No. _____

In The

Supreme Court of the United States

JOANNA BURKE & JOHN BURKE,

Petitioners,

v.

DEUTSCHE BANK NATIONAL TRUST CO.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

JOANNA BURKE
Counsel of Record
46 Kingwood Greens Dr.
Kingwood, Texas 77339
281 812 9591
kajongwe@gmail.com
Pro Se for Petitioners

QUESTIONS PRESENTED

I. Whether the Court of Appeals for the Fifth Circuit correctly applied the well-established exception to the law-of-the-case doctrine for appellate decisions that commit clear error and, if followed, would work a manifest injustice.

II. Whether the US District Court correctly concluded that the Court of Appeals for the Fifth Circuits' decision in the prior appeal was clearly erroneous to the extent it upheld an assignment by an entity purporting to act solely as a "nominee" for a dissolved principal with unknown successors.

III. Whether admitted and obvious Lender Income Fraud and Forgery on a Mortgage Application is exempt from the definition of 'Predatory Lending' as defined on the Department of Justice website and in the Texas Penal Code § 32.21(a)(1)(A), can be excluded from 'de novo' review by the Panel[s].

IV. Whether the Fifth Circuit Court of Appeals is bias. See 28 U.S. Code § 453 & 455.

In *Marshall v. Jerrico, Inc.*, 100 S. Ct. 1610 (1980), the Supreme Court of the United States said, "The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases . . . The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law. At the same time, it preserves both the appearance and reality of fairness . . . " (p. 1613)

QUESTIONS PRESENTED – Continued

V. Whether the decision to change the Opinion from Unpublished to Published is warranted based on the Fifth Circuits manifest departure from the Supreme Court of Texas precedent by relying on an Erie Guess.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

Appendix

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

OPINION BELOW

The published memorandum opinion of the United States Court of Appeals for the Fifth Circuit is included herein as Appendix 1.

JURISDICTION

This Court has jurisdiction of this petition to review the judgment of United States Court of Appeals for the Fifth Circuit pursuant to 28 USC § 1254(1). The Fifth Circuit's memorandum opinion was filed on 5 September 2018, (unpub.), revised on 10 September 2018 (pub.) and Petitioners' Petition for Rehearing and Rehearing En Banc was denied and entry of final judgment was on 28 November 2018.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment states in relevant part: "No state shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend, XIV, § 1.

Article III, Section 2, Clause 1 of the Constitution of the United States provides as follows: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; – to all Cases affecting

Ambassadors, other public Ministers and Consuls; – to all Cases of admiralty and maritime Jurisdiction; . . . "

PREFACE

This Case Provides a Timely Cause for the U.S. Supreme Court to Provide Relief to Injured Citizens and Homeowners for the First Time Since the Financial Crisis of 2008 and Etched into History as the 'The Great Depression'

As an American Founding Father, Thomas Jefferson declared; "The tree of liberty must be refreshed from time to time with the blood of patriots and tyrants".

In this Texas case, the blood has already been shed. Firstly, a judge with nearly forty years of working within the Texas Circuit at the bar or on the bench and who stood up for justice has been slain by its own.

A judge who stood up for the rights of residents and citizens of the State of Texas and the correct interpretation of the laws, no longer resides in the courtroom nor presents to the Circuit. Along with him, lies of a pair of gravely injured, elderly citizens, regarded as tyrants by many for fighting for their liberty and rights, and who are facing a wrongful foreclosure and loss of their precious retirement homestead.

This real-life story tells a deeply worrisome set of facts which impacts every citizen, resident and homeowner in a similar plight. This decade-long carnage, as a result of those responsible for the new system for

recording of the death-bond, commonly referred to as a securitized-mortgage, has reached epic proportions and after ten years of gross misconduct by those responsible, it commands this Courts' intervention, should it wish, in order to rewrite the final and fatal chapter.

The Supreme Court, the final arbiter of legal conflicts and reviews Acts of Congress. As key provisions of the Constitution are couched in grand ambiguities and because these concern greater issues of our life, of our liberties and of our happiness, the Supreme Court, by exercise of judicial review, wields tremendous political power.

After the Great Recession, government asked for answers and with the assistance of The Financial Crisis Inquiry Commission, a Report[1] was released with its incriminatory opinion:

> **"We conclude collapsing mortgage lending standards and the mortgage securitization pipeline lit and spread the flame of contagion and crisis."**

The Petitioners are before this Court as a direct result of predatory lending, combined with new system of mortgage-securitization and legal recording which has been abused by those entrusted with its 'honor system' and which led to inauthentic civil action.

---

[1] See FCIC Archived Report; https://fcic-static.law.stanford.edu/cdn_media/fcic-reports/fcic_final_report_full.pdf

STATEMENT OF THE CASE

The first 3 questions before the Court are uncomplicated; (1) the predatory mortgage loan, and; (2) the questionable legal documents, assignments, contracts and agreements involved in securitization of mortgages, and; (3) how the law surrounding the new entity called MERS is being misinterpreted and applied by Courts in Texas today. The fourth question is more challenging, but necessary; (4) whether homeowners can expect a fair and impartial hearing in the Court of Appeals for the Fifth Circuit and relying upon their own exacting standards;

> "A judge faced with a potential ground for disqualification ought to consider how his participation in a given case looks to the average person on the street." (id. p. 1111). – *Potashnick v. Port City Construction Co.*, 609 F. 2d 1101, (5th Cir. 1980)

When John and Joanna Burke approached IndyMac Bank, F.S.B. ("IndyMac"), in 2007, they were initially looking to release equity in their home and considering a reverse mortgage. However, they were urged to apply for a home equity loan instead, but IndyMac denied the application because the Burkes, as retirees, had no employment income.

Sometime later, a representative of IndyMac unexpectedly called the Burkes to report that the loan would be approved after all and, on May 21, 2007, Joanna Burke executed a home equity note (the "Note")

promising to pay IndyMac $615,000 in monthly installments.

The Note was secured by Deed of Trust (the "Deed") placing a lien on the Burkes' home. The Deed conveys to IndyMac, as the Lender, certain rights including the right to enforce the lien through foreclosure proceedings.

The Deed states further that MERS is the "beneficiary under this Security Instrument," and, "if necessary to comply with law or custom," may exercise IndyMac's rights and "take any action required of Lender".

I. The False Income Added to the Home Equity Loan Application by IndyMac is Predatory Lending

Within days of closing, the Burkes received the loan documents, which included an unsigned loan application stating that the Burkes enjoyed $125,000 in annual employment income.

The Burkes, however, had truthfully declared no employment income in the loan application process. The Burkes promptly notified IndyMac of this irregularity but received no satisfactory response.

II. Where the Burkes' Loan is Today is Unknown

After closing, the Burkes' mortgage traveled an indeterminate path. In July 2008, the original loan originator IndyMac Bank, FSB was closed by the Office of Thrift Supervision and nearly all of its assets were transferred to IndyMac Federal Bank, FSB ("IndyMac Federal"). Less than a year later, in March 2009, IndyMac Federal was placed in receivership by the FDIC and its deposits were transferred to OneWest Bank ("OneWest")[2]. The fate of IndyMac Federal's other assets, however, including the Burkes' mortgage, is a matter of pure speculation. IndyMac's ultimate successor as to the Burkes' mortgage is simply "unknown." As IndyMac collapsed, the Burkes' mortgage was less than carefully managed. In 2008, the Burkes complained that their monthly payments were placed in suspense and not applied to the mortgage.

