No.

In the

Supreme Court of the United States

Jose Gomes,

Petitioner,

v.

Countrywide Home Loans, Inc.,
Mortgage Electronic Registration Systems, Inc.,
and ReconTrust Company, N.A,

Respondents.

On Petition for Writ of Certiorari to the California Court of Appeal, Fourth District, Division One

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

California's statutory scheme for nonjudicial foreclosure permits only the trustee, mortgagee, beneficiary, or their authorized agent to initiate foreclosure proceedings. Does a state appellate court decision construing the statute in a manner that strips homeowners of any way to enforce that limitation deprive them of due process of law by permitting unauthorized persons to foreclose?

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The opinion of the California Court of Appeals, Fourth Appellate District, Division One, is reported at *Gomes v. Countrywide Home Loans, Inc.*, 192 Cal.App.4th 1149, 121 Cal.Rptr.3d 819 (2011). (Appendix,[1] page A1) The California Supreme Court denied review, without opinion, on May 18, 2011. (A22)

JURISDICTION

The court of appeal entered its judgment on February 18, 2011. The California Supreme Court denied review on May 18, 2011. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State

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[1] References to the Appendix are given in parentheses, with page numbers preceded by the letter "A."

deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Constitution, Amendment 14, Section 1.

The trustee, mortgagee, or beneficiary, or any of their authorized agents shall first file for record, in the office of the recorder of each county wherein the mortgaged or trust property or some part or parcel thereof is situated, a notice of default.

California Civil Code § 2924(a)(1) (specifying contents of that notice).

A beneficiary, or his or her authorized agent, shall, within 21 days of the receipt of a written demand by an entitled person or his or her authorized agent, prepare and deliver to the person demanding it a true, correct, and complete copy of the note or other evidence of indebtedness with any modification thereto, and a beneficiary statement.

California Civil Code § 2943(b)(1).

INTRODUCTION

In 2010, financial institutions seized more than one million homes across the United States through foreclosures. The number of foreclosure-related filings soared to 2.9 million. According to one real estate analyst, this number would have been far larger except for one thing—a slowdown in foreclosures due to growing questions of the legality of many of these actions:

> "Total properties receiving foreclosure filings would have easily exceeded 3 million in 2010 had it not been for the fourth-quarter drop in foreclosure activity—triggered primarily by the continuing controversy surrounding foreclosure documentation and procedures that prompted many major lenders to temporarily halt some foreclosure proceedings," said James J. Saccacio, chief executive officer of RealtyTrac. [2]

The "continuing controversy" was the alarming realization by state and federal law enforcement agencies, real estate professionals, and consumer advocates that mortgage fraud among foreclosing

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[2] http://www.reuters.com/article/2011/01/13/us-usa-housing-foreclosures-idUSTRE70C0YD20110113

banks and other lenders had become a nationwide epidemic of malfeasance affecting untold thousands of homeowners.

In October 2010, the Attorneys General of all fifty states launched a joint multistate investigation into the mortgage practices of lenders, including Bank of America (Countrywide's successor), JP Morgan Chase and Ally Bank, among others.[3] Investigations by state agencies, journalists, and attorneys representing borrowers continue to uncover a morass of negligence and fraud. Discrepancies in foreclosure filings include missing promissory notes, backdated assignments, forgeries of signatures on assignments and deeds of trust ("robosigning"), and the false notarizing of recorded documents. These misdeeds contribute to the processing of thousands of foreclosures by companies making billions of dollars with little oversight or inquiry as to the foreclosures' legality. Misconduct has been found or suspected in both judicial and non-judicial foreclosures.

In California, most foreclosures are nonjudicial. A promissory note for the money to buy real property may be secured by a lien on the property in the form of a deed of trust. That deed of trust grants the

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[3] http://www.businessweek.com/news/2010-10-13/attorneys-general-in-50-states-open-foreclosure-probe.html

trustee the power of sale if a homeowner such as Petitioner defaults on his loan. The lender may foreclose using a nonjudicial scheme established by the state legislature and embodied in California Civil Code § 2924 et seq. Nonjudicial foreclosure is also available to lenders in twenty-eight other states. These statutes have allowed much of the foreclosure abuse to take place, often with little or no recourse for the defrauded homeowner.

