No. 24-6280

In the Supreme Court of the United States

MARGALY PHILIPPE, *PETITIONER*

v.

WELLS FARGO, N.A. AS TRUSTEE FOR OPTION ONE MORTGAGE LOAN, TRUST 2007-FXD1 – *RESPONDENT*

BRIEF OF AMICUS CURIAE – SARAH MCKEE

Karen Beyea-Schroeder
Schroeder Law Office PLLC
P.O. Box 131747
The Woodlands, TX 77393
Telephone (832) 585-9829
E-mail: Karen.Schroeder@Schroeder-LawOffice.com

February 12, 2025

Table of Contents

Table Of Authorities ii

Interest Of Amicus Curiae.....1

Summary Of Argument 1

Argument.....3

I. The Massachusetts Statutory Framework for Foreclosure by Sale Arguably Satisfies Due Process If It Were In Force.....7

Promise to be Heard at a Meaningful Time.....8

Legislated Hearing for the Homeowner (Equitable Title-holder) Prior to Affirmation of Sale or Order of Resale 10

Meaningful Manner: Legislated Jurisdiction and Relevant Standard of Review 12

Meaningful Review of "His Doings" 13

II. Foreclosure by Power of Sale Now in Practice Omits the Requirements of M.G.L. c. 244 §12 and §13.....15

III. The SJC Has Held Consistently That Every Foreclosure by Sale Statute, i.e., G.L. c. 244, §§11-17C, Still Applies 19

Conclusion 22

Table of Authorities

Cases

146 Dundas Corp. v. Chemical Bank, 400 Mass. 588, Note 9 (1987)9
Abate v. Fremont Inv. & Loan, 470 Mass. 821 (2015) 19
Ames Family School Ass'n v. Baker, 273 Mass. 119, 122 (1930) 19
Bank of NY Mellon, trustee, v. Alton King, 485 Mass. 37 (2020) 1
Commonwealth of Massachusetts v. H&R Block, Inc. No. 08-2474-BLS (June 3, 2008) 14
Commonwealth v. Fremont Investment and Loan, 452 Mass. 733 (2008) 14
Condon v. Haitsma, 325 Mass. 371 (1950) 20
Desrosiers v. Governor, 486 Mass. 369 (2020) 13
Eaton v. FNMA, 462 Mass. 569 (2012) 3, 10, 15, 19
Faneuil Investors Group, Ltd. Partnership v. Selectmen of Dennis, 458 Mass. 1, 6 (2010) 4
Farnsworth, 106 Mass. 509 (1871) 20
FNMA v. Marroquin, 477 Mass. 82 (2017) 19, 21
Kirk v. MacDonald, 21 Mass. App. Ct. 21 (1985) 11, 13, 17
McGreevey v. Charlestown Five Cents Sav. Bank, 294 Mass. 480 (1936) 21
Moore v. Dick, 187 Mass. 207 (1905). 20
Negron v. Gordon, 373 Mass. 199 (1977), ... 19
Pryor v. Baker, 133 Mass. 459 (1882) 21
Repucci v. Exchange Realty Co., 321 Mass. 571 (1947) 8
Tyler v. Judges 175 Mass. 71 (1900) 6
U.S. Bank, N.A., trustee v. Schumacher, 467 Mass. 421 (2014) 19
U.S. Nat'l Bank, trustee v. Ibanez, 458 Mass. 637 (2011) ..... passim
Williams v. Resolution GGF Oy, 417 Mass. 377 (1994) 18

Statutes

Article I, Massachusetts Constitution "Part the First" (the Massachusetts Bill of Rights) 2
Article X, Massachusetts Constitution, Part the First 3, 4
Article XI, Massachusetts Constitution, Part the First 3
Article XII, Massachusetts Constitution, Part the First 3

Article XV, Massachusetts Constitution, Part the First 3
Article XXIX, Massachusetts Constitution, Part the First .. 3
Chapter 233 §70 (Acts of 1854)..... 7
Chapter 377 (Acts of 1854)..... 10
MGL Ch. 183 §21 2
MGL Ch. 183C 14
MGL Ch. 185C §3 12
MGL Ch. 240 §1 11
MGL Ch. 244 §§11-17..... 5, 19
MGL Ch. 244 §§11-17C ..... i, 2, 19
MGL Ch. 244 §§6-10..... 2
MGL Ch. 244 §1 2
MGL Ch. 244 §11 ..... 6, 8, 9, 13
MGL Ch. 244 §12 ..... passim
MGL Ch. 244 §13 ..... passim
MGL Ch. 244 §15 18
MGL Ch. 244 §2 2
MGL Ch. 423 §21 (1971) 16
Restatement (Third) of Property (Mortgages) (1998)..... 4
Section 70, Chapter 233 (Acts of 1851)..... 7

Other Authorities

1 F. Hilliard, The Law of Mortgages, p. 91 [citation omitted] (1853). 13, 15
Note, Remedies of Junior Lienors Omitted From Prior Foreclosure, 88 Pa.L.Rev. 994, 995–996 (1940) 16
Osborne, Mortgages §321, 668, 671 (2d ed. 1970) 16

