NO. 20-_____

In the Supreme Court of the United States

SANGEETA BHARGAVA,

Petitioner,

v.

MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. (MERS),

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeal of the State of California, Sixth Appellate District

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Are forgery and robo-signing one and the same?

2. Is it a violation of due process and equal protection of the law to forbid a victim of forgery to use the judicial process in order to prevent his loss?

3. Is it a violation of due process and equal protection of law to require that a victim must wait until unlawful and fraudulent foreclosure, dispossession, and eviction are complete to seek redress in the Courts, particularly when this occurs under the auspices of and with the procedure of state law?

PARTIES TO THE PROCEEDINGS

Petitioner, and Plaintiff-Appellant Below

- Sangeeta Bhargava

Respondents and Defendants-Appellees Below

- Bank of America, N.A. (BANA)
- Mortgage Electronic Registration Systems, Inc. (MERS)

Appellant Below

- Raghav Bhargava

LIST OF PROCEEDINGS

Supreme Court of California

S261830

Sangeeta Bhargava, *Plaintiff and Appellant, v.* Mortgage Electronic Registration Systems, Inc., *Defendant and Respondent*

Date of Order: July 15, 2020

Court of Appeal of the State of California for the Sixth Appellate District

H044982

Sangeeta Bhargava, *Plaintiff and Appellant, v.* Mortgage Electronic Registration Systems, Inc., *Defendant and Respondent*

Date of Final Opinion: March 20, 2020

Date of Rehearing Denial: April 13, 2020

Superior Court of the State of California for the County of Santa Clara

Case No. 16cv295113

Sangeeta Bhargava, *Plaintiff ,* v. Bank of America, NA; Mortgage Electronic Registration Systems, Inc.; Quality Loan Service Corporation; Michelle I. Miller; and Does 1-20, *Defendants.*

Date of Final Judgment: May 15, 2017

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WHY THIS MATTER IS URGENT

The Covid19 Pandemic and the consequent shelter in place has ruined the livelihood of many Americans. Its continuation threatens millions of homeowners. This in turn has caused states to impose foreclosure moratoriums, in part because it puts in danger hundreds of millions of paychecks and the existence of small businesses.

Homeowners will need to know what their legal rights are when these moratoriums are lifted. This in turn directly calls into play the law regarding due process and equal protection. This knowledge is essential to any economic recovery, particularly when there is demonstrable misconduct, *i.e.*, forgery, on part of the foreclosing entities.

OPINIONS BELOW

The unpublished decision of the California Court of Appeal, Sixth Appellate District, affirming the judgment on appeal appears as App.3a. The order of the California Court of Appeal denying a petition for rehearing appears as App.2a. The order of the California Supreme Court denying a petition for review appears as App.1a.

JURISDICTION

The judgment of the California Court of Appeal, Sixth Appellate District, was entered on March 20, 2020. Sangeeta Bhargava timely filed a Petition for Review with the California Supreme Court on April 27, 2020. The California Supreme Court denied the petition for review on July 15, 2020.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., amend. V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, 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.

U.S. Const., amend. XIV, § 1

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are

citizens of the United States and of the State wherein they reside. 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.

STATEMENT OF THE CASE

A. Statement of Procedure

Date	Event
3/14/2017	Plaintiff Files Second Amended Complaint
5/18/2017	Judgment of Dismissal in favor of MERS
7/11/2017	Petitioner Files Notice of Appeal
3/20/2020	Sixth District Issues Opinion Affirming Trial Court
4/13/2020	Sixth District Summarily Denies Petition for Rehearing
7/15/2020	California Supreme Court Denies Petition for Review

B. Statement of Facts and Procedure

1. Prelitigation

On July 26, 2005, Petitioner obtained a loan from Countrywide Home Loans in the amount of $2,730,000 and secured the loan with a deed of trust on her home located at 11860 Francemont Avenue, Los Altos Hills, CA 94022.

Paragraph 22 of the deed of trust granted to the Petitioner the contractual right to challenge the legality of defendants to commence foreclosure upon her property. Paragraph 22 states in part that the plaintiff/borrower shall have "the right . . . to bring a court action to assert the non-existence of a default or any other defense of Borrower to acceleration and sale."

2. Forgery-Lack of Authority

The core of Petitioner's complaint is that Angelica Del Toro, Gary Nord, and Chawnte Wells, people who signed forged documents, never were officers of BANA nor MERS. Their execution of documents thereby made their signing of documents forgery, and *void ab initio*. This will be discussed in-depth, within.

Nord, Del Toro and Wells were regularly salaried employees of BANA. Ms. Del Toro, Mr. Nord, and Ms. Wells acknowledge that they never were legitimate officers of BANA nor MERS. Ms. Del Toro, Mr. Nord, and Ms. Wells were "Foreclosure Specialists" who falsely claimed to be an "Assistant Vice President" of BANA or "Assistant Secretary" of MERS.

These are prima facie forgeries under California Penal Code § 470.

3. Foreclosure Activity

Based on these fraudulent, and forged, assignments and substitutions of trustee, Quality Loan Service recorded an (invalid) notice of trustee sale on or about March 28, 2016. This Notice of Trustee Sale is Santa Clara County Recorder instrument 23256552. The notice of trustee sale held QUALITY out as being the duly appointed foreclosure trustee.

4. Procedural History of This Matter in the Trial Court

On May 12, 2016, Petitioner filed her complaint in the Santa Clara County Superior Court. The matter was assigned to the Honorable William Elfving.

On March 9, 2017, the Trial Court granted leave to Petitioner to file a second amended complaint. The SAC was the same as the FAC with the exception that Petitioner amended allegation, in ¶ 2 of the SAC, that the property of 11860 Francemont Avenue, Los Altos Hills, CA 94022 was owner occupied.

Petitioner submits that when the doctrine of standing claims that a homeowner will not be allowed to challenge forged documents concerning her home's title, that interpretation of the doctrine of standing is unconstitutional. This will be discussed within.