III. The Lender Implemented a Manipulative Scheme to Induce Foreclosure

When the Burkes subsequently sought a loan modification, they were told to withhold three months of rent before making the request; they did so, only to be whipsawed and told that the arrearage needed to be paid before a modification would be considered.

---

[2] See FDIC sale price IndyMac to OneWest; https://www.fdic.gov/buying/historical/mortgage-servicing-assets.html

> Fifth Circuit Judge Priscilla Owen acknowledged this scheme as a common and recurring complaint by homeowners;
>
> "I've seen at least 50 of these claims . . . " (quote begins at 19.52 mins + of oral hearing recording) *Diaz v. Deutsche Bank Nat'l Trust Co.*, Case No. 15-41372 (5th Cir. 2016) (pet. denied)

After the Burkes made those payments, no modification was approved. Litigation would ensue, initially initiated by the Burkes'.

IV. Interpretation of MERS Assignment based on its' Own Writing is Clear, a Nominee is Only a Nominee.

On January 20, 2011, MERS executed a purported assignment of the Burkes' Deed to Deutsche Bank (the "Assignment"). The signature block of the Assignment leaves no ambiguity as to MERS' role in this transaction:

> MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., AS NOMINEE FOR INDYMAC BANK, F.S.B., ITS SUCCESSORS AND ASSIGNS
>
> By: _____
> Brian Burnett Assistant Secretary[3]
> Id. (emphasis added).

---

[3] See Appendix 12, App.111-112 and *McDonald v. OneWest Bank, FSB*, 2:10-cv-01952 (W.D. Wash. 2010), Doc. 1, p.4, #2.2 b. referencing how can Brian Burnett be both AVP of MERS and AVP of

The body of the Assignment and its corporate acknowledgement further reinforce that MERS executed the assignment solely "as nominee for lender, its successor and assigns." Nowhere in the Assignment is there any indication that MERS intended to assign any of its own interests, as beneficiary or otherwise, in the Deed.

The Assignment was backdated to April 9, 2010, but even as of that date, IndyMac – the Assignment's disclosed principal – had been defunct for nearly two years. IndyMac's immediate successor, IndyMac Federal, was also in receivership as of that date and its assets disbursed to other entities unknown on the current record.

While MERS purported to assign some entity's interests in the Deed, the identity of that entity is an utter mystery, as is MERS' actual authority to act on that entity's behalf (Appendix 4. App.26, No.26). Undeterred, Deutsche Bank initiated foreclosure proceedings in 2011.

V. Deutsche Bank Presented No Evidence It Holds the Burkes' Note

Instead, Deutsche Bank claimed to be the bona fide holder of the Deed, placing the validity of the Assignment squarely at issue. (Appendix 4, App.22).

Foreclosure for OneWest Bank . . . see Appendix 15, App.130-131; LinkedIn profile for Brian Burnett confirming OneWest Bank employee and no mention of MERS.

VI. The 'No Witness, No Evidence' Trial (2015)

After a bench trial in February 2015, the Trial Court entered judgment in favor of the Burkes (Appendix 7, App.78). The judgment concluded the Assignment was void because it was made "as nominee" for a defunct principal with unknown successors. Because it did not legally acquire the Deed, Deutsche Bank could not foreclose upon the lien it created.

VII. The Banks' First Appeal (Case No. 15-20201, 5th Cir. 2016)

Deutsche Bank appealed and did so with the benefit of new counsel. The briefing by pro se Burkes' never engaged the Trial Court's analysis of the Assignment language. Instead, Deutsche Bank framed the issue as whether MERS could assign its own interests, as beneficiary, notwithstanding IndyMac's dissolution.

The Fifth Circuits' 3-Panel, consisting of Judges Higginson, Haynes and Reavley followed suit, describing the dispositive issue as whether MERS "as beneficiary did not have authority to assign the deed of trust." But the Burkes have never contested MERS' that ability, acting as beneficiary, to assign its interest in a deed of trust. The contention is MERS did not operate in that capacity here because, under the plain terms of the Assignment, MERS purported to act solely as a "nominee." As to this issue, the Fifth Circuit panel held in a footnote that the Assignment language was not controlling because the panel had "not found a

single case from any Texas state Court" distinguishing between MERS' roles as a beneficiary and nominee.

Mirroring the *Obduskey v. McCarthy & Holthus, LLP* No. 17–1307, (2019) opinion; If it had meant to say "beneficiary" then why would it not have simply used the word?[4]

A. The Fifth Circuit Review was Incomplete

In the 2016 appeal, when the Fifth Circuit reversed the Burkes' judgment against Deutsche Bank on the MERS question alone, they did not return to the complaint as part of their 'de novo' review. The Panel did not address the lender application income fraud, despite including it in their opinion, and the fact it was part of the original case complaint and pleadings. The Fifth Circuit stated; "Joanna and John Burke applied for a home equity loan in early 2007, but were denied by IndyMac Bank because they had no income – they were retired." Ultimately, the Court of Appeals for the Fifth Circuit vacated judgment without consideration of the lender loan application fraud.

---

[4] See *Commission for Lawyer Discipline v Omar Weaver Rosales* Case No. 03-18-00147-CV, Texas Court of Appeals, Third District, Austin (2019); "When I use a word . . . it means just what I choose it to mean – neither more nor less." (Which also appears to take cognizance of *Obduskey*);

VIII. "Unique" MERS Defies Common Law

On remand the Trial Court noted a material error in the opinion (dated 9th June, 2016), which incorrectly named Deutsche Bank as the "mortgage servicer". After Judge Smith wrote a pre-approved Order (Appendix 9) regarding this error, the Fifth Circuit issued a corrected opinion on 19th July, 2016, naming Deutsche Bank ('trustee') as "the new mortgagee" (Appendix 10, App.103).

Judge Smith next sought the parties' assistance in reconciling the Fifth Circuits' footnoted analysis with basic contract and agency principles distinguishing between the roles of principal and agent.

At this scheduled conference with (fmr) Judge Smith[5] and attended by Mark Hopkins[6], counsel for Deutsche Bank and Beck Redden's counsel [for Burkes'], namely Ms Pfeiffer[7] and Ms Ali[8], both agreed with Judge Smiths' interpretation of Texas Law versus MERS and in conflict with the Fifth Circuits' interpretation and decision.

"Ms. Pfeiffer: " . . . And I do want to make an important clarification, which is we don't necessarily agree that the Fifth Circuit was correct in reversing this Court's judgment. . . . And I will add – and Ms.

---

[5] See Bio(s); https://www.txs.usCourts.gov/page/biography-judge-stephen-wm-smith and most recently; https://cyberlaw.stanford.edu/about/people/stephen-wm-smith

[6] See Bio; https://www.hopkinslawtexas.com/blank

[7] See Bio; http://www.beckredden.com/bios/pfeiffer-conniebio-update

[8] See Bio; http://www.beckredden.com/bios/hassan-ali-fatima

Hassan Ali might want to comment on this as well – I do think the Court's hypothetical and understanding of centuries of common law is correct, and it may just be that MERS is unique." – *Deutsche Bank v. Burke*, Transcript, Doc. 126, p. 34/35.