Treatises

209 CMR 18.24..... 14

Regulations

Davenport v. HSBC Bank USA, 275 Mich. App. 344 (2007) 8

Constitutional Provisions

Boddie v. Connecticut, 401 U.S. 371 (1971) 12, 19
Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673 (1930) 6
Butner v. United States, 440 U. S. 48 (1979)..... 4
Emigrant Residential LLC v. Pinti, et al., 37 F.4th 717 (1st Cir. 2022) 1, 19

HSBC Bank as Trustee v. Morris, 490 CMR 322 (2022) 14
Lindsey v. Normet, 405 U.S. 56 (1972)..... 5
Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982): 2, 12, 19
M'Elmoyle v. Cohen, 13 Pet. 312 (1839)..... 21
Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) 5, 12
O'Bannon v. Town Court Nursing Center, 447 US 773 (1980) 5
Pennoyer v. Neff, 95 U. S. 714 (1878)..... 6, 21
Shelley v. Kraemer, 334 U.S. 1, 16 (1948)..... 6

Federal Regulations

Fourteenth Amendment, United States Constitution 6, 12, 14, 18

Federal Rules

Fed. R. App. P. 28(a) 21
Fed. R. App. P. 32(a)(5)(A 21
Fed. R. App. P. 32(a)(6). 21
Fed. R. App. P. 32(a)(7) 21
Fed. R. App. P. 32(f), ...21

INTEREST OF AMICUS CURIAE[1]

Your *amicus i*s a 44-year member in good standing of the District of Columbia Bar (Bar No. 954990). She is a retired federal prosecutor, and past General Counsel of Interpol for the United States. In 2013, Governor Deval Patrick designated her his appointee for law to the Massachusetts Legislature's Registry of Deeds Reform Commission. Since 2014, she has volunteered with the non-profit Massachusetts Alliance Against Predatory Lending (maapl.info) on projects concerning purported home foreclosures by sale that failed to comply with applicable law. No such project has involved representation. The First Circuit Court of Appeals and the Massachusetts Supreme Judicial Court ("SJC") have accepted her *amicus* briefs.[2]

SUMMARY OF ARGUMENT

COMES NOW this Honorable Court's *amicus curiae* and respectfully files this brief *amicus curiae* in support of Petitioner-homeowners' Petition for Writ of Certiorari to the U.S. Supreme Court on January 13, 2025. The Petition addresses the State courts' failure to provide supposedly-foreclosed homeowners the fundamental due process right to be fully heard at a meaningful time and in a meaningful

---

[1] Counsel had no opposing counsel of record in this matter ten days prior to the deadline for filing this brief. Where the tenth day prior fell on a Sunday, she arranged courtesy notice to the lower court counsels of record for all parties timely on February 3rd, 2025 before midnight. Counsel reviewed and edited the briefs. Neither counsel, nor any party made a monetary contribution.

[2] Emigrant Residential LLC v. Pinti, et al., 37 F.4th 717 (1st Cir. 2022) ; Bank of NY Mellon, trustee, v. Alton King, 485 Mass. 37 (2020).

manner before the taking of their unalienable[3] right to their property.

This *amicus* addresses how foreclosing parties and the courts have stripped homeowners of their statutorily mandated procedural right[4] to be heard before a competent tribunal as part of the legislated Massachusetts foreclosure by sale scheme.[5] This is by far the most prevalent form of foreclosure in Massachusetts.[6] It is available to a foreclosing party if the mortgage includes a power of sale.[7] The step that purported foreclosing entities routinely and knowingly omit is M.G.L. c. 244, §§12 & 13, "Procedure after

---

[3] Article I of the Massachusetts Constitution "Part the First" (the Massachusetts Bill of Rights) enumerates the "unalienable" right to [real] property as "acquiring [ownership], possessing [occupancy and the right to define who is in trespass] and protecting"

[4] As held as impermissible in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982): **"**The issue in this case is whether a State may terminate a complainant's cause of action because a state official, for reasons beyond the complainant's control, failed to comply with a statutorily mandated procedure."

[5] Codified at M.G.L. c. 244, §§11-17C.

[6] Other forms are foreclosure by action (M.G.L. c. 244, §1, §§6-10); foreclosure by entry and possession (M.G.L. c. 244, §§1-2); and equitable foreclosure pursuant to the court's equitable jurisdiction.

[7] Cf. M.G.L. c. 183 §21 Section 21. The following "power" shall be known as the "Statutory Power of Sale" …. incorporated in any mortgage by reference:
But upon any default in the performance or observance …, the mortgagee … may sell the mortgaged premises …, by public auction …, first complying with the terms of the mortgage and with the statutes relating to the foreclosure of mortgages by the exercise of a power of sale, … such sale shall forever bar the mortgagor …from all right and interest in the mortgaged premises…."

sale"[8] and "Necessary parties."[9]

This is the required title settling procedure, to be completed after a foreclosure auction and before the closing. The homeowner with the equitable right to redeem must have notice. The procedure does not presume that the "person selling" had legal right (known as "jurisdiction and authority"[10]), as the real-mortgagee-in-interest[11] and noteowner or agent of the noteowner,[12] to exercise the power of sale through an auction. Instead, the "person selling" must prove up each element under oath in a Court with jurisdiction over title. Housing Court lacks such jurisdiction. It is impossible to overstate this proceeding's importance for the protection of property rights under both the U.S. Constitution, Amendment V, and the Massachusetts Declaration of Rights.[13] There is no SJC decision concerning M.G.L. c. 244, §12.