One of the factors contributing to the problem of improper foreclosures is lenders' common practice of assigning tasks such as collection of payments to a "loan servicer," which acts as the lender's ostensible agent. The loan servicer, often a large financial institution such as Bank of America, not only manages accounts but, in the event of a default, may have the power to authorize the trustee to foreclose.

Using a loan servicer is convenient for the lender or its assignees, but it creates insurmountable problems for borrowers in financial straits. Loan servicers collect fees for a wide range of services, including overseeing foreclosures, and a large servicer may manage hundreds of thousands or even millions of loans. Trying to renegotiate the terms of a loan with a servicer—or even getting current information from the servicer—becomes a frustrating tale of unreturned phone calls, lost documents, misrepresentations, and eventual foreclosure despite borrowers' best efforts to avoid losing their homes.

Another contributing factor is lenders' widespread use of a "nominee beneficiary" of the deed of trust, Mortgage Electronic Registration Systems, Inc. ("MERS"). Created by the financial services industry to avoid the necessity of recording millions of deeds of trust and assignments as loans pass through the secondary investment market, MERS's sole purpose is to minimize costs for the lenders and streamline the foreclosure process.

MERS exists because of the proliferation of mortgage-backed securities, such as collateralized debt obligations and other derivatives. A lender may immediately recoup its investment on a loan by selling it to investors. Those investors may, in turn, create large pools of loans to be used as collateral for secondary market instruments. Naming MERS as a beneficiary of the deed of trust lets the industry record that deed only once, even if the loan itself is resold over and over during the life of the pool in which it has been placed. This scheme obscures the movement of a borrower's promissory note through the secondary investment market. The use of MERS has created a system with a total lack of transparency that can be—and has been—used to mask fraud, negligence, and incompetence.

Yet the California courts have now slapped down Petitioner's request that Respondents prove their right to foreclose. In ruling to uphold the dismissal of Petitioner's suit, the State of California, through its judicial branch, has said to Petitioner and to thousands of homeowners across the state: "You have no right to proof that the claim on your home is legitimate." This ruling deprives homeowners of due process under the Fourteenth Amendment of the Constitution.

STATEMENT

A. The parties' dealings

In 2004, Petitioner executed a promissory note secured by a deed of trust for a loan of $331,000 to buy a home in San Marcos, California. The deed of trust identified the lender as KB Home Mortgage Company and the trustee as First American Title Company. It also identified MERS as follows: "MERS is a separate corporation that is acting solely as a nominee for Lender and Lender's successors and assigns. MERS is the beneficiary under this security instrument."[4]

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[4] MERS describes itself as follows:

> MERS was created by the mortgage banking industry to streamline the mortgage process by using electronic commerce to eliminate

Petitioner's loan servicer, Countrywide Home Loans, Inc., was formerly one of the country's largest originators of subprime mortgage loans. After substantial losses due to the collapse of home prices and the subsequent default of many of its loans, Bank of America acquired Countrywide in July 2008.

In March 2009, Recontrust N.A., purporting to act

> paper. Our mission is to register every mortgage loan in the United States on the MERS® System.
>
> Beneficiaries of MERS include mortgage originators, servicers, warehouse lenders, wholesale lenders, retail lenders, document custodians, settlement agents, title companies, insurers, investors, county recorders and consumers.
>
> MERS acts as nominee in the county land records for the lender and servicer. Any loan registered on the MERS® System is inoculated against future assignments because MERS remains the mortgagee no matter how many times servicing is traded. MERS as original mortgagee (MOM) is approved by Fannie Mae, Freddie Mac, Ginnie Mae, FHA and VA, California and Utah Housing Finance Agencies, as well as all of the major Wall Street rating agencies.
>
> http://www.mersinc.org/about/index.aspx

as an agent for MERS, caused a notice of default and election to sell to be mailed to Petitioner. Petitioner's attorney asked Countrywide for loan information, including documents required to be provided under the federal Truth in Lending Act; a copy of the note; documents evidencing any sale, transfer, or assignment of the note; and a beneficiary statement and payoff demand statement under California Civil Code § 2943. Countrywide responded with a generic letter promising a more complete response within 20 business days. When counsel received no further response from Countrywide, Petitioner sued Countrywide, MERS, and Recontrust in state court.