Dissatisfied with Deutsche Bank's counsels' arguments, the Trial Court, on December 21, 2017, again entered judgment for the Burkes. The Trial Court relied on centuries of unbroken Texas common law establishing that where an agent or nominee (here MERS) enters a contract (here the Assignment) on behalf of a disclosed principal (here IndyMac and its successors), the agent or nominee does not convey its own rights.

IX. Deutsche Banks' Second Appeal (Case No. 18-20026, 5th Cir. 2018)

In a second appeal, a partially separate panel of this Court comprising of Judge Graves, Davis and, Judge Haynes (from the First 3-Panel), again reversed and rendered judgment for Deutsche Bank. (Appendix 2). Judge Smiths' actions created irritation and animosity in the Fifth Circuit as they stated; "The magistrate judge proceeded to defy the mandate . . . The conduct here is extraordinary conduct that would lead to chaos if routinely done." (App.6).

However, the Judge complied with the rules of orderliness and allowed to question the decision of the appellate Court. See *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800 (1988);

> "Thus, even if the Seventh Circuit's decision was law of the case, the Federal Circuit did not exceed its power in revisiting the jurisdictional issue, and, once it concluded that the prior decision was "clearly wrong," it was obliged to decline jurisdiction".

In this case, the now former Judge was publicly chastised for this decision in an authored opinion by a Judge who also sat on the Prior Panel. As a result, Judge Smith apparently fell victim for his upstanding and courageous decision to defend a "manifest error in law";

> "A multimember Court must not have its guarantee of neutrality undermined, for the appearance of bias demeans the reputation and integrity not just of one jurist, but of the larger institution of which he or she is a part." See *Williams v. Pennsylvania*, 579 U.S. ___ (2016).

The Fifth Circuits' opinion, at the written hand of Judge Haynes, was unwavering and unmoved as she entered the judgment of foreclosure for the Second Panel, and against the Burkes' again on September 5th 2018.

A. The Opinion was Reclassified to Published

There would follow, a notable amendment, however, on September 10th, 2018, when the Fifth Circuit reclassified the opinion as suitable for publishing and they issued a revised opinion, thus etching the dubious

opinion into the Fifth Circuits' select pool of precedent cases for default defense attorneys to cite indefinitely moving forward.

REASONS FOR GRANTING THE PETITION

The Petitioners believe this case provides the Court with "exceptional circumstances" to intervene and grant this petition. After several litigious years, the Petitioners case has finally arrived in aggregated format, for consideration by the highest court in the United States.

I. The Petitioners Case Provides a Timely Cause for this Court to Set Its First Authoritative and Published Opinion on this Subject, which has been Percolating since the 2008 Financial Crisis

Relying on the Petitioners own research[9], it would appear that this Court has not found good cause to review any cases since the 2008 financial crisis that relate to judicial foreclosure and in particular, mortgage-securitization and the new "book entry system" called MERS, which has fueled so many contested court cases.

[9] Based on available 5-year history of Deutsche Bank cases filed; 65 and Ocwen 23 cases filed (and relying on Court website search tool) ; In summary, Petitioners either failed to submit a petition (after extension of time request) or were ultimately denied.

II. The Petitioners Case Provides a Suitable Illustration for the Court to Decide if Lender Loan Application Income Fraud is Predatory Lending

The lender knowingly and willfully committed fraud which was not reviewed by the Fifth Circuit.

(a) Unknown to the Burkes, IndyMac the Lender was Resorting to Fraudulent Lending Practices in an Attempt to Save Itself from its Liquidity Crisis and Impending Bankruptcy and Closure

An investigation by the Center for Responsible Lending ("CRL")[10] uncovered substantial evidence IndyMac Bank engaged in abusive lending during the mortgage boom, routinely making loans without regard to borrowers' ability to repay.

(i) This is Defined as Predatory Lending by the Department of Justice

This case involves senior citizens. "Predatory lending practices, broadly defined, are the fraudulent, deceptive, and unfair tactics some people use to dupe us into mortgage loans that we can't afford."[11] The DOJ

---

[10] See Center for Responsible Lending ("CRL") Report; https://www.responsiblelending.org/mortgage-lending/researchanalysis/indymac_what_went_wrong.pdf

[11] See DOJ website; https://www.justice.gov/usao-edpa/divisions/civil-division/predatory-lending

lists pages of criminal convictions for mortgage fraud by unethical businesses and consumers on their website, and most are convicted.

> "Lenders made loans that they knew borrowers could not afford and that could cause massive losses to investors in mortgage securities." – See FCIC Report, page xxii.

Nonetheless, and as questioned recently by Congress,[12] and after a colossal $700 billion dollar government bailout ("TARP") the lenders and executives responsible for predatory loans avoided internment.

(ii) The CRL interviewed an IndyMac underwriter who admitted to this type of fraud

" . . . I would reject a loan and the insanity would begin. It would go to upper management and the next thing you know it's going to closing." – Audrey Streater, former Indymac underwriting team leader.

In the alternative, Deutsche Bank Attorneys' also concealed evidence. They knew there was insufficient income based on the "closing" file. However, this matter currently forms part of a separate civil action. As this Court decided in *Obduskey* (*Obduskey v. McCarthy &*

---

[12] On 10th April, 2019 the U.S. House Committee on Financial Services conducted a hearing with top banking executives, many of whom were responsible for the subsequent revelations post Financial Crisis.

Hollis, LLP, No. 17–1307, p. 12 (2019)), 'we can leave [this question] for another day.'

III. This Case is a Good Vehicle as it Presents Substantial Issues of Law

A. Agency Relationships do not survive the demise of the Principal and Assignments made on behalf of a Defunct Entity are, accordingly, Void.

MERS could not assign the Deed as nominee for IndyMac. To be sure, the Deed also makes MERS a nominee for IndyMac's "successors and assigns." But Deutsche Bank's reliance on this clause is misplaced; MERS cannot act on behalf of a principal that cannot even be named. Deutsche Bank is thus left to argue that the Assignment transferred MERS' own beneficial interest in the Deed, but this also fails. Under controlling Texas law, this language of assignment must be honored. It makes no difference that MERS, as the Deed's beneficiary, could have transferred its interests to Deutsche Bank.

B. There is Nothing Unique to MERS

Texas Courts have applied standard agency principles to MERS, recognizing that MERS can act solely as principal, or solely as nominee. The distinction is not theoretical. Although MERS assigned the Burkes' Deed as a "nominee" for the lender and its successors, in other instances MERS uses assignment language by which it expressly assigns its own "beneficial interest"

in deeds of trust. The Assignment here – prepared by Deutsche Bank's own sophisticated counsel – should not be rewritten so that MERS can switch roles after the fact.

The Fifth Circuits' briefing in the appeal did not meaningfully address the language of the Assignment, much less the body of Texas law giving such language legal effect. The prior panel's error is plain.