---

[8] "The person selling shall, within ten days after the sale, file in the clerk's office a report on oath of the sale and of his doings, and the court may confirm the sale or set it aside and order a re-sale. Any person interested may appear or be summoned, and the order of the court confirming the sale shall be conclusive evidence against all persons that the power of sale was duly executed."

[9] "Unless the defendant is seized in fee simple in possession of the whole equity of redemption of the land demanded, an order for a sale shall not be made until all parties interested in the equity of redemption and whose estate or interest therein would be affected by such sale have been summoned to appear."

[10] *U.S. Nat'l Bank, trustee v. Ibanez*, 458 Mass. 637, 647 (2011)

[11] *Ibanez* at 648: "because the mortgagor is entitled to know who is foreclosing and selling the property"

[12] Eaton v. FNMA, 462 Mass. 569 (2012)

[13] Massachusetts Constitution, Part the First, Articles X, XI, XII, XV, and XXIX. All concern the protection of property.

ARGUMENT

When home mortgages increasingly included a private power of sale, how did the Massachusetts Legislature guarantee the constitutional due process right to be fully heard, at a meaningful and in a meaningful manner, before one's right to redeem the equitable title to one's home, in a title theory state, was considered legally extinguished?

(This Honorable Court is reminded that in the early 1800s, though English courts never did, all states eventually allowed private foreclosure by sale clauses in home mortgages. Now a little over half have rescinded that allowance, given that legislative attempts to ensure due process were felt to have failed. Still, almost half of the states use some version of Massachusetts' foreclosure by sale.)

"In a 'title theory state' like Massachusetts, a mortgage is a transfer of legal title in a property to secure a debt."[14] The final interpreter of each state's real property laws is that state's highest court.[15] The Petitioners petition from the Massachusetts courts' current denial of the timely and meaningful hearing provided by the statutory law governing foreclosure of a mortgage of real property by sale. These denials have been perpetrated in the last three decades by purported mortgagees and their, agents, then

---

[14] See Ibanez at 649, citing Faneuil Investors Group, Ltd. Partnership v. Selectmen of Dennis, 458 Mass. 1, 6 (2010). "[T]he homeowner-mortgagor retains only equitable title in the home; the legal title is held by the mortgagee. Id. [citations omitted.]

[15] Cf. Restatement (Third) of Property (Mortgages) (1998), citing Butner v. U. S., 440 U. S. 48 (1979) ("Property interests are created and defined by state law.")

allowed and facilitated by the failure of the Massachusetts Courts to enforce the Law of the Land,[16] from the lower courts up to and including the SJC.

The Petitioners raise the statutory scheme which the SJC has addressed frequently and, without exception, enumerated as including the due process hearing elements (M.G.L. c. 244 §§11-17). Yet foreclosing parties and the courts themselves now almost invariably disregard a constitutionally critical component of the scheme.[17] It is thus appropriate – indeed, essential -- for this Court to enforce due process rights as to this core human necessity of our homes, as the framers of our Constitutions recognized.

> The home is "at the center of those property interest historically sought to be protected by due process." O'Bannon v. Town Court Nursing Center, 447 US 773, 792, n.2 (1980) (Blackmun, J. concurring). See also *Lindsey v. Normet*, 405 U.S. 56 (1972). "Modern man's place of retreat for quiet and solace is the home. Whether rented or owned, it is his sanctuary. Being uprooted and put into the street is a traumatic experience."

The Massachusetts statutory framework for

---

[16] Article X: "Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty and property, according to standing laws. …: but no part of the property of any individual can, with justice, be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people. In fine, the people of this commonwealth are not controllable by any other laws than those to which their constitutional representative body have given their consent.

[17] A search by the Massachusetts Law Librarians on February 12, 2025, for all cases mentioning M.G.L. c. 244, §§12 and 13, returned no SJC decisions that cited either section.

foreclosure by sale arguably satisfies the usual elements of due process: notice[18]; the opportunity to be heard; that a taking be by a party with legal right; adjudication within an effective time frame, under an applicable standard of review, and by a statutorily authorized and impartial tribunal.

