

No. 20-7557
In the Supreme Court of the United States

Wendy Alison Nora,
Petitioner

v.

Office of Lawyer Regulation,
Respondent

**BRIEF OF AMICUS CURIAE
HOMEOWNERS LEGAL RIGHTS, INC.,
A FLORIDA NOT FOR PROFIT CORPORATION,
SUPPORTING PETITIONER**

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INTEREST OF AMICUS CURIAE¹

Amicus curiae Homeowners Legal Rights, Inc. (“HLR”), is a Florida not for profit corporation, operating under 26 U.S.C. § 501(c)(3). HLR advocates for homeowners throughout the 50 states and all

¹ Pursuant to Supreme Court Rule 37.6, counsel for amicus curiae states that the party whose Petition for Writ of Certiorari is supported by the Brief of Amicus Curiae, Homeowners Legal Rights, Inc. (“HLR”), a charitable corporation organized under the laws of the State of Florida and operating under 26 U.S.C. § 501(c)(3), assisted counsel for amicus curiae in the preparation of this brief in whole or in part at the direction of counsel for HLR. Petitioner serves on the Board of Directors of HLR. She was assisted by another member of HLR’s Board of Directors in preparing the draft of this brief for review and filing at the direction of counsel for HLR as amicus curiae. Counsel for the Amicus Curiae is appearing pro bono. The costs of preparation of brief are borne by members of HLR’s Board of Directors by self-assessment. No counsel for the Respondent duly admitted to practice before this Court has appeared, preventing counsel for the Amicus Curiae from obtaining consent to file the Brief. HLR construes the Respondent’s Waiver of Response submitted by counsel who is not a member of the bar of this Court which was docketed on April 15, 2021 as a waiver of opposition to the filing of HLR’s Brief as Amicus Curiae.

territories of the United States of America. HLR strives to educate the public about the unconstitutional taking of fundamental rights to life, liberty and property without due process of law, to advocate for the restoration and protection of due process rights of the people and to remind government officials of their duty to serve the interests of the people of the United States of America.

HLR is acutely aware of an all too frequent, nationwide phenomenon that lawyers representing homeowners have been subjected to disciplinary proceedings and sanctions in the course of their defense of homeowners. This phenomenon results in a chilling effect on the availability of attorneys to represent homeowners in need of professional representation of their property rights. HLR has substantial evidence that lawyers representing foreclosure claimants have frequently filed false documents in judicial foreclosure actions and in the public land records to make it appear that the foreclosure claimant has the right to the remedy of judicial or nonjudicial foreclosure.

In judicial foreclosure proceedings, false pleadings, based on fabricated evidence, authenticated as being true and correct are knowingly or recklessly filed when the pleadings and supporting documents are not true or correct. In nonjudicial foreclosure proceedings, false documents are filed in the public land records in order to give the appearance of the right to the nonjudicial

foreclosure remedy which are then relied on in court proceedings when homeowners seek judicial relief. The knowing or reckless filing of false documents by lawyers seeking foreclosure remedies occurs throughout the nation with impunity. Rather, it is the homeowners' lawyers who risk and suffer punishment for exposing the professional misconduct of opposing counsel.

Amicus appears to express HLR's concern that attorneys representing homeowners in defense of their homes are being punished for engaging in the lawful act of zealously representing their clients' rights. Homeowners' lawyers are being unconstitutionally punished for engaging in the lawful act of representing their clients' rights not to have their property interests taken on the basis of false pleadings and evidence.

HLR shares the same fundamental concern as that of the Petitioner which is that lawyers should not be punished for engaging in the lawful conduct of representing their clients' rights against false pleadings, based on false evidence and authenticated by falsely sworn affidavits or declarations in judicial proceedings and upon falsely acknowledged documents recorded in the public land records. The use of false pleadings based on false documents and evidence is colloquially referred to as "foreclosure

fraud."

Because, as in many states, the agents or employees of the Wisconsin Supreme Court investigate, initiate, prosecute and adjudicate lawyer discipline and the Wisconsin Supreme Court reviews lawyer discipline on appeal, this Court is the first possible forum which could review the discipline against Petitioner without reviewing its own actions and the actions of its agents and employees. Petitioner's situation exemplifies HLR's concern that lawyers are being punished for the lawful act zealously representing their clients. HLR has observed that the result of punishing lawyers for engaging in the lawful act of representing their clients is a chilling effect which reduces the availability of lawyers to represent homeowners in foreclosure cases.