This is in essence the petitioner's writ petition: Should a homeowner have the right to sue to prevent the unlawful sale of her home prior to the actual auction, particularly when forgery is involved?

5. Motion for Judgment on the Pleadings

On April 25, 2017, the trial court granted MERS' motion for judgment on the pleadings. In granting

the motion for judgment on the pleadings for MERS, the trial court accurately defined "robo-signing" as "Robo-signing is the failure to conduct a review of the evidence substantiating a borrower's default prior to recording or filing certain documents, including an assignment of a deed of trust, which is what Plaintiff alleges occurred in the SAC. [Citation.]" [Emphasis added.]

The Trial Court, however, then conflated "robo-signing" with forgery or unauthorized signing, stating, "Robo-signing claims often take the form of a plaintiff alleging an employee of an entity without the proper authority signed an assignment. [Citation.]"

The Trial Court then went on to hold that as a result of its finding (*i.e.*, that forgery is the same as robo-signing), the Petitioner did not have standing to challenge the illegal conduct of Nord, Del Toro nor Wells.

A judgment of dismissal was entered on May 18, 2017 and in favor of MERS.

Petitioner timely filed her notice of appeal on July 11, 2017.

The Sixth District Court of Appeal filed its opinion affirming the trial court's dismissal of the action against MERS on March 20, 2020. It affirmed the judgment on the basis that Petitioner did not have standing to challenge the foreclosure of her own home prior to a foreclosure sale.

This gave an unusual reading to paragraph 22 of the deed of trust, and construing it in favor of the party that drafted the adhesive contract, *i.e.*, deed of trust.

The Court of Appeal affirmed the judgment even though the actions of Nord, Del Toro, and Wells, constituted forgery. The Court of Appeal decision conflated the concept stated in *Saterbak* (to be discussed within) that forgery and robo-signing were one and the same when it comes to mortgages. The Court of Appeal affirmed the *Saterbak* concept that a homeowner does not have the right to challenge forgery in mortgage documents prior to a foreclosure sale of her home. Petitioner challenges this.

The Sixth District thereafter summarily denied Petitioner's Petition for Rehearing, doing so on April 13, 2020.

Petitioner timely filed a Petition for Review with the California Supreme Court on April 27, 2020. The California Supreme Court denied Petitioner's Petition for Review on July 15, 2020.

REASONS FOR GRANTING THE PETITION

A. "STRICT COMPLIANCE" GOVERNS NON-JUDICIAL FORECLOSURE

The harshness of non-judicial foreclosure has long been recognized. "The exercise of the power of sale is a harsh method of foreclosing the rights of the grantor." [*Anderson v. Heart Federal Savings* (1989) 208 Cal.App.3d 202, 215, citing to *System Inv. Corporation v. Union Bank* (1971) 21 Cal.App.3d 137, 153.]

The statutory requirements are intended to protect the trustor from a wrongful or unfair loss of the property [*Moeller v. Lien* (1994) 25 Cal.App.4th 822,

830; accord, *Hicks v. E.T. Legg & Associates* (2001) 89 Cal.App.4th 496, 503; *Lo Nguyen v. Calhoun* (6th Dist. 2003) 105 Cal.App.4th 428, 440], and a valid foreclosure by the private power of sale requires strict compliance with the requirements of the statute. [Miller and Starr, 5 Cal. Real Est. § 13:222, § 13:224 (4th ed.); *Anderson v. Heart Federal Sav. & Loan Assn.*, 208 Cal. App. 3d 202, 211 (3d Dist. 1989), reh'g denied and opinion modified, (Mar. 28, 1989); *Miller v. Cote* (4th Dist. 1982) 127 Cal.App.3d 888, 894; *System Inv. Corp. v. Union Bank* (2d Dist. 1971) 21 Cal. App. 3d 137, 152-153; *Bisno v. Sax* (2d Dist. 1959) 175 Cal.App.2d 714, 720.] It has been a cornerstone of non-judicial foreclosure law that the statutory requirements, intending to protect the trustor from a wrongful or unfair loss of the property, must be complied with strictly. [Miller and Starr, 5 Cal. Real Est. § 13:222, § 13:224 (4th ed.)]

B. THE POWER OF SALE COMES FROM CONTRACT (*i.e.*, DEED OF TRUST)

The California Supreme Court addressed the issue as to whether the non-judicial foreclosure statutes constituted a taking by the banks under color of state law. The California Supreme Court found, and placed heavy weight on, the fact that there was no state taking since the power of sale of a deed of trust was premised on private contract between the borrower and the bank. "[T]he power of sale exercised by the trustee on behalf of the lender/creditor in nonjudicial foreclosures is a right authorized solely by the contract between the lender and trustor as embodied in the deed of trust." [*Garfinkle v. Superior Court (Wells Fargo Bank)* (1978) 21 Cal.3d 268, 277-278; *Ibid.* at 282.]

The California Supreme Court went further on to hold that the non-judicial foreclosure statutes were for the protection of the borrower/debtor to prevent the unbridled and unrestricted exercise of the power of sale in a deed of trust.

> As we stated earlier, these statutory regulations were enacted primarily for the benefit of the trustor and for the greatest part limit the creditors' otherwise unrestricted exercise of the contractual power of sale upon default by the trustor. For this reason, it cannot realistically be claimed that the state, by acting to protect the debtor, has thereby become the partner of the creditor so that the creditor's actions are converted into the actions of the state. (*See Burton v. Wilmington Pkg. Auth.* (1961) 365 U.S. 715, 17 81 S.Ct. 856, 6 L.Ed.2d 45; *Barrera v. Security Building & Investment Corporation* (5th Circuit 1975) 519 F.2d 1166.)

Garfinkle v. Superior Court (Wells Fargo Bank) (1978) 21 Cal.3d 268, 279.