> Shelley v. Kraemer, 334 U.S. 1, 16 (1948): "The action of state courts in imposing penalties or depriving parties of other substantive rights without providing adequate notice and opportunity to defend has, of course, long been regarded as a denial of the due process of law guaranteed by the Fourteenth Amendment. *Brinkerhoff-Faris Trust & Savings Co. v. Hill, supra. Cf. Pennoyer v. Neff,* 95 U. S. 714 (1878)." Also, Tyler v. Judges 175 Mass. 71 (1900)

Nowadays, however, courts and counsel alike have for all intents and purposes forgotten that this framework includes these due process elements. Of an estimated 130,000 Massachusetts home foreclosures since the year 2000, only two handfuls purported to provide them[19]. Somehow, the due process aspect of foreclosure by sale in

---

[18] Cf. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 318-320 (1950) (notice by publication is not sufficient under the Fourteenth Amendment as a basis for adjudication depriving of substantial property rights known persons whose whereabouts are also known, since it is not impracticable to make serious efforts to notify them at least by ordinary mail to their addresses on record with the trust company.)

[19] A review of the caselaw demonstrates only a few cases; they are ones where it appears the mortgagor died prior to the scheduling of the foreclosure auction and the "person selling" filed for a "conditional judgment" under MGL Chap. 244 §11 and a couple more recent cases of attempts to auction after previous attempts failed, and such sales would now be barred by operation of law.

Massachusetts has disappeared down the memory hole.

I. **The Massachusetts Statutory Framework for Foreclosure by Sale Arguably Satisfies Due Process If It Were In Force**

M.G.L. c. 244, §§12 & 13 of the statutes governing foreclosure by sale unequivocally require a foreclosing party to file a sworn report of that party's "doings" within 10 days of the auction sale, with, nowadays, the Superior Court.[20] It implicitly requires the court to review that report for the legality of the foreclosure. This is because it then requires the court to take one of two actions: either to confirm the sale, or to set it aside. Section 12 provides in full:

> The person selling shall, within ten days after the sale, file in the clerk's office a report on oath of the sale and of his doings, and the court may confirm the sale or set it aside and order a re-sale. Any person interested may appear or be summoned, and the order of the court confirming the sale shall be conclusive evidence against all persons that the power of sale was duly executed.[21]

First enacted in 1851[22], for 170 years, therefore, Section 12 has made it unquestionable that a foreclosure sale is final *only* when it satisfies these five criteria: 1) a court with

---

[20] Massachusetts Superior Court is a trial court with original jurisdiction in civil actions greater than $50,000, as well as other civil and criminal jurisdiction.

[21] Originally enacted as Section 70, Chapter 233, of the Acts of 1851. Codified as M.G.L. c. 244, §12, in 1930. [Emphasis supplied.]

[22] Chapter 233 §70 of the Acts of 1854

legislated jurisdiction over title has 2) received from the "person selling" (not presuming "jurisdiction and authority," but providing an opportunity to prove t up) 3) their "report on oath" of their "doings" and 4) has done so "within ten days after the sale," and 5) the court has confirmed the sale.[23]

Section 12 provides further that "any person interested may appear or be summoned…." The word 'appear' implies that the court conducts some sort of hearing before determining whether to confirm the sale, or to set it aside. Such a sale must accordingly be considered merely provisional unless the court confirms it.

"An intent to pass an ineffective statute is not to be imputed to the Legislature."[24]

Defendant borrowers, who stand to lose their homes upon a foreclosure sale's confirmation, must be "interested" parties. Section 12 allows them to appear. It provides that "[a]ny person interested *may* appear or be summoned…." When a statute enumerates options but does not include the null set nor qualify that the list is non-exhaustive, it provides that one named option must be enforced.

Promise to be Heard at a Meaningful Time

---

[23] The sale may in fact be void because of the foreclosing party's failure to comply with requirements for foreclosure by sale. *Ibanez* at 647, citing *Davenport v. HSBC Bank USA*, 275 Mich. App. 344, 347-348 (2007) ("attempt to foreclose by party that had not yet been assigned mortgage results in 'structural defect that goes to the very heart of defendant's ability to foreclose …,' and renders foreclosure sale void.")

[24] *Repucci v. Exchange Realty Co.,* 321 Mass. 571, 575 (1947) [citation omitted.]

A review of the public record in the Massachusetts Registries of Deeds shows proceedings under M.G.L. c. 244 §§11 & 13 consistently through to the early 1990s. The foreclosure by sale adjudicatory steps of Section 11 prior to the advertising and auction, and the Sections 12 and 13 post foreclosure by sale adjudication, have had to be recorded in the relevant Registry of Deeds for at least a century. We have numerous 1970s and 1980s Section 11 orders, prior to auction, and Section 12 and 13 orders, as part of the suite of foreclosure by sale (and foreclosure by entry) documents recorded to memorialize foreclosures in the relevant Registry of Deeds.

Even as to the timing of when a high bidder must close after a foreclosure by sale auction, we have one case record demonstrating that the period was defined, in two different Notices of Sale published three times in a 1982 newspaper, as being 15 days from *the court's affirmation of the foreclosure by sale* from the M.G.L. c. 244 §§12 & 13 proceeding,[25] *not from the auction date as in the present period*.