B. Proceedings below

Petitioner's suit alleged that the foreclosure was improper because the parties conducting it did not have the current noteholder's authority to foreclose. The trial court sustained defendants' demurrer without leave to amend, holding that Petitioner had failed to state a cause of action. Petitioner appealed the judgment to the California Court of Appeal for the Fourth Appellate District.

The focus of Petitioner's claims was that, under California's nonjudicial foreclosure statutes, Civil Code § 2924, et seq., Petitioner was entitled to proof that the loan servicer, trustee, or an entity such as

MERS, either named in the deed of trust or acting through assignments of interest, had the legal authority on behalf of the promissory note's current holder to foreclose on the security.

In upholding the trial court's ruling dismissing Petitioner's claims, the California Court of Appeal held that the foreclosure statutes did not entitle a borrower to know if in fact a duly authorized party was pursuing the foreclosure on behalf of the current noteholder:

> He is seeking to impose the additional requirement that MERS demonstrate in court that it is authorized to initiate a foreclosure. As we will explain, such a requirement would be inconsistent with the policy behind nonjudicial foreclosure of providing a quick, inexpensive and efficient remedy.
>
> (A10)

The court's fixation on providing lenders with a convenient remedy ignores the statute's other purposes:

> The purposes of this comprehensive scheme are threefold: (1) to provide the creditor/beneficiary with a quick, inexpensive and efficient remedy against a defaulting debtor/trustor; (2) to ***protect***

> ***the debtor/trustor from wrongful loss of the property***; and (3) to ensure that a properly conducted sale is final between the parties and conclusive as to a bona fide purchaser.
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> (A9, quoting from *Moeller v. Lien*, 25 Cal.App.4th 822, 830 (1994) (emphasis added.)

Indeed, the California Supreme Court has stated that protecting the debtor/trustor is the main goal of the statutory scheme: "[T]hese statutory regulations were enacted primarily for the benefit of the trustor and for the greatest part limit the creditors' otherwise unrestricted exercise of the contractual power of sale upon default by the trustor." *Garfinkle v. Superior Court*, 21 Cal.3d 268, 279 (1978).

In reaching its dubious conclusion that a homeowner has no remedy to prevent nonjudicial foreclosure by an unauthorized person, the court refused to follow the reasoning of three federal district court cases, saying that none recognized a cause of action requiring a defendant to prove its authority to foreclose, and in each case the complaint identified a specific factual basis for alleging that the foreclosure was not instituted by the correct party. (A12) These statements mischaracterize the cases in question.

In *Weingartner v. Chase Home Finance, LLC*, 702

F.Supp.2d 1276 (D.Nev. 2010), the plaintiffs alleged, *inter alia*, a claim for injunctive relief on the ground that foreclosure was wrongful because the purported trustee who recorded the notice of default was not actually the trustee. The defendants brought a combined motion to dismiss for failure to state a claim, and for summary judgment. The district court denied both motions with respect to the claim for injunctive relief because copies of purported assignments indicated that the alleged trustee may not have been the trustee. *Id.*, at 1281-82. The court took judicial notice of the assignments at the *defendants*' request. *Id.*, at 1279 n. 1. The district court opinion gave no indication as to what specifically was alleged in the complaint.

In *Ohlendorf v. American Home Mortgage Servicing, Inc.*, 2010 U.S. Dist. LEXIS 31098 (E.D. Cal. 2010), the defendants moved to dismiss for failure to state a claim and, as in *Weingartner*, requested that the district court take judicial notice of assignments supposedly conferring the right to foreclose. *Id.*, at *5-*6. Noting that the assignments appeared to be backdated, and that recording backdated assignments may taint the notice of default, the court concluded that *the defendants failed to demonstrate that the assignments were valid*. *Id.*, at *23-*24. "Accordingly, defendants [sic] motion to dismiss plaintiffs' wrongful foreclosure is denied insofar as it is premised on defendants being proper beneficiaries." *Id.*, at *24.