C. Law-of-the-case Doctrine is not Inviolate and Trial Courts can, in narrow but applicable circumstances, deviate from a Mandate

Under longstanding Fifth Circuit law, issues decided by the appellate court should be followed in subsequent Trial Court or appellate proceedings unless " . . . [3] the decision was clearly erroneous and would work a manifest injustice."[13] The prior Panel decision was clearly erroneous and would result in manifest injustice if upheld.

The Supreme Court has explained that the doctrine is an exercise of judicial discretion, not a limit on judicial power.[14]

---

[13] *White v. Murtha*, 377 F.2d 428, 432 (5th Cir. 1967); see *Dickinson v. Auto Ctr. Mfg. Co.*, 733 F.2d 1092, 1096 (5th Cir. 1983) (confirming that this rule and the exceptions apply to subsequent proceedings in the trial court and on later appeals to the appellate court).

[14] *Messenger v. Anderson*, 225 U.S. 436, 444 (1912).

The Fifth Circuit similarly has "emphasiz[ed] that 'justice is better than consistency . . . [and] should reexamine the first decision as a prerequisite to its implementation as the law of the case."[15]

The Fifth Circuit has not hesitated to invoke the third exception in the past.[16] Other circuit courts have applied similar exceptions when justice requires.[17]

D. Deutsche Bank has not established any right to foreclose on the Burkes' home.

Deutsche Bank's standing to foreclose fails as they do not have any interest in the Burkes' Note and the Assignment is void.

E. An Assignment cannot be made on behalf of a Dissolved Principal with no assets to convey.

An agency relationship "terminates" when the principal "ceases to exist or commences a process that

---

[15] *Wm. G. Roe*, 414 F.2d at 867-68 (internal citations and footnote omitted).

[16] See, e.g., *United States v. Hollis*, 506 F.3d 415, 421-22 (5th Cir. 2007).

[17] See, e.g., *Negron-Almeda v. Santiago*, 579 F.3d 45, 50-52 (1st Cir. 2009) (invoking exception because to uphold incorrectly decided prior decision would bar the plaintiffs from the equitable relief to which they were entitled); *Sulik v. Taney County*, 393 F.3d 765, 766-67 (8th Cir. 2005) (first panel's ruling that a three year limitations statute governed some of plaintiff's claims "was clear error of law, and letting it stand would work a manifest injustice").

will lead to cessation of its existence."[18] Even if agency could survive a principal's demise in some theoretical capacity, an "existing right is a precondition for a valid assignment."[19] An agent cannot assign something its principal does not possess.

Here, IndyMac was not only closed when the Assignment was executed, it had been divested of substantially all of its assets. Deutsche Bank thus has not shown, and cannot show, that at the time of the Assignment IndyMac had "existing rights" in the Burkes' mortgage that MERS could convey as IndyMac's nominee.[20]

Uncompromisingly, Deutsche Bank flatly asserts that "the subsequent bankruptcy or dissolution of a lender does not negate MERS' ability to assign a deed of trust on behalf of the bankrupt entity."[21] Deutsche Bank cited nothing of relevance to support this remarkable proposition.

---

[18] Restatement (Third) of Agency A § 3.07(4).

[19] *Pain Control Inst., Inc. v. GEICO Gen. Ins. Co.*, 447 S.W.3d 893, 899 (Tex. App. 2014).

[20] Id.; see also *Pool v. Sneed*, 173 S.W.2d 768, 775 (Tex. App. 1943) ("The idea of an assignment is essentially that of transfer by one existing party to another existing party" (internal quotation marks omitted)).

[21] *Deutsche Bank v. Burke*, No. 18-20026 (5th Cir. 2018), Appellant Brief ("Aplt. Br.") at 21-22.

F. The Assignment here is Not Saved by its "Successors and Assigns" Clause.

Tacitly conceding that any assignment on behalf of defunct principal is void, Deutsche Bank emphasizes that the Assignment here was made not only on behalf of IndyMac, but also IndyMac's "successor and assigns." The Deed similarly identifies MERS as nominee for "Lender and Lender's successors and assigns."

This language cannot salvage the Assignment because Deutsche Bank has not identified anyone. Deutsche Bank suggests that OneWest may be Indy Mac's successor with respect to the Burkes' mortgage because it supposedly purchased "substantially all of IndyMac Federal Bank, FSB's residential mortgage portfolio."[22]

But Deutsche Bank cites to nothing confirming this hypothetical transaction. This mere possibility hardly shows that OneWest actually held the mortgage at the time of the Assignment.[23] "Texas law does not presume agency, and the party who alleges it has the burden of proving it."[24]

A party claiming agency must demonstrate that the "principal consent[ed] to the agent acting on the

---

[22] Aplt. Br. at 6 n.4 (emphasis added).

[23] See *Priesmeyer v. Pacific Southwest Bank, F.S.B.*, 917 S.W.2d 937, 938, 940 (Tex. App. 1996) (refusing to presume, without specific documentary showing, that a particular note was transferred from failed bank to entity that acquired "substantially all" of its assets).

[24] *IRA Res., Inc. v. Griego*, 221 S.W.3d 592, 597 (Tex. 2007).

principal's behalf" and "control[led] the acts of the alleged agent."[25]

MERS cannot identify any entity. MERS is a book entry system that "was created for the purpose of tracking ownership interests in residential mortgages."[26]

This precise issue was addressed in *Bain v. Metro. Mortg. Grp. Inc.*, 285 P.3d 34 (Wash. 2012) and the Bain Court rejected the argument.[27]

The law could be no other way. By its own admission, MERS can be an "agent for its members only."[28] Nothing in this record forecloses the possibility that the Burkes' Note has been transferred outside the MERS system. Requiring Deutsche Bank to identify MERS' principal thus ensures that MERS does not assume agency where none could exist.

---

[25] *Davis-Lynch, Inc. v. Asgard Techs., LLC*, 472 S.W.3d 50, 60 (Tex. App. 2015) (collecting Texas cases).

[26] *Bexar Cnty., Texas v. MERSCORP, Inc.*, No. SA-12-CA-586-FB, 2013 WL 12291471, at *2 (W.D. Tex. Feb. 25, 2013); see also *Harris Cnty. Texas v. MERSCORP Inc.*, 791 F.3d 545, 549 (5th Cir. 2015).

[27] Id. at 45-46. Although Bain applied Washington law, the control element it relied upon is equally central to Texas agency law. See *Davis-Lynch*, 472 S.W.3d at 60.

[28] *In re Mitchell*, No. BK-S-07-16226-LBR, 2009 WL 1044368, at *4 (Bankr. D. Nev. Mar. 31, 2009) (noting that MERS' counsel acknowledged this limitation at oral argument), aff'd on other grounds, 423 B.R. 914 (D. Nev. 2009).

G. The Banks' Reliance on the L'Amoreaux Case is Flawed

Deutsche Bank asserts under L'Amoreaux,[29] "when a deed of trust contemplates MERS' continuing to act as the nominee for the lender's 'successors and assigns,' the lender's existence (or non-existence) at the time of MERS' assignment is irrelevant."[30] L'Amoreaux in fact held the opposite.