These regular recordations and the one entire case record are sufficient proof that private parties' failure to comply, and the courts' abdication of judicial enforcement of

[25] See *146 Dundas Corp. v. Chemical Bank*, 400 Mass. 588, Note 9 (1987):" The notice contained the following terms: "Twenty Thousand Dollars ($20,000.00) are to be paid in cash, certified check, or bank draft at the time of the sale, and the balance is to be paid within fifteen (15) days following the order of the Superior Court approving the entry and sale at the Barnstable Registry of Deeds…."… "Nine thousand Dollars ($9,000.00) are to be paid … at the time of the sale of each lot; and the balance is to be paid within fifteen (15) days following the order of the Superior Court approving the entry and sale at the Barnstable Registry of Deeds…."

the due process hearing sections of the Massachusetts foreclosure by sale scheme, is a recent and impermissible historic anomaly.

Legislated Hearing for the Homeowner (Equitable Title-holder) Prior to Affirmation of Sale or Order of Resale

In 1854[26], the Legislature further amended what is now M.G.L. c. 244, §12, now codified as M.G.L. c. 244, §13, "Necessary parties." Its pertinent provisions:

> [A]n order for a sale shall not be made until all parties interested in the equity of redemption and whose estate or interest therein would be affected by such sale have been summoned to appear.

Section 13 thus provides that 6) the mortgagor will have notice and 7) before the sale is finalized, their opportunity to "defend."[27] The mortgagor contracted for this in the standard FNMA and FHLMC mortgage instrument used in Massachusetts for almost 50 years[28].

The mortgagor/borrower had conveyed legal title to the property upon legal execution of a legal mortgage, but retained "the equity of redemption" or, as it is also known,

---

[26] Chapter 377 of the Acts of 1854

[27] This is the posture affirmed in the wording required to be sent mortgagor-homeowners without which the SJC found an attempted foreclosure by sale "wholly void": "of the right to reinstate after acceleration and *the right to bring a court action to assert the non-existence of a default or any other defense [of[the plaintiffs] to acceleration and sale*" *Eaton* at 228 [emphasis by SJC].

[28] In 1976, FNMA and FHLMC published a joint uniform instrument now used in over 90% of home mortgages.

"equitable title."[29] Thus, summoning the mortgagor/borrower was a condition precedent to the court's issuing "an order for a sale."[30]

The Legislature's clear intent was for all parties with a stake in a property to be informed of the hearing on the (provisional) foreclosure sale concerning that property[31]. Other interested parties with the opportunity either to appear, to defend their interests, or not appear, was interpreted explicitly to include a junior mortgagee. Cf. *Kirk v. MacDonald*, 21 Mass. App. Ct. 21 (1985) (junior lienors of a mortgage on property entitled to notice of hearing concerning it foreclosure); Massachusetts try title statute, M.G.L. c. 240, §1 (where record title of land is clouded by an adverse claim or possibility of one, petitioner states to the court "all adverse claimants so far as known to him….")

Your *amicus* mentions this in order to highlight that before a foreclosure sale can become final, the statutory framework provides for 1) notice of a hearing; 2) an opportunity for all interest-holders to be heard; 3) that the "person selling" must prove up "jurisdiction and authority" to act as holder of the power of sale; 4) under oath as to all "doings" to demonstrate legality back to origination of mortgage; 5) before an impartial tribunal; 6) with subject matter

---

[29] *Ibanez* at 649 (when a person borrows money to purchase a home and gives the lender a mortgage, the homeowner-mortgagor retains only equitable title in the home; the legal title is held by the mortgagee.) [Internal citations omitted.]

[30] "Order for a sale" might not be the most helpful legislative drafting: Section 12 provides for "an order for a *re-sale*" after a court sets aside a (provisional) foreclosure sale.

[31] Summoning anyone else with an interest in that "equity of redemption," e.g., a future dower claim, is likewise required.

jurisdiction over title; 7) timely before any further dispositive action; and 8) a judicial confirmation or order to resell.

These satisfy the accepted criteria for due process under the Fourteenth Amendment to the U.S. Constitution.[32] They similarly suffice under the Massachusetts Constitution.

Meaningful Manner: Legislated Jurisdiction and Relevant Standard of Review

"In a meaningful manner" means not only a forum with the necessary jurisdiction over title[33], but review under established adjudicatory procedure[34] and standards.

Where a true title controversy exists, not only did the Legislature provide that a hearing must be held in a court

---

[32] Cf. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 318-320 (1950) (notice by publication is not sufficient under the Fourteenth Amendment as a basis for adjudication depriving of substantial property rights known persons whose whereabouts are also known, since it is not impracticable to make serious efforts to notify them at least by ordinary mail to their addresses on record with the trust company.)

[33] Massachusetts statute provides title jurisdiction to Superior, Land, Probate and Supreme Judicial Courts. But with recent omission of the title quieting provisions of the "statutes related to foreclosure by sale", a Court Division explicitly lacking title clearing jurisdiction (M.G.L. c. 185C §3), the Housing Courts where the only remaining guaranteed notice and hearing is still in force – that for a taking of possession of land (eviction) have been allowed impermissibly to presumptively treat Plaintiff's as if they have title.

