

23-5096

No.

ORIGINAL

IN THE  
Supreme Court of the United States

Kim Davis

*Petitioner*

FILED  
MAY 19 2023

OFFICE OF THE CLERK  
SUPREME COURT, U.S.

- v -

GENE R. MARIANO, ESQ.;  
NEW PENN FINANCIAL LLC, d/b/a Shellpoint Mortgage Servicing; STATE  
OF NEW JERSEY COURTS;  
STATE OF NEW JERS Y OCEAN COUNTY SHERIFF'S DEPARTMENT;  
BANK OF AMERICA, N.A.

*Respondent*

On Petition For Writ Of Certiorari  
from the United States Court of Appeals  
for the Third Circuit

Judgment Dated February 21, 2023

Before: AMBRO\*, KRAUSE, and SCIRICA, Circuit Judges  
Case 22-1608

PETITION FOR WRIT OF CERTIORARI

COURT LAST RULED ON THE MERITS OF THE CASE  
CHANCERY COURT OF NEW JERSEY

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## **I. QUESTIONS PRESENTED**

1. Whether Petitioner was deprived of her V Amendment due process right to property?
2. Whether Petitioner's was deprived of her VII Amendment right to a jury trial?
3. Whether Petitioner was deprived of her XIV Amendment protection of due process and equal protection of the law?

## **II. LIST OF PARTIES**

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

## **III. LIST OF PROCEEDINGS**

1. Bank of America, N.A. v. Davis, et al. docket at Case Number F-019820-16 May 21, 2018.
2. Bank of America, N.A. v. Davis, et al. docket Number A-4946-17T2), July 8, 2019.
3. KIM DAVIS vs. GENE R. MARIANO, ESQ.; NEW PENN FINANCIAL LLC, d/b/a Shellpoint Mortgage Servicing; STATE OF NEW JERSEY COURTS; STATE OF NEW JERSEY OCEAN COUNTY SHERIFF'S DEPARTMENT; BANK OF AMERICA, N.A. docket Number 1:19-cv-13515-NLH-MJS March 7, 2022 order and opinion, the March 26, 2021 order and the May 27, 2020 decision and order dismissing Petitioners complaint.
4. KIM DAVIS vs. GENE R. MARIANO, ESQ.; NEW PENN FINANCIAL LLC, d/b/a Shellpoint Mortgage Servicing; STATE OF NEW JERSEY COURTS;

STATE OF NEW JERSEY OCEAN COUNTY SHERIFF'S DEPARTMENT;  
BANK OF AMERICA, N.A. docket Number 22-1608, February 21, 2023.

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## **VI. PETITION FOR WRIT OF CERTIORARI**

I Kim Davis (“Petitioner”) in this action have personal knowledge of the facts and submit this Petition under the penalty of perjury. Petitioner respectfully seeks a writ of certiorari to review the United States Court of Appeals for the Third Circuits February 21, 2023 judgment.

## **VII. OPINION STATEMENT**

Petitioner respectfully ask this Court to review the attached judgment and opinions dates February 21, 2023 from the Circuit Judges Ambro, Krause, and Scirica. Docket No. 22-1608 (Pet. App. A 1a); the May 27, 2020 District Court final order granting the dismissal of the complaint (Pet. App. B 10a); the July 8, 2019 New Jersey Appellate Division order affirming the foreclosure judgment (Pet. App. C 67a); the May 21, 2018 New Jersey Chancery Division Final Judgment (Pet. App. D 73a).

## **VIII. JURISDICTION**

Pursuant to 28 U.S.C. § 1441(2)(c) and 28 U.S.C. § 1441(6) removal or transfer of a civil action is permitted when it includes a claim arising under the Constitution or laws of the United States within the meaning of section 28 U.S.C. § 1331 which states that “The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States”. Although the District Court might be uncomfortable presiding over an action which the state court rendered a prior interlocutory judgment, the District Court is permitted and retains jurisdiction. As a matter of law and in the interest of justice, the Court is required to transfer an action to a state court so that the matter can properly be prosecuted.

