

No. 16-1127

IN THE
Supreme Court of the United States

DANIEL W. ROBINSON, *et al.*,
Petitioners,

v.

MORTGAGE ELECTRONIC REGISTRATION
SYSTEMS, INC., *et al.*,
Respondents.

**On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit**

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that MERS had standing to challenge a state-court judgment rendered in a quiet-title action where MERS did not receive notice of the action as required by state law.

CORPORATE DISCLOSURE STATEMENT

Mortgage Electronic Registration Systems, Inc. is a wholly-owned subsidiary of MERSCORP Holdings, Inc. MERSCORP Holdings, Inc. is owned by Maroon Holding, LLC. Intercontinental Exchange, Inc. is the only publicly-held corporation that individually owns 10% or more of Maroon Holding, LLC.

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STATEMENT

The petition presents no certworthy issue and should be denied. The claimed conflict is illusory, the decision below is correct, and the court of appeals' unpublished opinion is a poor vehicle in all events.

1. MERSCORP Holdings, Inc. ("MERSCORP") operates and maintains a national electronic database known as the MERS® System that tracks the transfer of beneficial ownership interests and servicing rights in loans for which Mortgage Electronic Registration Systems, Inc. ("MERS") is designated as the beneficiary on the deed of trust. Members of the MERS® System include residential mortgage lenders, servicers of residential mortgage loans, and investors in such loans. Members are typically national companies engaged in interstate commerce, such as Freddie Mac and Fannie Mae.

When a borrower obtains a home loan from a MERS® System member-lender, the lender may designate MERS as the beneficiary or mortgagee on the security instrument (as the nominee for the lender). The security instrument is recorded in public land records where the real property (i.e., the secured collateral) is situated. Because MERS is the beneficiary, it will often be indexed by the county clerk in the public land-records index as a "grantee." The member then registers the loan on the national electronic database known as the MERS® System.

As the beneficiary, MERS is the nominee or agent of the original lender and any of the lenders' successors or assigns. Thus, MERS serves as a common agent or nominee for the members of the MERS® System. As long as a MERS® System member is involved with the mortgage loan, MERS typically will remain the

beneficiary and no assignment of the deed of trust is necessary. If there is no MERS® System member involved with the mortgage loan, then MERS executes an assignment of the mortgage to the non-MERS® System member, and that assignment instrument is recorded in the public land records.

For example, if the lender transfers the promissory note associated with that loan to another MERS® System member, that member agrees that MERS will remain as the beneficiary (now as the nominee for the lender to whom the note was transferred). So when the debt is transferred between MERS System® members, the beneficiary MERS does not change and MERS remains the holder of the deed of trust in the land records—an assignment of the deed of trust is unnecessary, as there is no change in the beneficiary.

The MERS® System thus effectively streamlines successive sales of mortgage loans, making the sales much more efficient. This innovative process results in fewer assignments of deeds of trust being executed and recorded.

2. To fund the purchase of a home in Los Angeles County, Petitioners obtained a loan for \$999,950 from United Pacific Mortgage. Petitioners executed a promissory note for that amount and secured the note with a deed of trust on the property dated February 7, 2005, and recorded February 15, 2005, in the Los Angeles County land records.

The deed of trust states that the “beneficiary of this security instrument is MERS (solely as nominee for Lender and Lender’s successors and assigns) and the successors and assigns of MERS.” It acknowledges Petitioners’ “understanding” and “agreement” that MERS holds “legal title to the interests granted by

Borrower in this Security Instrument,” and that “MERS (as nominee for Lender and Lender’s successors and assigns) has the right: to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the property; and to take any action required of lender including, but not limited to, releasing and canceling this Security Agreement.” Petitioners also agreed that the note secured by the deed of trust “can be sold one or more times without prior notice to Borrower” and that the “covenants and agreements of this Security Agreement shall bind . . . and benefit the successors and assigns of Lender.”

3. In January 2012, Petitioners filed a verified quiet-title action in the Los Angeles County Superior Court to eliminate the deed of trust. Even though more than \$1 million remained unpaid, the complaint alleged that the debt had been paid in full, such that there was no debt secured by the deed of trust. The complaint falsely alleged that there was no party who could or might claim to be a holder of that debt, and that no one had any right, title, or beneficial interest in the Deed of Trust. And the complaint identified the deed of trust as the adverse claim to be eliminated, seeking an order vesting fee title in Petitioners “free and clear as to any securitization instrument and or any secured interest.”