[34] "the Fourteenth Amendment's Due Process Clause has been interpreted as preventing the States from denying potential litigants use of established adjudicatory procedures, when such an action would be "the equivalent of denying them an opportunity to be heard upon their claimed right[s]." *Boddie v. Connecticut,* 401 U. S. 371, 380 (1971)" *Logan* at 429-430

with jurisdiction over title (here, M.G.L. c. 244 §§12 & 13), but timely as to "quiet title." But, if the Plaintiff's claim to title and thus to standing in a post-foreclosure eviction case is challenged, and, thus, brought into controversy, the case is outside the Massachusetts Housing Court's jurisdiction and must be transferred, since the 1825 enactment that created the Massachusetts eviction procedure, to the, then, Court of Common Pleas, now, Superior Court.

The applicable standard of review for an attempted taking of title *ab invito* is strict judicial scrutiny:

> "When analyzing due process challenges under art. 10, we 'adhere[ ] to the same standards followed in Federal due process analysis.' … When a fundamental right is burdened, we apply strict scrutiny." *Desrosiers v. Governor,* 486 Mass. 369, 388 (2020)

Here, these Petitioners and those like them have been consistently denied both the proper forum and the strict scrutiny standard, and, when the real mortgagee-in-interest also attempts to "buy back" the home at auction, the long settled "utmost diligence" standard and the standard of "free from doubt": this is the standard repeatedly cited by the expert F. Hilliard. This first recognized the fiduciary nature of the mortgagee/mortgagor relationship when provided by the "substantial" right to exercise a power of sale in a mortgage. That is: "void for the slightest unfairness or excess" – perhaps as near perfection as humans can attain.

Meaningful Review of "His Doings"

There was historic consistent compliance with

M.G.L. c. 244 §§11-13. Furthermore, *Kirk* shows that "doings" includes back to whether there was a fraudulent mortgage origination. By statute, this must be reported under oath where the mortgagor is present to defend, no doubt with rights to discovery, witnesses and cross-examination.

This is reflected in two 2008 Superior Court decisions from the future Chief Justice of the Massachusetts SJC, Ralph Gants, when he sat in the Business Litigation Section in Suffolk County. In the first, Gants addressed mortgages that he defined as "doomed to foreclose"[35]; in the second[36], he termed them as, at minimum, a "reckless disregard of the risk of foreclosure." The Massachusetts Division of Banks then issued regulations incorporating that conceptualization into 209 CMR 18.24: Mortgage Loan Servicing Practices: "(1) (d) Knowingly or recklessly facilitating the illegal foreclosure of real property collateral."[37]

This reflects the logical recognition that, were a mortgage loan (mortgage deed and promissory note together, per the mortgage industry's terminology) attempted to be originated in a prohibited manner, which made said origination void, there would be neither a conveyance of

---

[35] Upheld in *Commonwealth v. Fremont Investment and Loan,* 452 Mass. 733 (2008)

[36] Commonwealth of Massachusetts v. H&R Block, Inc. No. 08-2474-BLS (June 3, 2008)

[37] Consumer statutory and regulatory prohibitions are unwaivable (M.G.L. c. 93 §101). See also Massachusetts 2004 Predatory home Loan Practices Act (M.G.L. c. 183C) allowing prohibited origination to be recognized as void; belatedly upheld in *HSBC Bank as Trustee v. Morris,* 490 CMR 322 (2022) although lower court have refused to recognize that holding or apply it to those similarly situated also violating the Fourteenth Amendment.

title to a mortgagee, nor enforceable mortgage and promissory note contracts. Therein, any claim to a power of sale is void.

Further, where a mortgage with a power of sale creates a fiduciary obligation upon legal execution, all "doings" back to the oral offer of the contracts invokes judicial review under applicable standards.

II. Foreclosure by Power of Sale Now in Practice Omits the Requirements of M.G.L. c. 244 §12 and §13

The 1851 statutory framework governing foreclosure by sale has in essence endured to this day. The SJC, as affirmed through recent final interpretation in *Eaton v. FNMA,* 462 Mass. 569, n. 15 (2012) about the power of sale and that framework, cited land law expert Francis Hilliard in 1853 that it "has now become a very frequent provision in deeds of mortgage …. It will be jealously watched, declared void for the slightest unfairness or excess…."[38]

But have the Massachusetts courts indeed "jealously watched" the power of sale? It is fair to say that they do so no longer. Your *amicus* is well familiar with the evidence in dozens of home foreclosure cases of recent years. Key personnel at the Massachusetts Alliance Against Predatory Lending (maapl.info) are familiar with the evidence in over a 1,000 such cases, dating from about 2008. In not one case, including those of the Petitioners here, has the evidence shown that foreclosing party complied with the requirement to file a "report on oath" with the Superior Court

[38] 1 F. Hilliard, The Law of Mortgages, p. 91 [citation omitted] (1853).

within ten days of the foreclosure sale – or that the foreclosing party filed it at all. Nor has the borrower/mortgagor been summoned to a hearing, before that tribunal, to review that report and whatever other points might have borne on the foreclosure sale's validity. A review of Superior Court dockets in numerous cases shows no commencement of such cases. Nor does a review of higher court caselaw show reference to these statutes. There is every reason to believe that this disregard of Sections 12 and 13 is typical.

