deed of Trust explicitly contemplates MERS's continuing to act as nominee for the lender's] 'successors and assigns'"]; *Ghuman v. Wells Fargo Bank, N.A.* (E.D. Cal. 2013) 989 F.Supp.2d 994, 1002-1003.) This alleged theory of voidness therefore fails.") (2019 Op. p.13).

L'Amoreaux is not persuasive. The original lender transferred the Note to another bank *before* going out of business, thus MERS' authority continued as there was no gap between note holders. The *Deutsche* court rejected *L'Amoreaux* as inapplicable due to the intervening assignment. "MERS was no more acting on its own behalf than was the bank's own law firm." *Deutsche Bank Nat'l Trust Co. v. Burke*, 117 F. Supp. 3D 953, 961 (S.D.Tex. 2015) (*Rev., rendered on other grounds*) (bank offered no proof of a prior transaction by which it acquired its rights in the Note, therefore assignment was void). On appeal, Deutsche Bank presented evidence of an intervening transfer to the bankruptcy trustee; the ruling was reversed). In this case, PNMAC proffers an unenforceable contract for which it gave no consideration, or a document with a signatory not authorized to execute it. The TAC's "no authority argument is that, where Respondents admit PennyMac directed or ratified the employee's acts, PennyMac, as agent for PNMAC had no authority to direct or ratify any part of that transaction.

Unsubstantiated documents used to deprive homeowners of what may be their primary asset is widespread; litigation is but one aspect. Homeowners suffer at the base level of the problem, yet are the least able to defend against the financial institutions causing the harm.

2. The Financial Institutions who created MERS® allowed it to evolve into a shield for concealing the conduct described here, leaving a path of destruction in its wake as homeowners are wrongfully foreclosed and land title records across all States rendered unreliable

The inadequacies of the MERS® system as it currently operates is confronted by random litigation at the individual and local government level. County land title records are weakened as the local officials try to serve their community's needs, at times turning to the courts to halt the effects of MERS®, to no avail. A simple perusal through LexisNexis returns over a thousand lawsuits by County Recorders naming MERS as party, accusing MERS of creating a lack of transparency in the county land records. A sampling follows.

Multnomah County, Oregon, in 2012, commissioned a study of its records and promptly brought suit against MERS and its members for the practices undermining the accuracy and integrity of its document recording system. *Cty. of Multnomah v. Mortg. Elec. Registration Sys.*, No. 3:13-cv-00144-HZ, 2013 U.S. Dist. LEXIS 200604, at 1 (D. Or. Apr. 18, 2013) (settlement terms include prohibition against MERS named as a beneficiary in any recorded instruments).

In Essex County, Massachusetts the county recorder's office was described as "a crime scene," affecting thousands of homeowners who, "through no fault of their own have had their property rights trampled on and their chain of title compromised." The audit found 75 percent of all assignments examined to be invalid, and another ten percent were statutorily fraudulent.

The San Francisco County, California audit found evidence of a substantial number of trust deed assignments apparently executed by employees of the trustee or servicer rather than of the entity holding the beneficial interest.

Guilford County, North Carolina sought declaratory relief, unsuccessfully, from the naming of MERS in its title records which resulted in a fundamental lack of transparency. *Guilford County ex rel. Thigpen v. Lender Processing Servs.*, 2013 NCBC 30, 47, 2013 NCBC LEXIS 25, 27-28, 2013 WL 2387708 ("Plaintiff is not a party to those mortgage documents at issue nor may it be said to be a direct beneficiary of those documents.")

Nueces County, Texas brought an action alleging MERS's deceptive practices created confusion among property owners, damaged the integrity of the land records, and caused the loss of millions of dollars in revenue to the county. *Nueces Cty. v. MERSCORP Holdings, Inc*, No. 2:12-CV-00131, 2013 U.S. Dist. LEXIS 93424, at 1 (S.D. Tex. July 3, 2013) (holding, in part, MERS is not a lender, does not have the rights of a lender, note holder, or note owner to enforce a promissory note and seek a judgment against a debtor for the repayment of loans).

In Osceola County, Florida a forensic examination revealed a clear pattern of the MERS system being used to benefit the investors and lenders. Instruments were executed by "*employees of law firms, attorneys and employees of servicers and document manufacturing plants utilized the titles of 'Assistant Secretary of MERS' and 'Vice President of MERS,' when in fact, they were employees of the various*

entities conducting self-assignment of mortgages [ ] under the direction of their supervisors." (emphasis added)

In 2010 the U.S. Senate Committee on Banking, Housing and Urban Affairs held a hearing to review the severity of the housing crisis at that time. Testimony was received that the laws regarding MERS varied from state to state. *Id.* Counsel for the National Consumer Law Center testified: "[O]ut of the hundreds of homeowners that I represented, in virtually every case, I believe the homeowner was not in default when you looked at the surrounding facts." Id. 21-25.

The relevance of this minuscule sampling, is that rulings regarding the conduct of PNMAC, as well all others who robo-signed or backdated documents in order to fraudulently show standing to foreclose, conflict widely from state to state. This is an exceptionally important issue because there is every reason why avoiding or overlooking PNMAC's use of the MERS "honor system" to perpetrate title fraud, has resulted in oft-repeated errors and opposing rulings in the lower courts. Moreover, this is not a one-off kind of woe the Supreme Court must ignore. It is not that unusual to find homeowners demurred out even after they alleged they were entitled to an evidentiary hearing and prepared to prove they did not default on their mortgages or loan modifications.