This Court is urged to grant the Petition for the purpose of determining whether or not the strict scrutiny standard should be applied to allegations of misconduct of lawyers for assisting their clients in the exercise of their Petition Rights under the First Amendment to the *Constitution of the United States of America*. This Court, as the first neutral forum in which Petitioner appears involving these disciplinary proceedings and in which the issue of punishment of a lawyer for assisting her clients in the exercise of

their Petition Rights arises for the first time (to the best of the knowledge of counsel for HLR), should grant the Petition to determine that the strict scrutiny standard must be applied to allegations of misconduct in the course of representing clients in exercising their Petition Rights. It is expected that the application of the strict scrutiny standard to the exercise of Petition Rights will protect lawyers representing homeowners from selective prosecution for assisting homeowners in exercising their Petition Rights, will alleviate the chilling effect of selective discipline, and will make lawyers less hesitant to assist homeowners in protecting their property from fraudulent foreclosures.

INTRODUCTION AND SUMMARY OF ARGUMENT

HLR supports the Petitioner in seeking a Writ of Certiorari to the Supreme Court of Wisconsin because lawyers who represent homeowners, like the Petitioner, have been disciplined for seeking to expose foreclosure fraud. The discipline of lawyers for homeowners who have attempted to expose foreclosure fraud has had a chilling effect on other lawyers causing otherwise competent lawyers to be reluctant to represent homeowners in foreclosure cases.

It is well-established that the First Amendment to the *Constitution of the United States*, made applicable to the states through the Fourteenth

Amendment² , includes the right to petition the judiciary for redress of grievances. This Court has been careful to assure that lawyer disciplinary proceedings do not violate the First Amendment. See *In re Sawyer*, 360 U.S. 622, 640, 79 S.Ct. 1376, 3 L.Ed.2d 1473 (1959) and *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1038, 111 S.Ct. 2720, 115 L.Ed.2d 888 (1991). See also *NAACP v. Button*, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963) and *In re Edna Smith Primus, Appellant*, 436 U.S. 412, 98 S.Ct. 1893, 56 L.Ed.2d 417 (1978). It appears that this is the first case in which the issue clearly arises for review of whether or not a lawyer may be punished for assisting her clients in exercising their Petition Rights.

HLR has investigated the phenomenon of homeowners lawyers being disciplined and sanctioned for presenting arguments based on evidence of foreclosure fraud while allegations of misconduct of counsel for foreclosure claimants is ignored by the filing of false pleadings, supported by forged documents and falsely sworn declarations in judicial proceedings and the filing of forged documents in the public land records is ignored. In

² Pursuant to the incorporation doctrine, in *Gitlow v. New York*, 268 U.S. 652, 666 (1925), the First Amendment to the *Constitution of the United States* was held to be applicable to the States under the Fourteenth Amendment.

the Consent Judgments³ filed on April 11, 2012 in *United States of America, et al. v. Bank of America Corporation, et al.*, United States District Court for the District of Columbia, Case No. 12-cv-361 (commonly known as the National Mortgage Settlement), the extent of foreclosures being conducted on the basis of false documents was recognized by what were, in 2012, the five (5)

³ The Consent Judgments establishing the National Mortgage Settlement were most recently retrieved on April 25, 2021 and are retrievable at

http://www.nationalmortgagesettlement.com/files/Consent_Judgment_Ally-4-11-12.pdf

http://www.nationalmortgagesettlement.com/files/Consent_Judgment_BoA-4-11-12.pdf

http://www.nationalmortgagesettlement.com/files/Consent_Judgment_Citibank-4-11-12.pdf

http://www.nationalmortgagesettlement.com/files/Consent_Judgment_Chase-4-11-12.pdf

http://www.nationalmortgagesettlement.com/files/Consent_Judgment_WellsFargo-4-11-12.pdf

largest mortgage servicers.⁴ Notwithstanding the National Mortgage Settlement, the use of false pleadings, forged documents and perjured affidavits or declarations in judicial and nonjudicial foreclosure cases continues to this day.