Intriguingly, one case on Section 13, "Necessary parties," reached the Massachusetts Appeals Court more than 35 years ago. It appears to be the only case on Sections 12 or 13 that ever did.[39]

> "That the Kirks have a place in the foreclosure action is made quite clear by G.L. c. 244, §13, as amended by St. 1971, c. 423, §21, which states that "[u]nless the defendant is seized in fee simple in possession of the whole equity of redemption of the land demanded**, an order for a sale shall not be made until all parties interested in the equity of redemption and whose estate or interest therein would be affected by such sale, have been summoned to appear**." As junior lienors the Kirks have the required interest. In simplest terms, if the Kirks remained outside the action, the foreclosure could not affect their rights, with **the unsatisfactory result that the mortgagee or other purchaser would acquire a vulnerable title, while the Kirks would have to scramble to undo that title**. See Osborne, Mortgages §321, 668, 671 (2d ed.

[39] Cf. Massachusetts Law Librarians' search cited above at fn.10.

1970); Note, Remedies of Junior Lienors Omitted From Prior Foreclosure, 88 Pa.L.Rev. 994, 995–996 (1940)."[40]

As noted above, Massachusetts is a title-theory state.[41] In the lien-theory states, the lender holds a lien on the mortgaged property; the borrower retains the title. But the Appeals Court's calling the Kirks "junior lienors" has no effect on the function of Section 13. The court makes clear that unless all parties with an interest in the property are summoned to the court's review of the "report on oath" about a (provisional) foreclosure sale, the court's Section 12 determination about the foreclosing party's title will be vulnerable.

Nor, evidently, is the court's review of a Section 12 foreclosure sale "report on oath" to be superficial rather than substantive. The *Kirk* court held that the Kirks, once admitted to the foreclosure by sale review, could challenge all the way back to the origination of the mortgage, and have it recognized as void. "If admitted (in effect) to the foreclosure action, as we hold they should be, may the Kirks attack the mortgage… the Kirks as junior lienors would similarly have a right to assert the fraud."[42]

Despite *Kirk*, it is fair to say that skipping compliance with M.G.L. c. 244, §§12 and 13, is now the norm statewide. Dozens in Petitioners' homeowner network have argued that the purported foreclosure was "wholly void," the foreclosing party having omitted the §§12 and 13 proceeding's required elements which required "strict

---

[40] *Kirk v. MacDonald*, 21 Mass. App. Ct. 21, 24-25 (1985). [Emphasis supplied.]

[41] *Ibanez* at 649.

[42] Id. at 25.

compliance"[43] or, more commonly in this 20 year crisis with bank buybacks, "strictest care and utmost diligence."[44] They argues this voidness in the common "post-foreclosure" eviction cases, where title must have been established beforehand for standing to commence an eviction/"possession" case in Massachusetts law. But that test of title is so universally ignored by the "eviction" Housing Courts that the failure to comply with sections 12 and 13 has not even appeared in a judgment of eviction in those cases.

Instead, after the foreclosure sale and at its leisure,[45] the foreclosing party records a short-form affidavit about the sale, together with the foreclosure deed, in the Registry.[46] That's it. There is no "report on oath" to Superior Court. Nor is there notice to the foreclosed homeowner of a hearing at which the homeowner can appear, or a summons to appear. There is no impartial tribunal, indeed, there's no tribunal at all. Constitutionally, this is about as shaky as it can get. Yet "the Fourteenth Amendment's Due Process Clause has been interpreted as preventing the

---

[43] "We recognize that a mortgage holder must not only act in strict compliance with its power of sale but must also "act in good faith and . . . use reasonable diligence to protect the interests of the mortgagor," *Ibanez* at Note 16.

[44] a "mortgagee's duty becomes more exacting when it becomes the buyer of the property, …[and] will be held to the strictest good faith and utmost diligence…." *Williams v. Resolution GGF Oy*, 417 Mass. 377, 383 (1994)

[45] There is no deadline by which the foreclosing party must record its affidavit and foreclosure deed. M.G. L. c. 244, §15 (a). When the foreclosing party files appears to depend on how concerned it is to protect its asserted interest in the foreclosed property, by giving notice to the world of that interest. Your *amicus* has seen these instruments recorded as long as 17 months after the foreclosure sale.

[46] M.G.L. c. 244, §15.

States from denying potential litigants the use of established adjudicatory procedures, when such an action would be 'the equivalent of denying them an opportunity to be heard upon their claimed right[s]'."[47]

III. The SJC Has Held Consistently That Every Foreclosure by Sale Statute, i.e., G.L. c. 244, §§11-17C, Still Applies

Not only has M.G.L. c. 244, §12, been law since 1851 and §13 since 1854. For well over a century, the SJC has been referring to the statutory foreclosure by sale framework, M.G.L. c. 244, §§11-17C, as settled law. Sections 11-17C of course includes both Section 12, requiring a "report on oath" of the sale and of the foreclosing party's "doings," and Section 13, requiring that interested parties be summoned to the Section 12 procedure. The SJC noted in 1930 that this statutory framework was well known. "Mortgages with a power of sale have been repeatedly recognized and regulated by our statutes … c. 244, §§11-17 inclusive."[48] The complete statutory framework of foreclosure by sale is in full force still. There is no reason your *amicus* can see to omit compliance with Sections 12 and 13 of that framework.