In other words, the California Supreme Court found in 1978 that the paramount instrument was the contract, *i.e.*, deed of trust, between the borrower and the bank. It found that the non-judicial foreclosure laws were enacted to prevent runaway activity by the financial institutions.

C. WHAT IS ROBO-SIGNING?

In order to contrast robo-signing with forgery, one must examine what robo-signing is. The Trial

Court's order defined "robo-signing" using the definition provided by *Michael J. Weber Living Trust v. Wells Fargo Bank, N.A.*. The Trial Court defined, "Robo-signing is the failure to conduct a review of the evidence substantiating a borrower's default prior to recording or filing certain documents, including an assignment of a deed of trust, which is what Plaintiff alleges occurred in the SAC. (*See Michael J. Weber Living Trust v. Wells Fargo Bank, NA.* (N.D. Cal., Mar. 25, 2013, No. 13-CV-00542-JST) 2013 WL 1196959, at *4.)"

Petitioner did not allege robo-signing. Petitioner has alleged fraudulent and criminal conduct, *i.e.*, that forgery had occurred. Nonetheless, the Trial Court (and Court of Appeal) found the "allegations are mere legal conclusions and not in accordance with law."

The Trial Court (and Court of Appeal) summed up its position on the matter, writing, "Moreover, contrary to Plaintiffs assertions, it is well-settled that robo-signing renders an assignment only voidable, not void. (*See Pratap*, *supra*, 63 F.Supp.3d at p. 1109; *see also Mendoza v. JPMorgan Chase Bank, NA.* (2016) 6 Cal.App.5th 802, 819; *Javaheri v. JPMorgan Chase Bank, NA.* (C.D. Cal., Aug. 13, 2012, No. 2:10-CV-08185-ODW) 2012 WL 3426278, at *6.)" This is a plain error of law since a forged document, signed by those under authority that did not exist, is void, not voidable.

The Trial Court (and Court of Appeal) further incorrectly asserted, and concluded, that, "Even though Plaintiff repeatedly alleges that these documents are void due to robo-signing, . . . "

In summation, robo-signing occurs when a person with authority signs the document(s) without reviewing them for accuracy.

D. WHAT IS FORGERY?

The California Supreme Court has held that someone executing a document without lawful authority commits forgery. [*Century Bank v. St. Paul Fire & Marine Ins. Co.* (1971) 4 Cal.3d 319, 322.]

California Penal Code § 470 generally defines forgery. The definition of forgery is very broad. California Penal Code § 470(d) makes culpable of forgery, "Every person who, with the intent to defraud, falsely makes, alters, forges, or counterfeits, utters, publishes, passes or attempts or offers to pass, as true and genuine, any of the following items, knowing the same to be false, altered, forged, or counterfeited, . . . " This broad definition covers recorded assignments of the deed of trust and substitutions of trustee.

Consistent with California Penal Code § 470(d), BLACK'S LAW DICTIONARY defines forgery as, "3. Under the Model Penal Code, the act of fraudulently altering, authenticating, issuing, or transferring a writing without appropriate authorization." [*Forgery*, BLACK'S LAW DICTIONARY (11th ed. 2019).]

Petitioner's allegations of Nord's, DelToro's, and Wells' bad acts in reality constitute forgery.

E. FORGERY IS A POX ON SOCIETY

The pox of forgery is that it undermines the entire fabric of organized society. This was a danger recognized almost 30 years ago by the California Supreme Court. Over 30 years ago, the California Supreme Court held

that persons executing documents in the manner as Petitioner has alleged in her SAC (Second Amended Complaint) commits forgery. [*Century Bank v. St. Paul Fire & Marine Ins. Co.* (1971) 4 Cal.3d 319, 322.] The California Supreme Court further held that a civil action accrues even though forgery is defined by penal statutes. [*Ibid.*]

F. MORTGAGE FRAUD AND FORGERY HAVE BEEN ENDEMIC SINCE 2008

McDonnell Property Analytics conducted the first audit of a registry of deeds in the United States for the Honorable John L. O'Brien, Register of Deeds for Essex County (Southern District), Salem, Massachusetts. McDonnell's Report found, among other things, that only 16% of the recorded assignments of mortgage were valid. They found that 75% of assignments of mortgages were invalid, of which 27% were outright fraudulent. [McDonnell Analytics, https://www.mcdonnellanalytics.com/]

John O'Brien, The Register of Deeds of Southern Essex County, Salem, Massachusetts is one of the few county recorders who undertook due diligence to prevent the mortgage fraud and the recording of false documents.

In 2012, after conducting an investigation through McDonnell Property Analytics, Mr. O'Brien required that any documents submitted to his office and bearing the name of multiple fraudulent and forging document signers be submitted to his office under oath attesting that the documents were independently verified by affidavit. Mr. O'Brien found that many documents submitted were fraudulent. The Register also admonished that he was prepared to refer questionable documents to the Massachusetts Attorney General's Office

for review and possible criminal prosecution. As a result, almost all of the individuals whose names were on the lengthy list stopped submitting documents for recording.

G. FORGERY RENDERS ALL FORGED DOCUMENTS *VOID AB INITIO*

The consequences of Nord's, DelToro's, and Wells' forged and fraudulent signings are significant. Recently, the California Court of Appeal re-iterated that forgery makes a document void, not just voidable. [*WFG National Title Insurance Company v. Wells Fargo Bank, N.A., as Trustee* (June 2020) 51 Cal.App.5th 881, 890.]