In this case, the Respondents insist Petitioner must prove that, a) the signatory was not authorized to sign, or b) the signature on the assignment was not actually his and the notary fraudulently acknowledged it. The facts are, the signatory was an admitted PennyMac employee, and a purported MERS signing officer. His signature may or may

not be a forgery, and PennyMac may have authorized him to execute the ADOT or ratified it later; nevertheless, PennyMac, the agent of PNMAC, had no authority to direct its employees to assign a property interest to its principal.

3. The wave of self-assignments and document creation exists and must be contained

One classic case of self-assignment and document creation is *Szymoniak.* In *Szymoniak,* self-assignment for the purpose of immediate foreclosure led one victim to sue multiple lenders, servicers, and document production entities under the False Claims Act, *31 U.S.C. § 3729 et seq.* The United States joined the suit, and on February 4, 2012 entered into agreed judgments with five of the defendants, collectively known as the National Settlement Agreement (the Agreement).

The *Szymoniak* live pleading at the time of the Agreement alleges fraud based on self-assignments by MERS's signing officers, in detail and with specificity. Among the many examples was a named employee of mortgage servicer LPS and its designated MERS signing officer. She executed multiple assignments with seven different titles on behalf of seven different lenders, all in favor of Bank of America, who in turn used those assignments to foreclose on the borrowers (*Symoniak* SAC, p. 51-52). The same employee executed multiple assignments with twenty-five different titles on behalf of twenty-five different lenders for the benefit of Trustee Bank, who used those assignments to foreclose on borrowers. (Id. at 52-53).

Concurrent with the Agreement, the United States, with the individual States, reached a settlement with lenders and servicers regarding the MERS practices, known as the MERS Consent Order. MERS revised its Rules for Membership pursuant to the Consent Order of 2011. (6CT1240:3-9; AOB December 5, 2018, p.) Rule 3 states: "[I]n its Rules [for Members], MERS agrees to assign a mortgage that it holds as mortgagee of record '[u]pon request from the Member . . . where the Member is also the current promissory note-holder.' MERS Rule 3, § 3." *Culhane v. Aurora Loan Servs.*, (2011) 826 F. Supp 2d 352, 371. [underline added for emphasis] Oversight would be conducted by the Special Inspector General for Troubled Asset Relief Program. Periodic reports to Congress indicate a continuing failure of compliance. This is not unexpected; the Agreements has no enforcement mechanism, create no duty to the consumer, and specifically prohibit a private right of action.

The National Mortgage Settlement was drafted to help heal a broken financial system. Agreements were made within the settlement to help homeowners keep their homes. Taxpayer funds were pumped into the financial market to help with struggling Financial Institutions. Modifications were to be issued to correct the problems with homeowners losing their homes.

The Modification solution outlined in the National Mortgage Settlement provided a resolution for all parties, if the chain of title had been lost, a signed modification would correct the link and the homeowner should salvage their home, the investor could recover their investment and the Financial Institutions could correct their records. However,

many of the Financial Institution used the modification as 'foam on the runway' to foreclosure, instead.

Lending Institutions have continued with their bad practices. This is noted in several of the SIGTARP reports and outlined in the Appellant's Opening Brief: "SIGTARP Report of January 27, 2016, titled: "Mortgage Servicers Have Wrongfully Terminated Homeowners Out of the HAMP Program." CMI was among the major lenders found to be defaulting borrowers who were not in default. "SIGTARP's concerns over servicer misconduct contributing to homeowner defaults in HAMP have been borne out. Treasury's findings . . . show disturbing and what should be unacceptable results, as 6 of 7 of the mortgage servicers had wrongfully terminated homeowners who were in "good standing" out of HAMP." As noted already, CMI was subject to the National Mortgage Settlement Agreement of 2011 prohibiting it from doing exactly what was done in this case in 2011. Moreover, the National Settlement Agreement binds the signatories as well as their successors and assigns. PennyMac is the successor servicer and PNMAC purports to be the lender, therefore are subject to the agreement.

The conduct which led to the National Settlement Agreement and the MERS Consent Judgment is demonstrated in a bankruptcy case, *Sundquist v. Bank of Am., N.A.* (Bankr.E.D.Cal. 2017) 566 B.R. 563, 571 (vacated in part, as to distribution and terms of the punitive damages award of $45 million). The bank violated the automatic stay under 11 U.S.C.S. § 362(d) and, given its willful and intentional conduct, was found liable for extraordinary

punitive damages pursuant to § 362(k)(i); the court describes the conduct bank's as a nightmare.

> The mirage of promised mortgage modification lured the plaintiff debtors into a kafkaesque nightmare of stay-violating foreclosure and unlawful detainer, tardy foreclosure rescission kept secret for months, home looted while the debtors were dispossessed, emotional distress, lost income, apparent heart attack, suicide attempt, and post-traumatic stress disorder, for all of which Bank of America disclaims responsibility. Id.

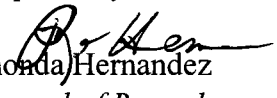
In this case, Petitioner and her family never anticipated the nightmare they are still living. Beginning with the refinancing, then the modification disaster that brought the Respondents into the situation, and the foreclosure based on fabricated documents, having no value in 2016 but later became the basis for affirming the judgment.

CONCLUSION

This case exemplifies the numerous cases where the homeowner was dispossessed by way of fabricated documents, the illusory modification plan, and a system that does not agree on what MERS is. Guidance from this Court would go far in assisting the courts across the country in ruling on the numerous issues concerning MERS' authority, thus creating stability for all the parties involved in the transaction.

The petition for a writ of certiorari should be granted to give Petitioner the opportunity to show why the decision of the Court of Appeal should be vacated and the case remanded to be tried on the merits.

Respectfully submitted,



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