In *Carrington Mortg. Servs. v. Moore*, 464 N.J. Super. 59, 70-71 (App. Div. 2020) the State Court stated that “Federal courts also may hear claims related to foreclosures under 28 U.S.C. § 1331 federal question jurisdiction, where the mortgagor raises a claim under federal law. See, e.g., *St. Clair v. Wertzberger*, 637 F. Supp. 2d 251, 253 (D.N.J. 2009) (finding federal question jurisdiction where mortgagor raised claims under federal law in defense of pending state foreclosure proceeding)”. The Court went on to state that *Rooker-Feldman* was inapplicable.

As prescribed under 28 U.S.C. § 1251(b)(1) where an action or proceeding involves a public minister, the jurisdiction of the courts of the United States should be exclusive of the courts of the States in controversies to which a State is a party, and suits against ambassadors, public ministers, consuls and vice consuls, is preserved and clarified by this section and section 1351 of this title. Although Petitioner did not call out each and every public servant involved in the deprivation, the reference of the civil servants (“minister’s”) erroneous actions and judgments infers to individuals rather than the State which permits a person to commence an action involving a public servant.

“The All-Writs Act” provides in relevant part that “the Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.” 28 U.S.C. § 1651(a). Under this authority, the writ of mandamus may be used in the federal courts to confine an inferior court to a lawful exercise of its prescribed

jurisdiction or to compel it to exercise its authority when it is its duty to do so. *Will v. United States*, 389 U.S. 90, 95, 88 S.Ct. 269, 19 L. Ed. 2d 305 (1967).

Based on the Court of Appeals March 15, 2023 mandate (Pet. App. E 76a) and its March 28, 2023 Order (Pet. App. A 1a), denying Petitioner's motion to recall its mandate, Petitioner has no other avenue to review the Court of Appeals Judgment or any of the related orders and judgments that deprived Petitioner of her constitutional and legal rights despite the inferior court's failure to confine itself to its lawfully prescribed jurisdiction.

## **IX. CONSTITUTIONAL PROVISIONS INVOLVED**

United States Constitution, Amendment 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 offense to be put twice 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.

United States Constitution, Amendment VII:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

United States Constitution, Amendment XIV:

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.

#### **X.STATEMENT OF THE CASE**

The District Court action is directly related to a state foreclosure action and is subject to a direct appeal if the state court misinterprets a federal law. An unlawful judgment is clearly subject to a collateral attack, the District Court erred when it failed to retain jurisdiction over a state court action that involved a violation of Petitioners constitutional rights. Article III, Section 2, Clause 2 of the Constitution grants the Supreme Court original Jurisdiction over all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party. When the Court has original jurisdiction over a case, it means that a party may commence litigation in the Supreme Court in the first instance rather than reaching the high court on appeal from a state court or an inferior federal court.

This Court has explained that it will exercise original jurisdiction only in appropriate cases. It has further stated that the question of what is appropriate concerns of course the seriousness and dignity of the claim; yet beyond that it necessarily involves the availability of another forum where there is jurisdiction over

the named parties, where the issues tendered may be litigated, and where appropriate relief may be had. Although the Court has exercised its original jurisdiction sparingly, where claims are of sufficient seriousness and dignity and resolution by the Judiciary is of substantial concern, the Court will hear them. In cases subject to concurrent original and appellate jurisdiction, the Supreme Court has discretion to decline to exercise original jurisdiction and instead require that a case first proceed through the lower federal courts.

Here the Petitioner has exhausted all avenues and can only obtain relief from this Court through the writ of certiorari or an extraordinary writ. Although the District Court retains jurisdiction over the joinder of Federal and State Claims, it refused to retain jurisdiction despite the Constitutional and lawful mandates prescribed under State and Federal law.