A forged deed (or its assignment) is completely void and ineffective to transfer any title to the grantee. [*Firato v. Tuttle* (1957) 48 Cal.2d 136, 139 (deed of reconveyance); *Burns v. Ross* (1923) 190 Cal. 269, 275 (assignment of contract of sale); *Cutler v. Fitzgibbons* (1906) 148 Cal. 562, 563-564; *Vaca Val. & C.L.R. Co. v. Mansfield* (1890) 84 Cal. 560, 566 (blank deed completed without authority); *Handy v. Shiells* (1st Dist. 1987) 190 Cal.App.3d 512, 517; *Wutzke v. Bill Reid Painting Service, Inc.* (3d Dist. 1984) 151 Cal.App.3d 36, 43; *Forte v. Nolfi* (1st Dist. 1972) 25 Cal.App.3d 656, 674 (note and deed of trust); *Kessler v. Bridge* (App. Dep't Super. Ct. 1958) 161 Cal.App.2d Supp. 837, 841; *Shurger v. Demmel* (3d Dist. 1957) 148 Cal.App.2d 307, 309; *Crittenden v. McCloud* (1st Dist. 1951) 106 Cal.App.2d 42, 50; *Montgomery v. Bank of America Nat. Trust & Savings Ass'n* (2d Dist. 1948) 85 Cal.App.2d 559, 564; *Gioscio v. Lautenschlager* (3d Dist. 1937) 23 Cal.App.2d 616.]

A subsequent title derived through a forged instrument is completely unenforceable, even if recorded and held by a bona fide purchaser. [*Bryce v. O'Brien* (1936)

5 Cal.2d 615, 616 (deed signed by grantor in blank); *Trout v. Taylor* (1934) 220 Cal. 652, 656; *Cutler v. Fitzgibbons* (1906) 148 Cal. 562, 563-564; *Meley v. Collins* (1871) 41 Cal. 663, 676-679; *Wutzke v. Bill Reid Painting Service, Inc.* (3d Dist. 1984) 151 Cal.App. 3d 36, 43-44.]

The title or lien of a bona fide purchaser based on a forged instrument in the chain of title is unenforceable against the true owner of the property, even though the purchaser relied on the public record. [*Bryce v. O'Brien*, *supra*, at 616 (deed signed by grantor in blank); *Trout v. Taylor*, supra, at 656; *Cutler v. Fitzgibbons*, *supra* at 563-564; *Meley v. Collins*, *supra* at 676-679; *Wutzke v. Bill Reid Painting Service, Inc.*, *supra* at 43-44.]

H. THE DEED OF TRUST IS A CONTRACT WHICH GRANTS STANDING

One of the great misunderstandings in foreclosure law is that the power of sale—the power to sell a home at a trustee's sale—is somehow governed exclusively by California's foreclosure statues, California Civil Code § 2924 *et seq.*. [*See*, *e.g.*, *Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, 272.] The power of sale is created by contract, not by statute. [*Jenkins v. JPMorgan Chase Bank, N.A.* (2013) 216 Cal.App.4th 497, 511-512.] Thus, the "standing" issue at the heart of this case turns on the language of a contract, rather than the language of the foreclosure statutes. [*Glaski v. Bank of America* (2013) 218 Cal. App.4th 1079, 1094.] A loan servicer who acts as the agent for a party who is not a beneficiary lacks the power to foreclose. [*Glaski*, *supra*.]

Unlike the holding of *Saterbak* and its progeny, and the holding of the California Sixth District Court

of Appeal in this matter, the California Supreme Court envisioned in 1978, as a part of the non-judicial foreclosure statutes, that a homeowner had the right to challenge a default and enjoin a foreclosure sale prior to its occurrence.

> The United States Supreme Court, however, has made clear that 12 United States Code section 91 does not apply to a debtor's action seeking a preliminary injunction against a national bank to protect his real property from wrongful foreclosure. (*Third National Bank v. Impac Limited, Inc.* (1977) 432 U.S. 312, 97 S.Ct. 2307, 53 L.Ed.2d 368.) Therefore, this remedy coupled with an action for declaratory relief on the question of default is now available to protect against a trustee's sale of the trustor's property while the question of default is being litigated.

Garfinkle v. Superior Court (Wells Fargo Bank) (1978) 21 Cal.3d 268, footnote 5.

The United States Supreme Court case of *Third National Bank v. Impac Limited, Inc.* (1977) 432 U.S. 312 was even clearer in holding that a preforeclosure sale lawsuit was appropriate in order to ensure that one's home was not lost to an unlawful foreclosure.

In *Third National Bank*, the bank sought a writ from the United States Supreme Court under the National Bank Act of 1864, *i.e.*, that one cannot levy a bank's assets until there is a final judgment. The homeowner had obtained a preliminary injunction in state court (the Tennessee Supreme Court) prohibiting a foreclosure sale of his home pending litigation due to

fact he was not in default of the terms of the deed of trust.

The United States Supreme Court rejected the bank's contention that the Act likewise forbade a temporary injunction, and did so with very strong language. The United States Supreme Court held that the bank's interpretation of the National Bank Act would give the bank privileges not enjoyed by other lenders and would provide a license for banks to wreak havoc on defenseless homeowners. The Court wrote:

> That reading would give national banks engaged in the business of making loans secured by mortgages on real estate a privilege unavailable to competing lenders. No reason has been advanced for assuming that Congress intended such disparate treatment. We cannot believe that Congress intended to give national banks a license to inflict irreparable injury on others, free from the normal constraints of equitable relief.

Third Nat. Bank in Nashville v. Impac Ltd., Inc. (1977) 432 U.S. 312, 323 [97 S.Ct. 2307, 2314, 53 L.Ed.2d 368.

Third National Bank concluded that the proper action of a homeowner is in fact to bring a lawsuit prior to the foreclosure auction and obtain a declaratory judgment and an injunction. It concluded, "Fairly read, the statute [National Bank Act] merely prevents pre-judgment seizure of bank property by creditors of the bank. It does not apply to an action by a debtor seeking a preliminary injunction to protect its own property from wrongful foreclosure." [*Third Nat. Bank in Nashville v. Impac Ltd., Inc.* (1977) 432 U.S. 312, 323-324.]

Contrast this permission that preforeclosure lawsuits are proper with prohibitions of *Saterbak* and *Jenkins*, to be discussed below.