In *Castro v. Executive Trustee Services, LLC*, 2009 U.S. Dist. LEXIS 14134 (D.Ariz. 2009), Arizona law required that ETS or MERS be the lawful holder of the promissory note in order to foreclose. The district court denied the defendants' motion to dismiss the plaintiffs' claim for declaratory relief. "Having elected to proceed via Rule 12(b)(6), rather than Rule 56, [the motion] will be denied because the record contains insufficient information to resolve the issue whether ETS or MERS is entitled to enforce the instrument as a matter of law." *Id.*, at *16-*17. In other words, rather than dispose of the matter at the pleading stage, the court required the defendants to move for summary judgment and produce evidence demonstrating that they were entitled to foreclose.

In the instant case, the California Court of Appeal also affirmed the order sustaining defendants' demurrer on the independent ground that Petitioner agreed in the deed of trust that "MERS (as nominee for Lender and Lender's successors and assigns) has . . . the right to foreclose and sell the Property." (A16) But MERS's right to foreclose derives from the *noteholder*, not the borrower. The trust deed cannot bind an assignee of the note, and a borrower should be allowed to verify that MERS is, in fact, the nominee of the *current* noteholder. Nothing in the statutes explicitly bars Petitioner from demanding to know the identity of the principal taking his home.

REASONS FOR GRANTING THE PETITION

A. The California court's decision deprived Petitioner of his right to due process under the Fourteenth Amendment to the United States Constitution.

Petitioner is not challenging the constitutionality of California's statutory nonjudicial foreclosure scheme. Rather, Petitioner contends that it is the California courts' construction of that otherwise valid statutory scheme that has deprived him of due process: it left him without a remedy to protect his home from foreclosure by persons acting without authority. "That the action of state courts and of judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment, is a proposition which has long been established by decisions of this court." *Shelley v. Kraemer*, 334 U.S. 1, 14 (1948). Specifically, a state appellate court decision can itself deny a litigant due process of law. *Richards v. Jefferson County, Alabama*, 517 U.S. 793, 803-05

(1996) (Alabama Supreme Court's extreme application of state-law res judicata principles was a denial of due process).

In *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673 (1930), the plaintiff bank sued to enjoin a county treasurer from collecting a portion of certain taxes assessed against its shareholders on the ground that the assessor denied the shareholders equal protection by assessing their shares at full value, while other classes of property were assessed at 75% of value or less. Earlier Missouri Supreme Court decisions had held that no administrative board, including the state tax commission, could grant the relief plaintiff sought, and that a bill in equity such as plaintiff's complaint for injunctive relief was the appropriate and only remedy. The trial court refused to grant the injunction and dismissed the action, and the plaintiff appealed. The Missouri Supreme Court, contrary to its prior decision, held that the state tax commission could have granted the requested relief if the plaintiff had complained to it in a timely manner. It then affirmed the trial court's judgment because the plaintiff had an adequate legal remedy that it failed to pursue (complaint to the state tax commission), and thus was not entitled to equitable relief in the form of an injunction.

The United States Supreme Court granted the plaintiff's petition for certiorari and reversed the Missouri Supreme Court decision. Justice Brandeis, writing for the Court, emphasized that it is for the state courts to determine the law of the state, and that the U.S. Supreme Court was not concerned with plaintiff's rights on the merits. Rather, its concern was that the Missouri Supreme Court decision, reversing its prior holding regarding the powers of the state tax commission, deprived the plaintiff of due process by denying it an opportunity to be heard.

> By denying to it the only remedy ever available for the enforcement of its right to prevent the seizure of its property, the judgment deprives the plaintiff of its property. . . . [¶] If the result above stated were attained by an exercise of the state's legislative power, the transgression of the due process clause of the Fourteenth Amendment would be obvious. [Citation] The violation is none the less clear when that result is accomplished by the state judiciary in the course of construing an otherwise valid [citation] state statute. The federal guaranty of due process extends to state action through its judicial as well as through its legislative, executive, or administrative branch of government.
>
> *Id.*, at 679-80.

As in *Brinkerhoff-Faris*, the California courts' decision in the instant case leaves Petitioner with no remedy to prevent the seizure of his property. Petitioner does not seek to add a requirement not already present in the statutes. Rather, he contends that the statutes must be construed so as to afford him a meaningful opportunity to enforce the statute's existing terms *before* his home is seized. The California courts' construction of the statutory scheme as barring Petitioner's suit challenging MERS's right to foreclose denies him any such opportunity, and thereby deprives him of due process in violation of the Fourteenth Amendment.