H. MERS did not assign its own beneficial interest in the Deed when acting solely as a nominee for a disclosed principal.

The Assignment can be upheld only if MERS assigned its own interests in the Deed. As the Trial Court found, this possibility is squarely foreclosed by the Assignment's plain terms and longstanding Texas law, applied in multiple Fifth Circuit decisions, requiring adherence to the contracting parties' chosen language of assignment.

In three places on the Assignment – the body of the document, the signature block, and the corporate acknowledgement – MERS makes clear the limited capacity in which it as the assignor was purporting to act: "Mortgage Electronic Registration Systems, Inc., as nominee for, IndyMac Bank, F.S.B., its successors and assigns." (emphasis added).

---

[29] *L'Amoreaux v. Wells Fargo Bank, N.A.*, 755 F.3d 748 (5th Cir. 2014).

[30] Aplt Br. at 20.

Nothing in the Assignment states that MERS was acting, or intended to act, as a principal to assign its own beneficial interests. Id. The Trial Court also confirmed Deutsche Bank implicitly conceded at trial that MERS was acting solely as an agent (nominee) when executing the Assignment.

Deutsche Bank never argued that the Assignment – which its own sophisticated lawyers drafted – was ambiguous on this point. Deutsche Bank never offered any extrinsic evidence either.

Texas law compels a finding that MERS acted solely as an agent (nominee) without conveying its own interests. A "nominee" is a type of agent.[31] The Fifth Circuit has used "nominee" and "agent" interchangeably in construing comparable MERS agreements.[32]

In accordance with centuries of common law,[33] Texas courts exercise a presumption that if an agent signs a contract for a disclosed principal, it does not make itself a party to the contract. Unless an ambiguity is created by contrary language in the body of the instrument itself – and Deutsche Bank does not argue that the contract language is ambiguous here – the agent does not become party to the contract. Moreover,

---

[31] See Black's Law Dictionary 1211 (10th ed. 2014) ("A person designated to act in place of another, usu; In a very limited way").

[32] See *Harris Cnty. Texas*, 791 F.3d at 558-59 (using the terms "nominee" and "agent" interchangeably when describing MERS' authority under typical deed of trust language).

[33] The Trial Court discussed the common law roots of this doctrine at length. Because Texas law controls, that discussion will not be repeated here.

contrary parol evidence – which was not even offered here – is inadmissible to override unambiguous contractual language.[34]

(a) The Leading Texas Case on this issue is *Cavaness v. General Corp.*

Certain elements of the Cavaness decision are particularly instructive here. For one, it made no difference to the result that Mr. Cavaness himself, as owner of the patent rights in question, held a personal interest in the subject matter of the contract. According to the Court, if the terms of the contract are clear, the parol evidence rule controls, whether or not the agent holds a personal stake in the matter. The court endorsed the view of the Restatement of Agency that, when the contract language is unambiguous, parol evidence is not admissible "although the effect of the evidence is to show that the purported principal is nonexistent."[35]

The Cavaness decision remains good law today[36] and regularly invoked by Texas courts.[37] The Fifth

---

[34] See *Cavaness v. General Corp.*, 283 S.W.2d 33 (Tex. 1955) (discussing these principles).

[35] Id. at 37 (quoting Comment b., Sec. 326).

[36] 3 Tex. Jur. 3d Agency § 310 (June 2017 Update) ("Where an unambiguous contract is executed and signed by an agent in the principal's name, extrinsic evidence is generally not admissible to show that the agent, in executing the agreement, intended to bind him- or herself only, instead of the principal." (citing *Cavaness*)).

[37] See, e.g., *Fleming & Assocs., L.L.P. v. Barton*, 425 S.W.3d 560, 573 (Tex. App. 2014); *Hull v. S. Coast Catamarans, L.P.*, 365 S.W.3d 35, 45 (Tex. App. 2011); *Barker v. Brown*, 772 S.W.2d 507,

Circuit has consistently applied Cavaness in a manner relevant to this case.[38]

Here, the Assignment states unambiguously that MERS was acting as a "nominee" in purporting to assign the interests of a disclosed principle (IndyMac and its successors) to Deutsche Bank. Nowhere "in the body of the instrument" *Id.* is it suggested that MERS was acting as a principal on its own behalf.

Indeed, Deutsche Bank does not argue to the contrary. Moreover, as in Cavaness, the fact that MERS could have executed the Assignment as a principal does not compel a contrary result. Courts cannot rewrite agreements simply because the parties could have structured them differently.

(b) In the Prior Panel Opinion, the Fifth Circuit did not give effect to the Assignment's plain terms

Holding; "Here, MERS assigned its right to foreclose under the deed of trust to Deutsche Bank. That

---

510 (Tex. App. 1989); *Fed. Deposit Ins. Corp. v. K–D Leasing Co.*, 743 S.W.2d 774, 775–76 (Tex. App. 1988); *Priest v. First Mortg. Co. of Texas, Inc.*, 659 S.W.2d 869, 872 (Tex. App. 1983); *Jordan v. Rule*, 520 S.W.2d 463, 465 (Tex. Civ. App. 1975) ("A written contract may itself afford the highest evidence of the identity of the contracting parties and the terms of the agreement," citing *Detroit Fidelity & Surety Co. v. First Nat'l Bank*, 66 S.W.2d 406, 407 (Tex. App. 1933)).

[38] See, e.g., *Martin v. Xarin Real Estate, Inc.*, 703 F.2d 883 (5th Cir. 1983); *Nishimatsu Constr. Co. v. Houston Nat'l Bank*, 515 F.2d 1200 (5th Cir. 1975); *Northern Propane Gas Co. v. Cole*, 395 F.2d 1 (5th Cir. 1968).

the assignment did not state that MERS was acting in its capacity as beneficiary does not change our analysis."[39] The Fifth Circuit discarded decades of Texas law and over prior Fifth Circuit opinions, which it cannot do.[40]. Several explanations for this incongruous outcome are possible. One possibility is that the prior panel proceeded on the assumption that common law principles of agency do not apply to MERS, a creature of recent vintage, such that even where MERS purports to act as a "nominee," it may be assumed that MERS also acts as a principal. Possibly to this end, the prior panel observed that it had located no Texas authority distinguishing between MERS as "nominee" and MERS as "beneficiary."[41] That authority exists, however, as the Trial Court respectfully noted on remand. Specifically, in *EverBank* the Texas Court of Appeals distinguished a prior case on the ground that, there, "MERS was acting merely as a nominee or agent of a lender" and not, as in *EverBank*, in its capacity as "as a beneficiary."[42]

---

[39] *Deutsche Bank*, 655 Fed App'x at 254.

[40] In the Fifth Circuit, the rule of orderliness generally forbids one panel from overruling a prior panel. *Teague v. City of Flower Mound*, 179 F.3d 377, 383 (5th Cir. 1999). This rule extends to conflicting language in the subsequent case. *Arnold v. U.S. Dept. of Interior*, 213 F.3d 193, 196 n.4 (5th Cir. 2000) ("under the rule of orderliness, to the extent that a more recent case contradicts an older case, the newer language has no effect").

[41] *Id.* at 254 n.1.