Petitioner is entitled, under the 5th and 14th amendments, to due process and equal protection on what constitutes forgery, and the consequence of forgery making documents void. She is entitled to have her paragraph 22 contract language to be fairly quoted and interpreted by the Courts. She is entitled to her day in court before being forced to suffer significant loss and harm.

One of the firmest rules of contract interpretation is that clear contract language must be applied as written. California Civil Code § 1638 provides that, "The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity." Applying that principle, the California Supreme Court has held the "mutual intention of the parties is to be inferred, if possible, solely from the written provisions of the contract. Where contractual language is clear and explicit, it governs." [*Powerine Oil Co. v. Superior Court* (2005) 37 Cal.4th 377, 396.]

California case law is clear that the language of the deed of trust is paramount in determining standing. The requirements contained within the deed of trust, "are conditions precedent to the acceleration of the debt or to foreclosure." [*Pfeifer v. Countrywide Home Loans, Inc.* (2012) 211 Cal.App.4th 1250, 1255.] The fact that the Plaintiffs could be in default, to someone, does not mean anything. "'The fact that a borrower is in arrears does not allow the trustee to circumvent the conditions precedent' to foreclosure [Citation]. Indeed, '[t]he conditions precedent in the deed of trust which govern the accrual of the [trustee's] latent power to

foreclose' do not become relevant until the borrower has 'first breached the deed of trust in some way.'(*Ibid.*) [Emphasis in Orginal.]" [*Pfeifer* at 1279.] "' . . . the deed of trust is a contract in which the parties have agreed that material breach of the note by nonpayment will not deprive the borrowers of their rights to enforce conditions precedent. [Citation.]"' [*Pfeifer* at 1279.]

This brings one to the question, what does the clear language in the Deed of Trust, ¶ 22, give to the borrower—Sangeeta Bhargava in this case?

The paragraph 22 language is that the Appellant shall have "the right . . . to bring a court action to assert the non-existence of a default or any other defense of Borrower to acceleration and sale." [Emphasis added.] The rules of statutory interpretation would appear to grant to the homeowner a right to challenge an assignment or other recorded document when forgery occurs. The clear language grants to the homeowner the right to make this challenge prior to a foreclosure sale of her home, not just after the sale. This interpretation also has to be answered with *Pfeifer*, *Glaski*, *Garfinkle*, *Third National Bank*, and *Yvanova* in mind.

If the documents executed by Nord, Del Toro, and Wells are forgeries, Petitioner has the right to challenge the foreclosure upon her home pursuant to the rights granted to her by Paragraph 22 of the deed of trust. [*Glaski v. Bank of America, N.A.* (2013) 218 Cal.App.4th 1079, 1094-1095.] *Yvanova* further specifically embraced the holding of *Glaski v. Bank of America* (2013) 218 Cal.App.4th 1079, which case held that a homeowner has the right to challenge a void assignment. [*Yvanova v. New Century Mortgage* (2016) 62 Cal.4th 919, 940.] Clearly such alleged forgeries constitute the legal "non-

existence of a default or other defense of Borrower to acceleration and sale."

I. WHETHER THE SIGNATURES ARE ONLY ROBO-SIGNING, PETITIONER IS ENTITLED TO HAVE THE TRIER OF FACT DETERMINE THIS, RATHER THAN IT BE ASSUMED

This same paragraph 22 of the deed of trust would grant Petitioner standing to challenge the assignments and substitutions even if they are arguably mere robo-signings, which are voidable. They are not yet ratified. While her lawsuit may be defeated in the context of robo-signing by a subsequent ratification, that ratification cannot to be assumed to occur, which is what all of the cases cited in support of the robo-signing proposition do assume. This lack of robo-signing ratification leaves Petitioner's claims viable, assuming that only robo-signing has occurred, until such a ratification is presented in an evidentiary and admissible manner. Until such ratification actually occurs, the chain of title remains subject to contamination. This issue of ratification is an issue to be decided by the trier of fact.

The interpretation, and consequences, of the meaning of paragraph 22 is a factual interpretation which should be left for a jury to decide.

J. *YVANOVA* GRANTS STANDING-POST FORECLOSURE SALE

The California Supreme Court, in *Yvanova v. New Century Mortgage* (2016) 62 Cal.4th 919 dramatically changed the standing landscape for non-judicial foreclosures. *Yvanova* overruled a number of cases long cited by the financial institutions as depriving standing.

Homeowners have standing to challenge a foreclosure sale resulting from an assignment per *Yvanova*. "A borrower therefore 'has standing to challenge the assignment of a mortgage on her home to the extent that such a challenge is necessary to contest a foreclosing entity's status qua mortgage.' [Citation.]" [*Yvanova v. New Century Mortgage* (2016) 62 Cal.4th 919, 935.] "As it relates to standing, we disagree with defendants' analysis of prejudice from an illegal foreclosure. A foreclosed-upon borrower clearly meets the general standard for standing to sue by showing an invasion of his or her legally protected interests [citation]—the borrower has lost ownership to the home in an allegedly illegal trustee's sale." [*Yvanova*, *supra*, 62 Cal.4th at p.937.]

The *Yvanova* Court went on to further explain, in overruling *Jenkins v. JP Morgan Chase Bank, N.A.* (2013) 216 Cal.App.4th 497, "When the plaintiff alleges a void assignment, however, the *Jenkins* court's concern with enforcement of a third party's interests is misplaced. Borrowers who challenge the foreclosing party's authority on the grounds of a void assignment 'are not attempting to enforce the terms of the instruments of assignment; to the contrary, they urge that the assignments are void ab initio.' [Citation.] [Emphasis in original.]" [*Yvanova v. New Century Mortgage* (2016) 62 Cal. 4th 919, 936.]