**Rooker-Feldman is not a bar**

In order for an action to be barred by *Rooker-Feldman*, all four of the following requirements must be met: (1) the federal plaintiff lost in state court, (2) the plaintiff complains of injuries caused by the state court judgment, (3) that judgment issued before the federal suit was filed, and (4) the plaintiff invites the district court to review and reject the state court judgment.

Petitioner did not suggest or complain of an injury caused by the state court judgment, but rather from injuries caused by the foreclosure plaintiff's fraudulent conduct in prosecuting the state court case against her. In this instance it is the actions of the foreclosure plaintiff's and the continual wrong resulting from the

Respondents obstruction to Petitioners right to a fair hearing (extrinsic fraud) which cause and continue to cause injury. The Court of Appeals has consistently ruled that *Rooker-Feldman* is not a bar to federal jurisdiction when a plaintiff asserts an injury caused by the defendant's actions and not by the state court, see *Great W. Mining*, 615 F.3d at 167 ; *see also Van Hoven v. Buckles & Buckles, P.L.C.* , 947 F.3d 889, 893 (6th Cir. 2020) and *Hulsey v. Cisa* , 947 F.3d 246, 250 (4th Cir. 2020).

The Court of Appeals refusal to retain jurisdiction violates Constitutional and federal law. As prescribed under the V Amendment, No person shall... be deprived of life, liberty, or property, without due process of law. In addition XIV, Amendment prohibits any State from depriving 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.

In order to prevent a person or an officer of the State from depriving a citizen of their rights under the color of law, Congress enacted the civil rights act which permits a party so injured or deprived to commence an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators see 42 U.S.C. § 1985.

The damages related to the deprivation is codified under 15 U.S.C. § 1641 and is commonly known as the "Holder Rule". Under the Holder Rule, the injured party is entitled to damages for unfair and deceptive practices. From the onset of the State action Petitioner complained of the foreclosure plaintiff's unconscionable and illegal acts (Pet. App. G 97a). The relief Petitioner seeks is a clear legal right enacted to

deter a lender, creditor, assigner, assignee, transferer, transferee, servicer or agent from participating in unfair and deceptive practices such as implementing a scheme to separate the Petitioners duty to pay a debt from the foreclosure plaintiff's ("Holder") duty to fulfill its obligation.

The purpose of the Holder Rule is to Preserve the Consumers' Claims and Defenses (16 C.F.R. Part 433), and ensure that consumer credit contracts used in financing the retail purchase of consumer goods or services specifically preserve the consumer's rights against the seller. The FTC determined that it constitutes an unfair and deceptive practice for a seller, in the course of financing a consumer purchase of goods or services, to employ procedures which make the consumer's duty to pay independent of the seller's duty to fulfill its obligations.

The Holder Rule prohibits a seller from taking or receiving a consumer credit contract that does not contain a prescribed notice which preserves the consumer's claims and defenses in the event that the contract is negotiated or assigned to a third-party creditor. In addition, the Rule provides that the seller may not accept the proceeds of a purchase money loan unless the evidence of the loan contains the prescribed notice preserving as against the lender whatever claims and defenses the consumer may have against the seller. Omission of the required notice by the seller, or acceptance by the seller of the proceeds of the purchase money loan where the evidence of the loan does not contain the notice, constitutes an unfair or deceptive practice within the meaning of Section 5 of the Federal Trade Commission Act.

If banks accept consumer paper which fails to contain the notice required of sellers, they may be considered to be a participant in the seller's violation of the Rule. Banks making purchase money loans must include the following notice in ten-point, bold face, type in their contracts.

**NOTICE**

Any holder of this consumer credit contract is subject to

all claims and defenses which the debtor could assert against the seller of goods or services obtained pursuant hereto or with the proceeds hereof. Recovery hereunder by the debtor shall not exceed amounts paid by the debtor hereunder.