[42] *EverBank, N.A. v. Seedergy Ventures, Inc.*, 499 S.W.3d 534 (Tex. App. 2016).

Were that not enough, MERS itself distinguishes between its roles as "nominee" and "beneficiary" when assigning interests in deeds of trust. Consider the assignment addressed in *Morlock, L.L.C. v. Bank of America, N.A.*[43] There, MERS executed a "Corporate Assignment of Deed of Trust/Mortgage" providing in pertinent part:

"For value received, the undersigned grants, assigns, and transfer to BAC Home Loans Servicing, JP, FKA Countrywide Home Loans Servicing, JP all beneficial interest under that certain Deed of Trust dated 1/30/2007, executed by Eduardo Ramirez and Erica Ramirez."[44]

This language of assignment is common in MERS' assignments. It was used by MERS in Davis,[45] a case cited by Deutsche Bank, and it is referenced in case law across the country.[46] In short, MERS knows

---

[43] *Morlock, L.L.C. v. Bank of Am., N.A.*, No. H-14-1678, 2014 WL 7506888, at *2 (S.D. Tex. Oct. 29, 2014).

[44] Id. (emphasis added).

[45] *Davis v. Countrywide Home Loans, Inc.*, 1 F. Supp. 3d 638 (S.D. Tex. March 3, 2014) (discussing assignment by MERS of "all beneficial interest" in deed).

[46] See, e.g., *Rust v. Bank of Am., N.A.*, 573 F. App'x 343, 344 (5th Cir. 2014) (discussing MERS assignment of "all beneficial interest under [the] Deed of Trust" (internal quotation marks omitted)); *In re Rinehart*, No. 11-41210-JDP, 2012 WL 3018291, at *3 (Bankr. D. Idaho July 24, 2012) (discussing assignment of "all MERS' beneficial interest in the DOT to First Horizon" (internal bracket and quotation marks omitted)); *Hall v. Bank of Am., N.A.*, No. 12-CV-3068- RWS, 2013 WL 1747916, at *3 (N.D. Ga. Apr. 22, 2013) (addressing MERS assignment of "all beneficial interest" under a deed of trust (internal quotation marks omitted)); *Knecht*

how to assign its beneficial interests and executes assignments with specific language to accomplish that objective.

Deutsche Bank's lawyers did not use that language in the Assignment here, which does not even acknowledge, much less purport to assign, MERS' beneficial interest in the Deed. Instead, Deutsche Bank drafted an assignment with MERS acting solely as "nominee." That election is binding.

More fundamentally, even if there were a sound basis for MERS to be carved out from basic agency principles, Texas courts, respectfully, must do the carving. Exercising diversity jurisdiction, the federal courts' task is to "predict state law, not to create or modify it."[47]

---

v. Fidelity Nat'l Title Ins. Co., No. C12-1575RAJ, 2015 WL 3618358, at *6 (W.D. Wash. June 9, 2015) (discussing MERS assignment of "all beneficial interest under certain Deed of Trust" (internal quotation marks omitted)).

[47] See *Herrmann Holdings Ltd. v. Lucent Techs. Inc.*, 302 F.3d 552, 558 (5th Cir. 2002). As the Trial Court observed, to the extent this Court has doubts about MERS' status under Texas law, an appropriate course would be to certify the issue to the Texas Supreme Court. See Tex. R. App. P. 58.1.

(c) The Banks' usage of *Casterline* is Not Relevant to the Language of the Assignment

The Prior Panel's incorrectly translated *Casterline v. OneWest Bank, F.S.B*,[48] and on which Deutsche Bank also relies.[49] To be sure, *Casterline* and this case bear certain similarities – a deed that was assigned by MERS "as nominee" for IndyMac, the same defunct principal.[50]

Casterline never contested, as the Burkes do here, MERS's authority to assign its deed "as nominee" only, and that issue was neither discussed nor decided in the opinion.[51] Casterline thus has nothing to say about the proper understanding of the Assignment language in this case.[52]

Casterline also highlights an important aspect. The briefing in which the Burkes proceeded pro se, could have easily led the Fifth Circuit to believe that

---

[48] See *Deutsche Bank*, 655 F. App'x at 254 n.1 (citing *Casterline v. OneWest Bank, F.S.B.*, 537 F. App'x 314 (5th Cir. 2013)).

[49] See Aplt. Br. at 18-19.

[50] See Aplt. Br. at 18-19.

[51] Id. at 317 ("Casterline has not challenged the assignment of the Security Instrument to OneWest.").

[52] *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 557 (2001) ("Judicial decisions do not stand as binding 'precedent' for points that were not raised, not argued, and hence not analyzed."); *Thomas v. Texas Dep't of Criminal Justice*, 297 F.3d 361, 370 (5th Cir. 2002) (quoting *Nat'l Cable Television Ass'n, Inc. v. Am. Cinema Editors*, 937 F.2d 1572, 1581 (Fed. Cir. 1991) ("When an issue is not argued or is ignored in a decision, such decision is not precedent to be followed in a subsequent case in which the issue arises.").

the dispositive issue was whether MERS had authority to assign – i.e., whether it could have in theory assigned – its rights in the Deed.

This often-litigated[53] question was a focus of both Deutsche Bank's presentation on appeal, and the prior panel's decision.[54] But as the Trial Court reiterated on remand, MERS' authority to assign its rights in the Burkes' Deed has never been called into question. The issue to be resolved is whether MERS exercised that right – a possibility that the unambiguous Assignment language precludes.[55]

I. The Second Panel disregarded Factual Findings in concluding that MERS could assign the Deed as Nominee for the FDIC

The Second Panel held that even if MERS acted solely as a nominee, the Assignment could be upheld

---

[53] See e.g., *Burton v. Nationstar Mortg., L.L.C.*, 642 F. App'x 422, 425 (5th Cir. 2016).

[54] See *Deutsche Bank*, 655 F. App'x at 254 (emphasizing that "Texas law and our precedent make clear that MERS, acting on its own behalf as a book entry system and the beneficiary of the Burkes' deed of trust, can transfer its right to bring a foreclosure action to a new mortgage.").

[55] Deutsche Bank has stated; "Martins clearly sets out the ability of MERS to[ ] exercise its rights as any other mortgage[e]." Aplt. Br. at 18 (emphasis added). Deutsche Bank continues; "The genesis of the Trial Court's confusion is the Trial Court's erroneous belief that MERS improperly act as both principal and agent in the same transaction. This Court, however, has made clear that MERS' ability to 'assign' a Deed of Trust is not limited by its capacity as a 'nominee' of a lender." Aplt. Br. at 19 (emphasis added).

because the Deed makes MERS a nominee for IndyMac and its "successors and assigns." The Panel surmised in this regard that the FDIC, which enjoys statutory authority to convey assets of banks in receivership, was IndyMac's operative successor. This was error.