Yvanova held that a homeowner who challenges an assignment is "asserting her own interest in limiting foreclosure to her property to those with legal authority to order a foreclosure sale. This, then is not a situation in which standing to sue is lacking because its 'sole object . . . is to settle rights of third persons who are not parties.' [Citation.]" [*Ibid.*]

Yvanova goes on to emphasize the prejudice suffered by a homeowner in a non-judicial foreclosure, which is inherent in any unlawful foreclosure. The mere occurrence of the foreclosure is the harm and the prejudice. "A homeowner who has been foreclosed on by one with no right to do so has suffered an injurious invasion of his or her legal rights at the foreclosing entity's hands. No more is required for standing to sue. [Citation.]" [*Yvanova v. New Century Mortgage* (2016) 62 Cal.4th 919, 939.]

The *Yvanova* Court explained why such a standing rule is necessary. "The borrower owes money not to the world at large but to a particular person or institution, and only the person or institution entitled to payment may enforce the debt by foreclosing on the security." [*Yvanova v. New Century Mortgage* (2016) 62 Cal.4th 919, 938.]

"The logic of defendants' no-prejudice argument implies 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, after all, he or she owed the debt to someone, though not to the foreclosing entity. This would be an 'odd result' indeed. [Citation.] [Emphasis in Original.] "[*Ibid.*]

Yvanova poignantly pointed out, "As a district court observed in rejecting the no-prejudice argument, '[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.' (Citation.)" [*Yvanova v. New Century Mortg. Corp.* (2016) 62 Cal.4th 919, 938.]

The California Supreme Court went on to affirm the holding and reasoning of *Glaski v. Bank of America, N.A.* (2013) 218 Cal.App.4th 1079 finding that *Glaski* was both correct to hold that a plaintiff homeowner has standing "to claim that the foreclosing entity's purported authority to order a trustee's sale was based on a void assignment of the note and deed of trust." [*Ibid.*]

K. WHERE *YVANOVA* FELL SHORT

While *Yvanova* provided needed guidance concerning the impact of a void instrument upon a foreclosure sale, it fell short by specifically ruling that its decision pertained only to post-foreclosure sale situations. Only if a homeowner has been dispossessed of his home and is facing eviction does he then have standing to challenge the sale. [*Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919, 924, 934.] This is true even though the forgery was existent long before the foreclosure process started, *i.e.*, the recording of a notice of default.[1] A Notice of Default is damaging to the value of the home (it makes it a "distressed property") and to the credit-worthiness of the homeowner.

Yvanova limited its holding to only post-foreclosure sale circumstances:

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[1] The non-judicial foreclosure process is commenced with the recording and service of a notice of default. [Civ. Code § 2924 (a)(1).] Three months later, or thereafter, a notice of trustee sale is recorded and served. [California Civil Code § 2924(a)(1).] Twenty days later, or thereafter, the property can go to foreclosure auction. [Civ. Code § 2924(a)(2); Civ. Code § 2924(a)(3); Civ. Code § 2924(a)(4); Civ. Code § 2924f.] [*Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919, 927.] There is no judicial oversight in the nonjudicial foreclosure process.

> Our ruling in this case is a narrow one. We hold only that a borrower who has suffered a nonjudicial foreclosure does not lack standing to sue for wrongful foreclosure based on an allegedly void assignment merely because he or she was in default on the loan and was not a party to the challenged assignment. We do not hold or suggest that a borrower may attempt to preempt a threatened nonjudicial foreclosure by a suit questioning the foreclosing party's right to proceed.

Yvanova v. New Century Mortgage Corp. (2016) 62 Cal. 4th 919, 924.]

> We do not address the distinct question of whether, or under what circumstances, a borrower may bring an action for injunctive or declaratory relief to prevent a foreclosure sale from going forward.

Yvanova v. New Century Mortgage Corp. (2016) 62 Cal. 4th 919, 934.

This reluctance is in direct conflict with the California Supreme Court holding in *Garfinkle v. Superior Court*, supra, footnote 5:

> "Therefore, this remedy [preliminary injunction] coupled with an action for declaratory relief on the question of default is now available to protect against a trustee's sale of the trustor's property while the question of default is being litigated."

This reluctance is also in direct conflict with *Third National Bank*, supra, which was relied upon by *Garfinkle*.

Saterbak v. JPMorgan Chase Bank, N.A. (2016) 245 Cal.App.4th 808 immediately limited the holding of *Yvanova* to post-foreclosure sale situations, only. It held, "However, California courts do not allow such preemptive suits because they 'would result in the impermissible interjection of the courts into a nonjudicial scheme enacted by the California Legislature.'" [*Saterbak v. JPMorgan Chase Bank, N.A.* (2016) 245 Cal.App. 4th 808, 814-815.] *Saterbak* equated forgery with robo-signing, and thus making the troubled document only voidable, not void. [*Saterbak* at 814.] *Saterbak* set the stage for California Courts of Appeal to hold that *Yvanova* did not apply to pre-foreclosure situations, and thus a homeowner, being the victim of forgery, had no standing until the foreclosure sale occurred. The California Sixth District Court of Appeal has embraced this perspective.

Saterbak, *Jenkins*, and the California Sixth District Court of Appeal in this matter have discarded the constitutional protections affirmed by the United States Supreme Court in *Third National Bank* in 1977 and the California Supreme Court in *Garfinkle* in 1978.

Rather than the non-judicial foreclosure statutes providing protection to homeowners from runaway foreclosures, and the deed of trust providing contractual terms, *Saterbak*, *Jenkins*, and the Sixth District Court of Appeal have interpreted the deed of trust (prepared by financial institutions on a take-it-or-leave-it basis) most favorably for the banks and constricted the statutory non-judicial foreclosure protections so as to now become instruments of exile to homeowners facing non-judicial foreclosure.

L. *LUNDY V. SELENE* AFFIRMS THAT HOMEOWNERS HAVE STANDING TO CHALLENGE PRE-FORECLOSURE WRONGS

On March 17, 2016, the Honorable Jon Tigar of the Federal District Court did an in-depth analysis of the implications of *Yvanova* in the case of *Lundy v. Selene Finance, LP* (N.D. 2016) 2016 WL 1059423.