Although Petitioner constantly claimed that the foreclosure plaintiff was in violation of the "Holder Rule", both the State Court nor the District Court enforced Petitioners preserved state and federal claims. As such Petitioner respectfully ask this Court to utilize its mandamus powers to ensure that both the State Court and Court of Appeals comply with the Constitution and the Laws of the land.

**The State Court Final Judgment is Unlawful**

New Jersey statute mandates the filing of a notice where both a bond and mortgage are given for the same debt or the foreclosure of the mortgage is required before any action can be instituted on the bond. *Schwartz v. Bender Investments, Inc.*, 58 N.J. 444, 446 (1971). The purpose of N.J.S.A. 2A:50-2 is to prevent a multiplicity of actions for the recovery of a debt secured by a mortgage and a bond, thereby obviating the possibility, if not indeed the probability, of irreconcilable determinations of that issue. *Ledden v. Ehnes*, 22 N.J. 501, 509 (1956); *Montclair Savings Bank v. Sylvester*, 122 N.J. Eq. 518, 524-525 (E. & A. 1937).

In this instance the foreclosure plaintiff and its coconspirators employed a scheme to separate Petitioners duty to pay a debt under the mortgage from the foreclosure plaintiff's duty to fulfil its obligation against the note. Although Petitioner presented defenses and counterclaims, the State Court refused to review or permit the claims. The foreclosure plaintiff deliberately discontinued or failed to proceed with an action against the note as prescribed under NJ 2A:50-2 because the

foreclosure plaintiff know he had no cause of action against the underlying obligation.

In *Great Falls Bank v. Pardo*, 263 N.J. Super. 388, 397 (Ch. Div. 1993) the State Court stated that ("the mortgage is merely security for the debt and without a subsisting debt or obligation, the mortgage has no efficacy. Thus, when the underlying obligation fails, the mortgage becomes a nullity. *See Grennon v. Kramer*, 111 N.J. Eq. 337, 340-41, 162 A. 758 (E. A. 1932); *Mardirossian v. Wilder*, 76 N.J. Super. 37, 40, 183 A.2d 761 (Ch.Div. 1962); *Weinberg v. Weinberg*, 118 N.J. Eq. 97, 98, 177 A. 844 (Ch. 1935); *Perkins v. Trinity Realty Co.*, 69 N.J. Eq. 723, 727, 61 A. 167 (Ch. 1905); *Bliss v. Cronk*, 62 N.J. Eq. 496, 501, 50 A. 315 (Ch. 1901); *Magie v. Reynolds*, 51 N.J. Eq. 113, 117, 26 A. 150 (Ch. 1893); *In re Kennedy Mortg. Co.*, 17 B.R. 957, 965 (Bankr. D.N.J. 1982).").

As an accommodation party Petitioner is entitled to reimbursement from the accommodated party and is entitled to enforce the instrument against the accommodated party. An accommodated party who pays the instrument has no right of recourse against, and is not entitled to contribution from, an accommodation party see 12A:3-419(e). As evident by Petitioners indorsement and the fact that she did not benefit from the value given by the alleged third-party beneficiary, she is not liable to the agreement or contract of others. The indorsement clearly shows that Petitioner is merely an accommodation party. As prescribed under 12A:3-419(a) If an instrument is issued for value given for the benefit of a party to the instrument ("accommodated party") and another party to the instrument ("accommodation

party") signs the instrument for the purpose of incurring liability on the instrument without being a direct beneficiary of the value given for the instrument, the instrument is signed by the accommodation party "for accommodation."

The indorsements on the face of the instrument clearly indicates the intent of the indorser's and the conditional provisions of the instrument. It is clear and unambiguous that Petitioner is an accommodation party, which discharged from her liability and obligation when American Mortgage Network, Inc indorsed the note with a qualified special indorsement which Countrywide subsequently indorsed with a qualified, restrictive indorsement.