---

[47] *Logan* at 429 - 430 (1982), citing *Boddie v. Connecticut*, 401 U.S. 371, 380 (1971)

[48] *Ames Family School Ass'n v. Baker*, 273 Mass. 119, 122 (1930); see also *Eaton v. FNMA*, 462 Mass. 569 (2012); *U.S. Bank, N.A., trustee v. Schumacher*, 467 Mass. 421 (2014); *Pinti v. Emigrant Mortgage Co.*, 472 Mass. 226 (2015); *FNMA v. Marroquin*, 477 Mass. 82 (2017); *Abate v. Fremont Inv. & Loan*, 470 Mass. 821, 832 (2015); *Negron v. Gordon*, 373 Mass. 199, 206 (1977), *Moore v. Dick*, 187 Mass. 207, 208 (1905)

> "[W]here the language of a statute is plain there is no room for speculation as to its meaning or its implication. The Legislature must be presumed to have meant what the words plainly say …."[49]

In 2011, the SJC reaffirmed the entire §§11-17C framework in *Ibanez*. Yet in neither of the cases consolidated in *Ibanez* had the lower court required compliance with Sections 12 and 13. The recent cases cited in footnote 48, show the same anomaly. All of them reaffirm the §§11-17C foreclosure by sale framework. None of them indicates that the foreclosing parties and lower courts even acknowledged that these included Sections 12 and 13. This Court must take this petition to reverse this omission, which is fatal to the due process commitment to homeowners in Massachusetts whose mortgages pervasively include the Statutory Power of Sale. It is vital that the highest court in the United States finally determine that compliance with the Legislature's full due process framework dependent upon Sections 12 and 13 for foreclosure by sale, is required for the validity of such a foreclosure by sale.

The SJC declared in *Ibanez* at 646-647 recognizing only the lack of *immediate* oversight:

> "Recognizing the substantial power that the statutory scheme affords to a mortgage holder to foreclose without immediate judicial oversight, we adhere to the familiar rule that "one who sells under a power [of sale] must follow strictly its terms. If he fails to do so there is no valid execution of the power, and the sale is wholly void." Moore v. Dick, 187 Mass. 207,

[49] *Condon v. Haitsma*, 325 Mass. 371, 373 (1950) [emphasis supplied].

211 (1905). See Roche v. Farnsworth, 106 Mass. 509, 513 (1871) (power of sale contained in mortgage "must be executed in strict compliance with its terms"). See also McGreevey v. Charlestown Five Cents Sav. Bank, 294 Mass. 480, 484 (1936)."

Even more recently, *FNMA v. Marroquin,* 477 Mass. 82, 86 (2017) reaffirmed:

"See Pryor v. Baker, 133 Mass. 459, 460 (1882) ('The exercise of a power to sell by a mortgagee is always carefully watched, and is to be exercised with careful regard to the interests of the mortgagor)."

The necessary conclusion from this is that failure to provide a homeowner the rights to be fully heard in defense at a meaningful time in a meaningful manner via compliance with M.G.L. c. 244, §§12 and 13, "results in 'no valid execution of the power [of sale], and the sale is wholly void."

"The term 'due process of law', when applied to judicial proceedings, **means a course of legal proceedings according those rules and principles which have been established by our jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity, there must be a competent tribunal to pass upon their subject matter** … [at 715] was after qualified so as to make the act applicable when **the court rendering the judgment has jurisdiction of the parties and of the subject matter**, and **not to preclude an inquiry into the jurisdiction of the court in which the judgment was**

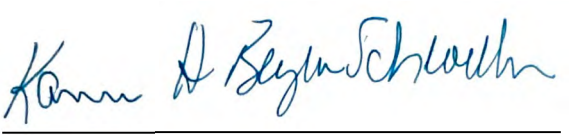
> **rendered**, …. *M'Elmoyle v. Cohen*, 13 Pet. 312" *Pennoyer v. Neff,* 95 U.S. 714 (1878)

CONCLUSION

The people of Massachusetts need the state courts to be reminded that our Constitutions require enforcement of due process before the taking of the core property interest of ownership (and possession) of real property.

Wherefore your *amicus* is pleased to support Homeowner-Petitioners' Petition for Writ of Certiorari,

Respectfully submitted,



Karen Beyea-Schroeder
Schroeder Law Office PLLC
P.O. Box 131747
The Woodlands, TX 77393
Telephone (832) 585-9829
E-mail: Karen.Schroeder@Schroeder-LawOffice.com

Counsel on behalf of
Sarah McKee
D.C. Bar No. 954990
6 Bee St., Charleston, SC 29403

February 12, 2025