Rather than construe the statutory scheme so as to protect the debtor/trustor, which is its primary purpose (*Garfinkle, supra*), the courts' decision has construed the statutes to protect the purported trustee and a sham beneficiary, MERS, from having to prove their right to foreclose. It denies the borrower the opportunity to be heard when he questions whether the beneficiary and the trustee are who they say they are—that they have in fact been authorized to take the borrower's home.

B. Petitioner has substantial information supporting his allegation that MERS lacks authority to foreclose on his home.

MERS's protean role in foreclosures is pernicious. Depending on the situation, MERS has presented itself as a beneficiary—as it has here—or, when it suits its purposes, as a "mere nominee" with no beneficial interest in any of the promissory notes secured by deeds of trust.

The language in the deed of trust has the warped surreality of an M.C. Escher engraving. On the one hand, the Borrower grants the Property and power of sale "to Trustee, in trust." Mere lines later, the document states that MERS holds "only legal title to the interests granted by Borrower" and has "the right to foreclose and sell the Property." Yet this is impossible: the property is held by a *trustee* under the deed of trust. The court of appeal held that "under California law MERS may initiate foreclosure as the nominee, or agent, of the noteholder." (A14) But there has never been any answer to Petitioner's original question: ***Who is*** the noteholder?

The court of appeals sidestepped this question by holding that Petitioner had *agreed* in the deed of trust to grant MERS the power to foreclose: "Specifically, Gomes agreed that 'MERS (as nominee for the Lender and Lender's successors and assigns) has . . . the right to foreclose and sell the Property.'" (A16) But MERS's right to foreclose derives solely from the noteholder. Gomes, as the borrower, was powerless to authorize MERS to foreclose.

The California nonjudicial foreclosure scheme itself is irrelevant. Petitioner is asking only that Respondents prove that they are the proper parties to invoke that scheme because they are, in fact, either the original parties to the promissory note and deed of trust or the assigns or agents of those parties. This is not a novel, out-of-the-mainstream issue.[5] It has arisen in courts across the country in both state and federal jurisdictions.

Based on MERS's own contradictory positions regarding its authority and role in the chain of title, state and federal courts, including bankruptcy courts in the Ninth Circuit, have questioned MERS's authority to enforce or transfer an ownership interest in a promissory note. United States Bankruptcy Courts in jurisdictions from New York to

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[5] This case should not be confused with the many "show-me-the-note" cases in which courts have consistently ruled that foreclosing entities do not have to produce the note under California's foreclosure statutes. Petitioner is not asking to see the original note.

California have repeatedly questioned the legal basis for MERS's role in foreclosures. In New York, the Bankruptcy Court analyzed MERS's authority in *In Re Agard,* Bk #810-77338 (E.D.N.Y., 2011), in part due to the dozens of cases MERS brought in that district for relief from stay. Language in the mortgage documents, similar to that in a deed of trust in California, described MERS as the nominee of the lender and beneficiary of the deed of trust. *Agard* held that MERS was neither:

> By MERS's own account, it took no part in the assignment of the Note in this case, but merely provided a database which allowed its members to electronically self-report transfers of the Note. MERS does not confirm that the Note was properly transferred or in fact whether anyone including agents of MERS had or have physical possession of the Note. What remains undisputed is that MERS did not have any rights with respect to the Note and other than as described above, MERS played no role in the transfer of the Note.
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> *In Re Agard* at 22.

Thus MERS claims to have no rights in the promissory notes secured by mortgages or deeds of trust.

Petitioner's inquiry is further justified by the *Agard* court's recognition that whatever the borrower may understand and agree to in the deed of trust conveys no actual authority to MERS. The agency relationship on which the California courts relied is created not by the agent, nor by the belief or assent of a third party such as Petitioner, but by the principal.