The Second Panel overlooked Judge Smith's undisputed factual finding that by the time FDIC intervened "substantially all of its assets were sold." Deutsche Bank has never argued or shown otherwise.[56] The doubtful possibility that Petitioners' mortgage was under FDIC receivership at the time of the Assignment does not establish an agency relationship between MERS and the FDIC and Deutsche Bank, "has the burden of proving it."[57]

IV. The Petitioners Case Provides a Creditable Model for this Court to Decide if a 'Manifest Error' Overrides the 'Law-of-the-Case Doctrine' to Ensure Justice is Served and Historic and Controlling Laws are not Overruled

This case cannot be reduced to "some technical defect" in assignment documents, as Deutsche Bank contends.[58] At stake is whether Deutsche Bank is authorized to turn a family from its home. "For over 175 years, Texas has carefully protected the family

---

[56] See App.26, No.26.

[57] *IRA Res., Inc. v. Griego*, 221 S.W.3d 592, 597 (Tex. 2007).

[58] Aplt. Br. at 10.

homestead from foreclosure."[59] Parties are held to exacting standards under Texas law. Deutsche bank has not shown it holds a security interest on which it can foreclose.[60] Deutsche Bank is a stranger to the Burkes' loan. It would not only be manifestly unjust to the Burkes, but it would grant Deutsche Bank a windfall.

(a) The Second Panel erred to the extent it held that established exceptions to Law-of-the-case Doctrine do not apply on Remand.

The Second Panel questioned whether the "clearly erroneous" exception to law-of-the-case doctrine can even be applied to depart from a mandate on remand.

The Second Panel's reluctance conflicts with prior case law. The Fifth Circuit has repeatedly held that the "mandate rule is but a corollary to the law of the case doctrine."[61] Both doctrines "give way to three exceptions," including where "the earlier decision is clearly erroneous and would work a manifest injustice."[62] Exceptions to law-of-the-case exist because, in the end,

---

[59] *LaSalle Bank Nat. Ass'n v. White*, 246 S.W.3d 616 at 618 (Tex. 2007).

[60] See Tex. R. Civ. P. 736.1(d)(3)(B); Texas Property Code § 51.0001(4); *Leavings v. Mills*, 175 S.W.3d 301, 308-10 (Tex. App. 2004).

[61] *Ball v. LeBlanc*, 881 F.3d 346, 351 (5th Cir. 2018) (quoting *United States v. McCrimmon*, 443 F.3d 454, 460 (5th Cir. 2006)).

[62] Id. (internal quotation marks omitted); see also *United States v. Pineiro*, 470 F.3d 200, 205 (5th Cir. 2006).

"justice is better than consistency."[63] A lower court honors the rule of orderliness by raising the inconsistency so that it can be addressed by the appellate court. Such was the case here.

V. The Fifth Circuit has an Appearance of Bias which is Supported by the Record

While this is a sensitive issue as it involves analysis of the Courts' administration and ethics, the facts presented show a consistent visual pattern of prejudgment.

"Disqualification is required if an objective observer would entertain reasonable questions about the judge's impartiality. If a judge's attitude or state of mind leads a detached observer to conclude that a fair and impartial hearing is unlikely, the judge must be disqualified." [Emphasis added]. *Liteky v. U.S.*, 114 S.Ct. 1147, 1162 (1994), and;

Courts have repeatedly held that positive proof of the partiality of a judge is not a requirement, only the appearance of partiality. *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 108 S.Ct. 2194 (1988) (what matters is not the reality of bias or prejudice but its appearance); *United States v. Balistrieri*, 779 F.2d 1191 (7th Cir. 1985) (Section 455(a) "is directed against the appearance of partiality, whether or not the judge is actually biased.");

---

[63] *Wm G. Roe v. Armour & Co.*, 414 F.2d 862 (5th Cir. 1969).

(i) FED. R. APP. P. WITH 5TH CIR. R. & IOPs details the scheduling and "separation of assignment of judges and calendaring of cases". Clearly, this was not applied. Whilst auditing the Judge assignments and calendaring during the two visits to the Fifth Circuit, some oddities were noted, and in particular, discrimination against homeowners. In order to confirm this serious allegation, an audit was performed of 12 months mortgage foreclosure cases heard in the Fifth Circuit between Nov. 2017 and Oct. 2018. A total of 42 were mortgage/ foreclosure cases were heard during this time and 11 of them (26%) involved Deutsche Bank.

(ii) Judge Haynes sat on both of the Burkes' Appeals. In the most recent, she authored the opinion stating the Burkes' "near decade of *free living*" was good reason foreclosure was justified. Review of the administration docket and correspondence will confirm she also denied the Burkes' due process.

(iii) Judge Davis, per financial disclosures, owns or owned shares in Deutsche Bank.[64]

(iv) Judge Graves, on the Second Panel, also sat on the often-cited, 3-Panel in

[64] A judge who is a stockholder in a corporation is disqualified from hearing a case in which that corporation is a party – *Pahl v. Whitt*, 304 SW2d 250 (Tex. App. – El Paso 1957, no writ history)

Reinagel v. Deutsche Bank, Case No. 12-50569 (5th Cir., 2013). A case where Snr. Judge Higginbotham, who invests in rental properties nationwide per his financial disclosures, has been documented deriding homeowners for "still living in their homes", and;

> **"... Ain't no free lunch and there sure ain't no free house (laughing) ..."**
>
> See oral recording, available at Court library. (quote starts at 28.40 mins +).[65]

The Burkes audit found Judge Graves sat on 7 mortgage foreclosure related panel cases, which included either/and/or Deutsche Bank/Ocwen, the Bank and Mortgage Servicer named in the Burkes' case. Questionably, he did not sit on any foreclosure cases which did not include either Deutsche Bank or Ocwen during this period. In 4 of those 7 cases (57%), warnings or similar were issued to homeowners defending their foreclosures. All cases found in favor of the Bank.

---

[65] Judge Higginson, the panel writer during the Banks' 2016 appeal, was a founding member of the Inn of Court. A regional chapter in Texas changed its name to "The Patrick E. Higginbotham American Inn of Court", where its mission statement reads: "A legal profession and judiciary dedicated to professionalism, ethics, civility, and excellence." A contradiction.

(v) Despite its authority and available legal staff, the Fifth Circuit thought it appropriate and acceptable that appellate counsel for Deutsche Bank provide the Fifth Circuit with briefs (templates) for download from the official Court website. They are mistaken.

> "Alice M. Batchelder, Circuit Judge, dissenting . . .
>
> PUBLIC CONFIDENCE in this court or any other is premised on the certainty that the court follows the rules in every case, regardless of the question that a particular case presents. Unless we expose to public view our failures to follow the court's established procedures, our claim to legitimacy is illegitimate."
>
> – *Grutter v. Bollinger*, Nos. 01-1447, 01-1516 (6th Cir. 2002) ("Sister Court"), Page 102.

VI. The Petitioners Case Provides an Earnest Example for the Court to Review Three Core Arguments as Raised by the Hon. Judge Graves in *Reinagel*, a Precedent Case in Texas

In his minority opinion, Judge Graves wrote (Appendix 16, App.132-137);

i. Forgery Makes an Assignment Void, not Voidable.

The Burkes' also filed their own Supplemental Briefing (Appendix 11, App.104-107) wherein they discuss the "forged" assignment.

ii. Violations of the Pooling and Servicing Agreements (PSA) as Evidence.

iii. The Note and the Mortgage are Inseparable.