The Holder Rule was enacted to prevent assigners and assignee's from implementing unfair and deceptive schemes that separate consumers duty to pay a debt from the holder's duty to fulfill its obligations and promises. Here the accommodated party owes a duty to Petitioner to pay the debt as agreed and the laws of the land preserves Petitioners claims and right related to unfair and deceptive practices.

The foreclosure plaintiff deprived the State Court of jurisdiction when it commenced an action in violation of 2A:50-6 which states in part that "No judgment shall be entered... in any action on the bond or note, unless, prior to the entry of the judgment, if by confession, or prior to the commencement of the action, if the proceeding be by action, there shall be filed in the office of the clerk or register of deeds and mortgages as the case may be, of the county, in which the real estate described in the mortgage is situate a written notice of the proposed judgment or

action, setting forth the court in which it is proposed to enter the judgment or begin the action, the names of the parties to the bond or note and to the judgment or action, the book and page of the record of the mortgage, together with a description of the real estate described therein.

In this instance the office of the clerks or register of deeds and mortgages is void a written notice of an action against the bond or note. Although the foreclosure plaintiff filed a notice of pendency pursuant to 2A:15-9 against the mortgage, the foreclosure plaintiff failed to comply with 2A:50-6 and 2A:50-7 which jurisdictionally bars the entry of a judgment on a bond. 2A:50-6 clearly states that no judgment shall be entered on a bond without written notice of the action and the parties to the bond while 2A:50-7 state that the 2A:50-6 filing should be together with the 2A:15-9 filing.

In *110-112 Van Wagenen Avenue Co. v. Julian*, 101 N.J. Super. 230, 233-34 (App. Div. 1968) the State Appellate Division stated (“The aforementioned *sections 6* and *7* deal with suits for deficiencies by mortgagees who have foreclosed their mortgages. The former section mandates the filing of a notice of intention before a foreclosing mortgagee may sue on a bond for a secured debt, and the latter section provides for the recording of filed notices. They promote an important function because a deficiency judgment upon a bond secured by a mortgage which has been foreclosed reopens the foreclosure and gives the mortgagor six months within which to redeem the property. *N.J.S. 2 A:50-4*. The basic underlying purpose of *sections 6* and *7* (originally enacted as *L. 1907, c. 231*) is to stabilize titles to mortgaged lands purchased under foreclosure sales. *Neu v. Rogge*, 88 N.J.L. 335, 339-340 (E.

A. 1915); *O'Connor v. Briscoe*, 119 N.J.L. 362, 365 (E. A. 1938). As the *Rogge* court pointed out, the clear legislative intent was to provide, through the means of a public record, a method "to make secure the title to a purchaser of mortgaged lands which had been foreclosed \* \* \* and which were subject to redemption \* \* \*" (at p. 339). In *O'Connor* the required filing of a *lis pendens* under *section 6* (then *section 51* of the Mortgage Act, 3 C.S., p. 3423) was held to be mandatory since "it declares a public policy for the conservation and protection of the public records relating to the title to lands."").

In *Central Penn National Bank v. Stonebridge Ltd.*, 185 N.J. Super. 289, 304 (Ch. Div. 1982) the Chancery Division stated that "Since May 1, 1980 a foreclosure of the mortgage is required before any action to recover a personal judgment can be commenced, whether the mortgage debt is evidenced by a bond *or by a note* N.J.S.A. 2A:50-2. This statute requires a foreclosure of the mortgage first, then an action on the note, the same as the procedure on a bond, for a deficiency, except as provided in N.J.S.A. 2A:50-2.3".

The foreclosure plaintiff's failure to file the mandated notice against the note with the notice against the mortgage is clearly a failure to state a cause of action against the note. In *New Century Financial Services, Inc v. Suk Cha Carrero* Docket No. A-3926-05T23926-05T2 January 25, 2008 the State Appellate Division determined that a judgment is void for lack of subject matter jurisdiction when the court has no authority to adjudicate the controversy. See *Bank v. Kim*, 361 N.J. Super. 331, 339 (App. Div. 2003) (mortgage foreclosure judgment void in violation of

bankruptcy automatic stay). Although the failure to satisfy a condition precedent may not always function as an absolute bar in all cases, where, as here, the condition is fundamental to even start the action, and is statutory in origin, the failure to satisfy the condition, is a threshold prerequisite which acts as an absolute bar to the exercise of judicial authority.