> Other than naming MERS as "nominee", the Mortgage also provides that the Borrower transfers legal title to the subject property to MERS, as the Lender's nominee, and acknowledges MERS's rights to exercise certain of the Lender's rights under state law. This too, is insufficient to bestow any authority upon MERS to assign the mortgage. In *Bank of New York v. Alderazi*, the court found "[t]he fact that the borrower acknowledged and consented to MERS acting as nominee of the lender has no bearing on what specific powers and authority the lender granted MERS." *Alderazi*, 900 N.Y.S.2d at 824. Even if it did bestow some authority upon MERS, the court in *Alderazi* found that the mortgage did not convey the specific right to assign the mortgage.
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> *In Re Agard* at 31.

In a more recent case decided in New York's Supreme Court, Appellate Division, *Bank of N.Y. v. Silverberg*, 2011 NY Slip Op 05002, the court was faced with facts similar to those in *Agard.* Acknowledging the ubiquitous reach of MERS—it holds approximately 60 million loans and is involved in approximately 60% of loans in the U.S.—the court nevertheless ruled that, despite language in the mortgage (similar to that in Petitioner's deed of trust), MERS lacked the authority to assign the right to foreclose because it was never the holder or an assignee of the note:

> This Court is mindful of the impact that this decision may have on the mortgage industry in New York, and perhaps the nation. Nonetheless, the law must not yield to expediency and the convenience of lending institutions. Proper procedures must be followed to ensure the reliability of the chain of ownership, to secure the dependable transfer of property, and to assure the enforcement of the rules that govern real property.
>
> *Id.*

In *MERS v. Nebraska Dept. of Banking*, 270 Neb. 529, 704 N.W.2d 784 (2005), MERS sought a declaration that it was not a "mortgage banker" and therefore not subject to the license and registration requirements of Nebraska's Mortgage Bankers Registration and Licensing Act. Counsel for MERS explained its limited role:

> MERS does not take applications, underwrite loans, make decisions on whether to extend credit, collect mortgage payments, hold escrows for taxes and insurance, or provide any loan servicing functions whatsoever. MERS merely tracks the ownership of the lien and is paid for its services through membership fees charged to its members.
>
> *Id.* at 534.

Finding that MERS had only an incidental role, and lacked any ownership interest in the notes secured by the mortgages, the Nebraska Supreme Court held that MERS was not a mortgage banker within the meaning of the Nebraska Act. *Id.* at 535.

MERS took a much different position in *Landmark National Bank v. Kesler,* 2009 Kan. LEXIS 834 (September 19, 2009), when it sought to intervene in a foreclosure action involving a second mortgage note in which MERS had been named as the lender's "nominee." The original lender had assigned the mortgage to Sovereign Bank, but the assignment had not been recorded in the county where the property was located. Neither Sovereign nor MERS had been given notice of a foreclosure action filed by the first mortgage holder. The property was sold at a sheriff's sale. Sovereign learned of the foreclosure, objected to the sale, and argued that MERS—which had not been named as a party in the foreclosure action—was a contingently necessary party. MERS then sought to intervene.

The Kansas Supreme Court held that MERS had no standing. The mortgage instrument described MERS as functioning "solely as nominee" for the lender, but did not define the term "nominee." The court noted that MERS's counsel had at various times described its role as nominee as holding the mortgage "in street name"; later he stated that the nominee "is the mortgagee and is holding the mortgage for somebody else"; at another point he declared that the nominee "is more like a trustee or more like a corporation, a trustee that has multiple beneficiaries"; thus, you do not serve the beneficiaries, "you serve the trustee of the trust; you serve the agent of the corporation." *Id.*, 2009 Kan. LEXIS 834 * 8. Counsel for the property's buyers described a nominee as a "representative in a rather limited sense" and later "like a power of attorney." *Id.*

The Kansas court concluded that the relationship MERS had to Sovereign was more akin to that of a straw man than to a party possessing all the rights given a buyer. *Id*. at *9. It cautioned that the MERS system "made it difficult for unsophisticated borrowers to be certain of the identity of their lenders and mortgagees. (Citation.) . . . MERS creates a system in which the public has no notice of who holds the obligation on a mortgage." *Id.* at *11.