ARGUMENT

I. Since the Financial Crisis of 2008 and thereafter, millions of homes have been foreclosed based on false documents.

Millions of homes were foreclosed between 2008 and the April, 2012 execution and filing of the National Mortgage Settlement. Notwithstanding the National Mortgage Settlement, foreclosures based on false documents continued. By 2016, over 10 million homes had been foreclosed. See the December 2, 2016 report of the Federal Reserve Bank of St. Louis, titled “The End Is in Sight for the U.S. Foreclosure Crisis” retrievable at

⁴ In April, 2012, the five (5) largest mortgage servicers and their parent companies were Ally Financial, Inc./GMAC Mortgage, LLC and other subsidiaries; Bank of America Corporation, Bank of America, N.A., BAC Home Loan Servicing, LP and various subsidiaries of Countrywide Bank, FSB acquired by Bank of America, N.A.; Citigroup, Inc./CitiBank, N.A. and CitiMortgage, Inc.; JPMorgan & Company/JPMorgan Chase Bank, N.A.; and Wells Fargo & Company/Wells Fargo Bank, N.A.

<https://www.stlouisfed.org/on-the-economy/2016/december/end-sight-us-foreclosure-crisis>, most recently retrieved on April 25, 2021.

Courts throughout the nation appear to have erroneously concluded that the National Mortgage Settlement terminated foreclosure fraud when, in reality, the very same conduct of filing false documents which was sanctioned in the National Mortgage Settlement continues unabated to this day. Public land records are littered with forged assignments of mortgages or deeds of trust throughout the nation,⁵ which were created for the purpose of making it appear that foreclosure claimants have standing to obtain the remedy of foreclosure. Moreover, during the Foreclosure Crisis of 2008-2016, millions of documents purporting to be the “original” promissory notes representing homeowners’ alleged indebtedness have been fabricated with forged endorsements-in-blank.⁶

While the courts of this nation have turned a blind eye to the ubiquitous use of fabricated

⁵ Assignments of mortgages or deeds of trust are forged when the party executing the document is not is not the party entitled to receive payments on the claimed indebtedness.

⁶ Endorsements-in-blank are forged when the party endorsing the instrument is not authorized to do so by the original payee.

documents and false pleadings in judicial actions by foreclosure claimants' attorneys, lawyers for homeowners are being disciplined for assisting their clients in the exercise of their Petition Rights in their efforts to expose foreclose fraud. By subjecting homeowners' lawyers to professional discipline for presenting evidence and arguments attempting to expose foreclosure fraud, disciplinary authorities are engaging in content-based regulation of Petition Rights which is subject to strict scrutiny on review.

II. Due to the mortgage and eviction moratoriums for the COVID-19 National Emergency, it is expected that a new wave of foreclosures will be forthcoming.

HLR knows, through its advocacy and educational efforts, that there are foreclosure cases or cases related to underlying judicial and nonjudicial foreclosures in most, if not all, states in ongoing cases resulting from the Foreclosure Crisis of 2008-2016⁷ ("Legacy Cases"). Nevertheless, it is widely anticipated that when the federal and state mandated COVID-19 mortgage moratoriums are lifted, there will be a new wave of foreclosures.

⁷ HLR adopts the 2008-2016 time frame for the Foreclosure Crisis based on the time frame identified by the Federal Reserve Bank of St. Louis in "The End Is in Sight for the U.S. Foreclosure Crisis", *supra*.

The Consumer Financial Protection Bureau (“CFPB”) has demonstrated awareness of the concern that a new wave of foreclosures will be forthcoming after the forbearance period ends, by proposing a new rule under Regulation X of the Real Estate Settlement Procedures Act as 12 CFR §1024.31, 12 CFR § 1024.39, and 12 CFR 1024.41. See Appendix A: the text of the proposed new rule excerpted from the CFPB’s April 2, 2021 Docket No. CFPB-2021-0006, retrievable at https://files.consumerfinance.gov/f/documents/cfpb_mortgage-servicing_nprm_2021-04.pdf, most recently retrieved on April 26, 2021. The purpose of the proposed new rule is

. . . to assist borrowers affected by the COVID-19 emergency. The Bureau is taking this action to help ensure that borrowers affected by the COVID-19 pandemic have an opportunity to be evaluated for loss mitigation before the initiation of foreclosure. The proposed amendments would establish a temporary COVID-19 emergency pre-foreclosure review period until **December 31, 2021**, for principal residences. (Emphasis added.)