The foreclosure plaintiffs clearly devised an unconscionable and despicable plot to obtain an unlawful judgment which resulted in fraud on the court and deprived the Court of jurisdiction. 2A:50-6 jurisdictional bar prevents a final determination of a party's equitable rights prior to the determination of its legal rights or the legal rights of the opposing party. As such the State Court judgment is unlawful and void.

#### **State Court Permits an Action After the Mortgage was Foreclosed**

Both State and Federal law permits the mortgagor to commence a post foreclosure action to enforce an agreement, express or implied, to assume or guarantee the payment of any mortgage. 2A:50-22(b) provides a right to commence an action within one year of the foreclosure action case. 15 U.S.C. § 1641 provide varying time frames to commence an action against a foreclosure plaintiff, the assigner, assignee, transferer, transferee, servicer and agent for various violation related to disclosures, breach of contract, breach of fiduciary duty, conversion and certain banking laws.

Petitioner property was taken under the color of law, in clear violation of the Constitution and the laws of the State of New Jersey and the United States of

America. Such blatant disregard to the laws, property and rights of a person must not be allowed to continue or go unpunished.

## **XI. REASON FOR GRANTING WRIT**

This Court developed and implemented a well-established standard for determining the threshold relative to jurisdiction and the deprivation of rights under the color of law. Moreover, in reaching its judgment an important federal question of law was decided in a way that conflicts with prior Court of Appeals determinations and those of this Court.

In order to avoid the erroneous deprivation of Petitioner's substantive and procedural rights to due process, it is important that this Court exercise its supervisory power and grant Petitioner a writ to certiorari mandating the Court of Appeals to modify its judgment so that it conforms with its own prior decisions and prior decisions of this Court.

## **XII.CONCLUSION**

Based on the record, it is undisputed that Petitioner was deprived of her property rights under the color of law when the foreclosure plaintiff implemented an unconscionable scheme to obtain an unlawful equitable judgment prior to the hearing of Petitioners legal or equitable rights. The May 21, 2018 judgment of foreclosure violated State law (A2:50-6) which mandates that no judgment shall be entered on a bond or note, unless, prior to the commencement of any action, there shall be filed in the office of the clerk a notice and that said notice is to be filed forthwith, together with the filing of the notice of lis pendens see A2:50-7.

A2:50-6 & A2:50-7 notice requirement informs the Court and the adverse party of the cause of action being prosecuted. Absent notice a complaint fails to include a cause of action depriving the court of jurisdiction.

Despite the foreclosure plaintiff's attempt to utilize unfair and deceptive practices, both the State and Federal government preserves the rights of a citizen to commence an action to recover damages resulting from certain unconscionable, unfair and deceptive action committed by lenders, creditors, assigners, assignee's, transferer's, transferee's, servicers or agents.

Congress enacted the "Holder Rule" to deter lenders and creditors from participating in unfair and deceptive practices such as the implementation of a scheme to separate a consumer's duty to pay a debt from the holder's duty to fulfill its obligation and promise see 15 U.S.C. § 1641.

As such each Court has jurisdiction to remand, transfer or totally destroy an unlawful judgment or order. For these reasons Petitioner respectfully request a writ of certiorari be granted and the matter remanded to the Court of Appeals, the District Court or transferred to the State Court for prosecution and determination of all parties' legal rights.

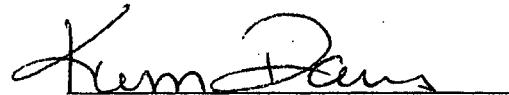
Date 19<sup>th</sup> day of May, 2023.

  
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