Lundy v. Selene was a pre-foreclosure situation. *Lundy v. Selene* observed, "But it is clear that *Yvanova's* prejudice analysis does not depend on the unfairness of requiring a plaintiff to be subjected to foreclosure proceedings by an entity that has no right to initiate those proceedings. For this reason, the Court concludes that *Yvanova's* reasoning applies just as strongly to pre-foreclosure plaintiffs. [Emphasis added.]" *Lundy* at *11.

The California Court of Appeal in the case of *Sciarratta v. U.S. Bank National Association* (2016) 247 Cal.App.4th 552, a post-foreclosure situation, was in exact accord with Judge Tigar's reasoning. Any other holding would leave a homeowner victim to dishonest persons or entities which chose to illegally foreclose on people's homes. *Sciarratta*, in supporting *Lundy* and quoting *Yvanova*, observed: "'Banks 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.'" [*Sciarratta v. U.S. Bank National Association* (2016) 24 Cal.App.4th 552, 556.]

The published *Saterbak* decision is in direct conflict with long-standing California law pertaining to forgery. Its logic is non-sensical in light of *Yvanova*. *Saterbak* is in direct conflict with *Sciarratta*, coming

from the same Fourth District and in direct conflict with the well-reasoned *Lundy*.

M. WHAT IS TO BE THE LAW, *LUNDY* OR *SATERBACK*?

There has never been a more appropriate time than now, nor greater urgency, for the Supreme Court to close the constitutional door left open in *Yvanova v. New Century Mortgage* (2016) 62 Cal.4th 919. *Yvanova* addressed only the question of standing post-foreclosure auction.

Is the logic of *Lundy v. Selene Finance, LP* (N.D. 2016) 2016 WL 1059423, *Sciarratta v. U.S. Bank National Association* (2016) 247 Cal.App.4th 552, *Glaski v. Bank of America, N.A.* (2013) 218 Cal.App.4th 1079, *Garfinkle v. Superior Court (Wells Fargo Bank)* (1978) 21 Cal.3d 268 and *Third Nat. Bank in Nashville v. Impac Ltd., Inc.* (1977) 432 U.S. 312 to be the law in California, and the United States? Is *Yvanova* constitutionally required to be carried over into pre-foreclosure lawsuits?

Or is the law as articulated by *Jenkins v. JP Morgan Chase Bank, N.A.* (2013) 216 Cal.App.4th 497 (overruled in part by *Yvanova*) and specifically *Saterbak v. JPMorgan Chase Bank* (2016) 245 Cal.App.4th 808, footnote 5, to govern pre-foreclosure litigation?

This question needs to be settled once and for all, for the entire United States. This petition presents to this Court a simple, succinct, and timely opportunity to do so.

N. PLEAS TO CLOSE THE DOOR LEFT OPEN

The question left open in *Yvanova* has created pleas for guidance from the Courts of Appeal and even

recently the Ninth Circuit. They acknowledge that *Yvanova* left the door open concerning pre-foreclosure lawsuits. The Ninth Circuit recognized that the California Supreme Court needs to speak out on the issue of pre-foreclosure lawsuits. Otherwise, each court will have to research what appears to be the current trend of the law at that time and thus come to its own and arguably conflicted conclusion.

"The California Supreme Court has not directly answered the question of whether preemptive, pre-foreclosure actions are viable under California law." [*Perez v. MERS* (9th Circuit 2020) 2020 WL 2312867, page 3.] "Because California's highest court has not yet addressed the question of whether preemptive, pre-foreclosure actions are viable under California law, we look to the relevant decisions of the California intermediate appellate courts. [Citation.]" [*Perez v. MERS* (9th Circuit 2020) 2020 WL 2312867, page 3.]

Shortly after the decision in *Yvanova* was issued, even the California Courts of Appeal were troubled by the incompleteness of that decision.

> Although *Yvanova* limited its holding to the post-sale context, its determination that borrowers have standing after a foreclosure sale to allege that the assignment of a deed of trust was void raises the distinct possibility that our state Supreme Court would conclude that borrowers have a sufficient injury, even if less severe, to confer standing to bring similar allegations before the sale.

Brown v. Deutsche Bank National Trust Co. (2016) 247 Cal.App.4th 275, 281.

The decisions forbidding pre-foreclosure lawsuits ignored the core concerns expressed by *Yvanova* throughout its opinion, and iterated by other cases such as *Lundy v. Selene Finance, LP* (N.D. 2016) 2016 WL 1059423. The case most frequently used to eviscerate *Yvanova* is *Saterbak v. JPMorgan Chase Bank, N.A.* (2016) 245 Cal.App.4th 808.

This United States Supreme Court needs to clarify, directly, whether the logic of *Lundy* or the logic of *Saterbak* is to be the law in California, and throughout the United States. The work of *Yvanova v. New Century Mortg. Corp.* (2016) 62 Cal.4th 919 needs to be completed.

The words of *Lundy v. Selene* are worth reconsidering. "But it is clear that *Yvanova's* prejudice analysis does not depend on the unfairness of requiring a plaintiff to be subjected to foreclosure proceedings by an entity that has no right to initiate those proceedings. For this reason, the Court concludes that *Yvanova*'s reasoning applies just as strongly to pre-foreclosure plaintiffs. [Emphasis added.]" *Lundy* at *11.

In her petition for review, Petitioner directly presented the question to the California Supreme Court. "This California Supreme Court needs to clarify, directly, whether the logic of *Lundy* or the logic of *Saterbak* is to be the law in California." [Page 13 of Petition for Review.] The California Supreme Court declined to grant hearing even though Constitutional Rights of Due Process and Equal Protection (and the California Constitution) were directly at issue.

O. *GOMES* IS MISUNDERSTOOD

Saterbak, *Jenkins*, and even *Perez* reflect a misapplication of the holding of *Gomes v. Countrywide Home Loans* (2011) 192 Cal.App.4th 1149. It is this same misunderstanding which MERS sought to perpetuate. MERS argues that Petitioner does not have standing prior to a foreclosure sale of her home.