The CFPB’s invitation for comments on the proposed new rule is extensive, so it is not expected that the proposed new rule will be adopted in the form it has been published for comment. The CFPB’s effort to manage the expected new wave of foreclosures expands the time frame for providing

modifications of outstanding claimed indebtedness and provides time for homes to be sold. The CFPB acknowledges that approximately 2.1 million primary residences are more than 90 days delinquent in payments. See CFPB notice of proposed new rule, Section II. Background at E. Heightened Risk of Foreclosure, page 24. *Id.*

The extent to which false pleadings supported by forged documents will once again be used in the new wave of foreclosures is undetermined because the false documents in the Legacy Cases were fabricated only when foreclosure was to be initiated. But the extent to which the securitization process which led to the fabrication of documents continues to this day or forbearance has been provided to homeowners whose with documents which pre-date the Foreclosure Crisis of 2008-2016, it is likely that foreclosure fraud issues will arise in 2022. If so, the content of the issues which may be raised in defense of homeowners' property rights in future foreclosure efforts will occur again. In any event, there are numerous Legacy Cases still ongoing throughout the nation.

III. Homeowners are entitled to zealous representation in defense of their property rights under the First Amendment to the *Constitution of the United States*.

California Motor Transport v. Trucking Unlimited, 404 U.S. 508, 510, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972) stands for the proposition that the First Amendment to the *Constitution of the United States* guarantees the right to petition the judiciary for redress of grievances. In *Bill Johnson's Restaurants v. National Labor Relations Board*, 461 U.S. 731, 741, 103 S.Ct. 2161, 76 L.Ed.2d 277 (1983), this Court held:

In *California Motor Transport Co. v. Trucking Unlimited*, 404 U. S. 508, 404 U. S. 510 (1972), we recognized that the right of access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances.

Foreclosure litigation is complex and involves commercial law, real estate law, civil motion practice and implicates criminal law. Homeowners need zealous advocacy to defend their property rights which is being chilled by disciplining their lawyers for the content of their defenses as occurred in Petitioner's case.

When homeowners' are unable to obtain counsel to assist them in the exercise of their Petition Rights, they are seriously disadvantaged because

they are in litigation against corporations which must appear by attorneys. Where First Amendment Petition Rights are implicated in state government action, the standard for review should be strict scrutiny. See *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226, 192 L.Ed.2d 236 (2015) which holds:

The First Amendment, applicable to the States through the Fourteenth Amendment, prohibits the enactment of laws “abridging the freedom of speech.” U.S. Const., Amdt. 1. Under that Clause, a government, including a municipal government vested with state authority, “has no power to restrict expression because of its message, its ideas, its subject matter, or its content.” *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972). Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests. *R.A.V. v. St. Paul*, 505 U.S. 377, 395, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115, 118, 112 S.Ct. 501, 116 L.Ed.2d 476 (1991).

No compelling government interest is served by regulating the content of homeowners’ defenses against foreclosures through the threat of disciplining lawyers for attempting to expose foreclosure fraud. To the contrary, the content-based discrimination by imposing discipline and threatening to impose discipline on homeowners’

lawyers for assisting them in the exercise of their Petition Rights violates homeowners' fundamental rights and causes them irreparable harm. In *Elrod v. Burns*, 427 U.S. 347, 374, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976), this Court held:

The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury. See *New York Times Co. v. United States*, 403 U.S. 713, 91 S.Ct. 2140, 29 L.Ed.2d 822 (1971).

Because of the chilling effect of state lawyer disciplinary authorities' punishment of homeowners' lawyers based on the content of the issues raised in judicial proceedings, HLR urges this Court to grant the Petition for Writ of Certiorari to protect the Petition Rights and Due Process Rights of lawyers seeking to litigate issues of foreclosure fraud.

IV. Punishing homeowners' lawyers for presenting evidence and argument that false documents are being used in foreclosure cases is a due process violation of the most basic sort.

In *Bordenkircher v. Haynes*, 434 U.S. 357, 363, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978) the United States Supreme Court held, "To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort . . . and for an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is 'patently unconstitutional.'"

HLR respectfully contends that the threat of professional discipline against lawyers representing them in defense of their property rights in judicial proceedings ("Petition Rights") is patently unconstitutional. The Petition for Writ of Certiorari should be granted so that this Court can make it clear that content-based regulation of the subjects to be addressed in judicial proceedings must be reviewed for "compelling state interest" under the strict scrutiny standard to protect homeowners' lawyers from discipline for the lawful act of representing their rights and interests.

CONCLUSION

Your amicus curiae respectfully urges the Court to grant the Petition for Writ of Certiorari.

Dated at Galveston, Texas this 26th day of April, 2021.



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