This warning relates exactly to what Petitioner was seeking. Yet the California courts have decided he has no right to be heard on that question. The California courts have denied Petitioner any right to learn the identity of the current holder of the promissory note secured by the deed of trust, and thus to ascertain whether or not the holder authorized MERS to foreclose. The State of California is no longer merely regulating or creating a private scheme for lenders; it has taken overt official action to protect lenders, trustees, and MERS from the legal consequences of their negligent or fraudulent misconduct. Contrary to what the courts may have thought at one time, the foreclosure statutes, as interpreted by the courts in this case, no longer offer the borrower *any* protection from negligence, incompetence, or even intentional fraud.

Because Petitioner's case was dismissed at the initial pleading stage, this ruling is particularly insidious. The State has thus cut off any opportunity for discovery to determine what role MERS actually played. The court of appeal described MERS as the "nominee, or agent, of the noteholder." (A14) But that was merely its assumption. Nowhere in Petitioner's complaint did he allege that MERS was the agent of the noteholder. Thus, by dismissing the case at the earliest possible stage, and cutting off Petitioner's ability to do any discovery, the court left unexamined the question as to whether there actually is an agent-principal relationship between the *current* noteholder and MERS. The court's reasoning that the deed of trust authorizes MERS to foreclose ignores the fact that, regardless of the language in the deed of trust, that instrument is only incidental to the promissory note it secures. *Domarad v. Fisher & Burke*, 270 Cal.App.2d 543 (1969).

> [W]e note the following established principles: that a deed of trust is a mere incident of the debt it secures and that an assignment of the debt carries with it the security; that a deed of trust is inseparable from the debt and always abides with the debt, and it has no market or ascertainable value, apart from the obligation it secures; and that a deed of trust has no assignable quality independent of the debt, it may not be assigned or transferred apart from the

> debt, and an attempt to assign the deed of trust without a transfer of the debt is without effect.
>
> *Id.* at 553-554 (citations and internal quotations omitted).

MERS claims that it has the authority to foreclose as the noteholder:

> In mortgage foreclosure cases, the plaintiff has standing as the holder of the note and the mortgage. When MERS forecloses, MERS is the mortgagee and it is the holder of the note because a MERS officer will be in possession of the original note endorsed in blank, which makes MERS a holder of the bearer paper. ***MERS will not foreclose unless the note is endorsed in blank and held by MERS***.
>
> http://www.mersinc.org/Foreclosures/index.aspx (emphasis added).

Thus, as MERS concedes, if a lender or assignee cannot find the original note (which securitization often makes impossible), it will not foreclose. What is important in this statement by MERS is that it is referring to the promissory note itself, not the deed of trust. This is in essence what Petitioner was asking for: not the original note, which is not required under

California's foreclosure scheme, but the identity of the holder of the note.

Recognizing the growing trend of courts to deny MERS the right to foreclose, effective April 1, 2011, the Federal Home Loan Mortgage Corporation ("Freddie Mac") which buys mortgages in the secondary market, barred MERS from foreclosing in its own name on loans held by the company.[6] This is no insignificant decision. According to its website, in the ten years ending in 2009, Freddie Mac invested approximately $4.9 trillion in more than 30 million loans, including $800 million in almost 3.6 million loans in California alone.[7]

The court of appeal was concerned about the effect of such litigation on the foreclosure process, but it ignored the effect on homeowners like Petitioner. The court's rationale is that, if inquiries such as Petitioner's were allowed, then suits would possibly be filed "solely for the purpose of delaying valid foreclosures." (A12)

But if the foreclosure is *valid*, the foreclosing

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[6] Freddie Mac Bulletin 2011-5, March 23, 2011

[7] http://www.freddiemac.com/corporate/company_profile/our_role_state/

party should be able to produce documentation, such as assignments of the promissory note, to show the borrower that the lender or its assigns authorized the foreclosing party to proceed. The court's concern regarding frivolous delaying tactics is unwarranted, especially when weighed against the risk that a borrower could lose his or her home in a fraudulent nonjudicial foreclosure.

If eliminating delay in foreclosing on a borrower's most valuable asset is their overriding concern, then California's courts have surrendered fairness and due process, the cornerstones of our judicial system, to the private interests of some of this country's most powerful financial institutions.

CONCLUSION

Review and reversal of the decision below is warranted. The Petition for a writ of certiorari should be granted.

Respectfully submitted,

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