In *Gomes*, the plaintiff challenged the right of MERS (Mortgage Electronic Registration Systems, Inc.) to initiate the foreclosure of his home. The plaintiff in *Gomes* did not allege any wrongdoing on the part of MERS, or even lack of corporate capacity. The plaintiff in *Gomes* simply wanted to test the right of MERS to foreclose.

Concerning the allegations of the plaintiff, the *Gomes* Court explained, "Gomes has not asserted any factual basis to suspect that MERS lacks authority to proceed with the foreclosure. He simply seeks the right to bring a lawsuit to find out whether MERS has such authority. [Emphasis in the original.]" [*Gomes v. Countrywide Home Loans* (2011) 192 Cal.App.4th 1149, 1156.]

It should be noted that Petitioner Sangeeta Bhargava has been quite specific in alleging wrongdoing in this matter. She has alleged, and claimed by supported discovery, that Nord, Del Toro, and Wells were never officers or employees as their signatures on recorded documents falsely claim. The limited evidence produced from discovery establishes this.

P. *JENKINS'* AND *SATERBAK'S* BLANKET PROHIBITION

Jenkins and then *Saterbak* took this limited holding of *Gomes* and amplified it into a blanket prohibition concerning any pre-foreclosure lawsuit. Those two cases effectively held that regardless of the circumstances, a homeowner does not have standing to challenge an unlawful foreclosure until the foreclosure sale has been completed and a trustee's deed upon sale existent, and the homeowner dispossessed.

In *Jenkins* and *Saterbak*, there was no discussion concerning contractual rights accorded by the deed of trust. In this case, the contractual provision is paragraph 22 of the deed of trust. There also was no discussion of due process nor equal protection of law.

Q. DUE PROCESS AND EQUAL PROTECTION

The Trial Court and then the Court of Appeal held that Petitioner did not have standing. They relied on the dicta of *Saterbak v. JPMorgan Chase Bank* (2016) 245 Cal.App.4th 808, 816, as well as *Jenkins*, to come to that conclusion, *i.e.*, the distinction of pre-foreclosure versus post-foreclosure. By the denial of standing, and then the dismissal of her complaint, Petitioner was deprived her of her day in Court to litigate the harm perpetrated by the Respondent. This deprivation is on its face a denial of due process of law and a denial of equal protection of law in *Jenkins* and *Saterbak*.

The Petitioner raised these constitutional issues, doing so on the very date that she filed her lawsuit, submitted in each and every pleading, attended each and every court appearance, and throughout the course of the appeal. Inherent in all these acts, *i.e.*, her seeking

redress from the court, is the concept of due process of law, and equal protection of law.

R. COLOR OF LAW

Petitioner does not argue that the California non-judicial foreclosure statutes are unconstitutional. She does not argue that the non-judicial foreclosure statutes permit a taking in violation of constitutional rights. Nor does Petitioner argue due process and equal protection violations by claiming that the non-judicial statutes clothed MERS (and Bank of America) with the authority of state law. The recourse, or safety net, of a homeowner about to be harmed is in seeking protection within the judicial system, before the harm befalls him. [*Garfinkle v. Superior Court (Wells Fargo Bank)* (1978) 21 Cal.3d 268, 277-278, 282 and footnote 5.; *See also Third Nat. Bank in Nashville v. Impac Ltd., Inc.* (1977) 432 U.S. 312, 323-324.]

It is the deprivation of standing, as prescribed by *Saterbak* and *Jenkins*, by the Trial Court and then the Court of Appeal, which have violated Petitioner's constitutional rights by denying to her access to the courts. The denial of her constitutional rights occurred both by 1. the legal prohibition of challenging pre-nonjudicial foreclosure sale, particularly when forgery has occurred, and 2. equating as a matter of fact and law the misconduct of forgery and robo-signing.

Absent consideration of the rights extended by the contractual deed of trust, the only authority which MERS and Bank of America (BANA) have to foreclose upon Petitioner's home comes from the procedural requirements of the non-judicial foreclosure statutes, *i.e.*, California Civil Code § 2924 *et seq.*. It was under the color of these procedural laws upon which MERS

and BANA operate that set the stage for the subsequent constitutional deprivations.

Property owners are expected to be vigilant in protecting their rights. It is non-sensical to believe, as a practical matter, that the equitable owner of a property does not have a right to correct errors in recordings on his property when those very errors would deprive the owner of the right to object to later enforcement. Such an interpretation is a deformation of the doctrine of standing.

It is undisputed that the Petitioner has standing to sue. She is the "real party in interest" with respect to the claims sued upon, *i.e.*, she has a right to relief. [California Code of Civil Procedure § 367; *see Dino v. Pelayo* (2006) 145 Cal.App.4th 347, 353; *Cloud v. Northrop Grumman Corp.* (1998) 67 Cal.App.4th 995, 1004.]

The question presented by this petition is whether Petitioner's redress can be brought prior to the trauma of a foreclosure sale, or does she have to wait until she has been dispossessed and she and her family are facing eviction.

In deciding this question, this Supreme Court is asked to reflect on the horror of a foreclosure upon one's home. When a borrower is faced with the loss of the family home, the emotional, psychological, and financial effects are overwhelming, and devastating. The emotional upheaval and feeling of failure always have serious mental health ramifications, and have frequently led to suicide. These concerns are very much present today, and for millions of Americans.

CONCLUSION

For the reasons set forth in this Petition for a Writ of Certiorari, Petitioner prays that this Court grant her certiorari as she has been denied due process and equal protection of the law, in violation of the Constitution of the United States. These violations occurred both by 1. the legal prohibition of challenging pre-nonjudicial foreclosure sale when forgery has occurred, and 2. equating as a matter of fact and law the misconduct of forgery and robo-signing.

Respectfully submitted,

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