One deliberates if Judge Graves' eventual affirmation of the judgment against Reinagel was based on concern of reprisals, as witnessed in the case of former Judge Smith. Judge Graves appears intimidated by the predisposed Senior Judge alongside him. As noted, it would not be the first time there is friction in the Circuits and questions raised by Judges about the internal policies and administration of these self-managed Circuits, who review complaints directly regarding their own prejudicial Court behavior.

> "Judge Moore correctly states that our "only source of democratic legitimacy is the perception that we engage in principled decision-making.' . . . If actions are taken that may imperil that legitimacy, a member of this court who observes them is left with two alternatives, both unpalatable. One is to allow the actions to pass in silence, even after explanations have been requested, but have not been produced. Silence simply allows those actions to continue and to be repeated, with real consequences for both the court and the litigants who appear before it. The other alternative is to place the actions on the record, for such

> remediation as may be possible. . . . Legitimacy protected only by our silence is fleeting. If any damage has been done to the court, it is the work of the actors, not the reporters."
>
> – *Grutter v. Bollinger*, Nos. 01-1447, 01-1516 (6th Cir. 2002) ("Sister Court"), Page 102, footnote 49.

iv. New York versus Texas Justice; Implementing the Correct Interpretation of Texas Law

In Reinagel, Judge Graves legal statements are correct in law. Indeed a New York Judge poured over Reinagel and other decisions by the Fifth Circuit in a foreclosure case[66] in his District. Lawyers for the homeowner, similar to this case, claimed the Bank was inauthentic (Appendix 13, App.118-120). The Judge relied upon the "forgery" argument and repelled the Bank. (The homeowner prevailed, retained her home and obtained full satisfaction of her note).

VII. The Passage of Time has Illuminated the Financial Institutions and Default Industry Failed Legal Stratagems, But History Has Retained the Pejorative Evidence

The overwhelming obstruction for bankers, loan originators and debt purchasers, including their entourage of default industry affiliates, is history. It is black

---

[66] See *Cynthia Carrsow-Franklin* (10-20010), United States Bankruptcy Court, S.D. New York Doc 109 Filed 01/29/15 & Adv. Proc. No. 16-08246 (rdd)

and white. It cannot be photocopied and altered (Appendix 14, App.124-129).

After the crisis hit, the financial and mortgage industry went into a tailspin. They were unprepared for the aftermath and the legal issues that would follow, as a result of mortgage-securitization and the new "book entry" and "honor system" called MERS. When the lenders started returning coupon checks submitted by homeowners, which were supposed to be recorded as a mortgage payment, this allowed 'banks' to accelerate the debt and engage their default attorneys to initiate formal legal foreclosure proceedings on homeowners, like the Burkes. However, substituting rubber stamps and parties, history has recorded these events and legal deficiencies:

(a) Civil Actions in the Name of MERS

In the early years, the lenders and their attorneys were foreclosing as MERS. The Courts, the OCC, OTS, FDIC, FHFA and lawyers for the homeowners objected.[67]

(b) Civil Actions in the Name of Servicers

The Default Attorneys conferred with their client(s) and decided to start foreclosing in the name of

---

[67] See MERS Consent Order, "acting as mortgagee of record in the capacity of nominee for lenders, and initiating foreclosure actions." https://www.occ.gov/news-issuances/news-releases/2011/nr-occ-2011-47h.pdf

the mortgage servicer. Again, this raised 'red flags' and objections in the Courts' by Judges on the Circuit(s) and lawyers for homeowners and a Texas Judicial Foreclosure Taskforce.[68]

(c) Civil Actions as the Trustees

The latest version, with Trustees commonly referred to as the "Banks" in Courts. The chosen vehicle adopted for this case, with questionable and backdated documents.

VIII. This is a Worthy Case Because the Relief Promised and Subsequently Cancelled by Deutsche Bank is of Enormous Concern as it Injures Citizens and Consumers and this Court holds the Power to Intervene

Deutsche Bank recently made an announcement[69] reneging on the $7.2 billion dollar fine in the form of penalties a relief package for homeowners. Incredulously, this decision has not resulted in a public outcry. Deutsche Bank's 2017 settlement[70] was scheduled to expire for homeowners in March 2022.

---

[68] See Supreme Court of Texas Task Force on Judicial Foreclosures Transcript (Appendix 12, App.110-117).

[69] See https://www.americanbanker.com/news/deutsche-bank-the-doj-and-how-4b-in-aid-to-distressed-homeowners-evaporated

[70] See DOJ: "Deutsche Bank's Conduct Contributed to the 2008 Financial Crisis" https://www.justice.gov/opa/pr/deutsche-bank-agrees-pay-72-billion-misleading-investors-its-sale-residential-mortgage-backed

CONCLUSION

IX. The Great Depression and this Court Provided Citizens Much More Empathy and Relief When Compared to The Great Recession but this Court can Effect Positive Change Moving Forward

In the last century, history has recorded three times where the United States economy dangerously faltered. In *United States v. Winstar Corp.*, 518 U.S. 839 (1996), the first two events were summarized perfectly by Justice Souter. The third and most recent is the 2008 financial crisis, also referred to as "the Great Recession".

In the intervening years since Winstar, new legislation, new regulatory bodies combined with the advent of Mortgage Electronic Registration Systems (MERS), non-banks (mortgage servicers) and securitized "pooled" loans (residential mortgage backed securities) have negatively and materially impacted how mortgage loans are processed and recorded.

The Great Depression is remembered by this Courts' decision in *Blaisdell*,[71] which provided farmers, businesses, citizens, and ultimately the economy, much needed relief by staying foreclosures and making mortgage payments affordable for the long-term. To-date, there has been no such repeat of Blaisdells' successfully implemented relief for homeowners.

---

[71] *Home Building & Loan Association v. Blaisdell*, 290 U.S. 398 (1934).

Instead, it has been chaos. Banks have committed loan forgery and fraud in order to sell mortgages onto investors. Then they have frequently engaged in judicial estoppels over the last decade, redesigning their arguments when seeking claims for damages in civil actions for investors, yet shamelessly rely on the same 'faulty and fraudulent' evidence in Courts to foreclose on homeowners.

Respectfully, the Petitioners case is the right vehicle to obtain definitive answers and closure for distressed and deserving Texas homeowners.

X. In the Petitioners opinion, along with the Lower Court Judge and the Petitioners past Lawyers', this Case is Presented at the Right Time and is the Best Vehicle for this Court to Address Predatory Lending and a Nominee Called MERS

To consider a corrective decision in this Petition would provide a landmark ruling, one which moving forward will allow *qualified* homeowners the legal protections which they are not currently able to obtain in Texas Courts today.

By decree of this Court, the correct interpretation of the laws in Texas will be defined, thus reaffirming homesteads are sacrosanct from predatory loans, inauthentic civil actions and discrimination of homeowners by the judiciary.

For the above and foregoing reasons, Petitioners request the issuance of a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

Dated: April 26, 2019

Respectfully,

JOANNA BURKE
Counsel of Record
46 Kingwood Greens Dr.
Kingwood, Texas 77339
281 812 9591
kajongwe@gmail.com
Pro Se for Petitioners