A title report attached to the complaint identified MERS as claiming an interest in the deed of trust (as record beneficiary of the security instrument) and identified U.S. Bank as the owner of the note. The complaint further alleged that United Pacific Mortgage had sold the note on the secondary market. Despite that allegation, the only defendant named in the action, and the only entity given notice of it, was United Pacific Mortgage.

This was not an accident or oversight. Now removed websites featuring the lawyer who filed the complaint boasted of his ability to enable borrowers to obtain “foreclosable proof” homes, “free and clear of any lien,” without having to repay the debt. These websites advertised that borrowers could “take advantage” of MERS’ business model by filing quiet-title actions without joining MERS or the current note owner as parties or providing them notice. Instead, the website advises borrowers to name only the original lender after confirming that that entity no longer has any interest in the note. The website then advises:

GUESS WHAT THIS DOES FOR YOU . . .
VOILA . . . it completely nullifies your trust deed . . . Guess what that means? It makes your property non-foreclosable, the property is now free and clear. You are free to sell it and stash the cash in your pocket.

In this case, the scheme worked as intended. United Pacific Mortgage, having no interest in the note, did not appear. MERS and U.S. Bank, having no notice, did not appear either. Based on Petitioners’ false representations, the state court entered judgment on April 17, 2013, quieting title in Petitioners’ names and purporting to expunge the deed of trust.

4. MERS did not learn of the judgment until August 2013. Had MERS received the statutorily required notice, it would have followed its standard policy of notifying the note holder or loan servicer of the quiet title action. MERS or U.S. Bank could then have appeared at trial to challenge the false allegations on which the state-court judgment was based.

In September 2013, MERS and MERSCORP filed suit in federal court seeking declaratory and injunctive relief on the basis that the quiet-title judgment was void. MERS alleged that it was entitled to notice of the quiet-title action under § 760.010 of the California Civil Procedure Code, because MERS had recorded a claim against the property. MERS also alleged that the judgment violated its federal and state due process rights by depriving MERS of several state-created rights without notice.

The District Court initially dismissed the suit based on a misunderstanding of the statutory requirements for California quiet-title actions. After further briefing, the court corrected its error and denied Petitioners' motion for judgment on the pleadings on the first amended complaint.

Both sides filed motions for summary judgment. The District Court held (i) that MERS and MERSCORP had standing; and that (ii) MERS and MERSCORP were entitled to summary judgment because, among other reasons, Petitioners' failure to join MERS in their quiet-title action violated § 760.010. Pet. App. 14-16. The District Court did not reach the due process issue nor did it find it necessary to define MERS' role as beneficiary.

The Court of Appeals affirmed in a short, unpublished opinion. Pet. App. 2-3. Like the District Court, it relied solely on the California statute and did not reach the due process issue. It held that MERS had standing because it suffered an injury in fact when the Petitioners failed to name it as defendant in their quiet title action. *Id.* at 3 n.3.

REASONS THE WRIT SHOULD BE DENIED**I. THE ALLEGED CONFLICT IS WHOLLY ILLUSORY.**

Petitioners' attempt to manufacture a conflict on Article III standing never gets out of the gate, because there is simply no conflict for this Court to resolve. Article III standing, of course, has three elements: (1) an injury in fact, (2) caused by the challenged action, that is (3) redressable by the relief sought. *Sprint Communications Co. v. APCC Services, Inc.*, 554 U.S. 269, 273 (2008). The petition challenges only the first element. It does not dispute that, if MERS has sustained injury, the cause of that injury was the entry of the quiet-title judgment and the order setting it aside will redress that injury.

There is no dispute that MERS had a statutory right under state law to be joined in the quiet title action. Section 760.010 provides that a quiet-title plaintiff “*shall* name as defendants in the action the persons having adverse *claims* to the title of the plaintiff.” (Emphasis added). It is also undisputed that a recorded deed of trust identified MERS as beneficiary, thus creating a claim adverse to the property. Petitioners concede that they did not join MERS in their action. Pet. at 4-5. That alone establishes the required injury.

Attempting to manufacture a conflict, Petitioners argue that other state courts, including Kansas and Tennessee, have held under other states' laws that MERS' interest is insufficient to warrant notice of a tax claim or quiet-title action. Pet. at 20-24.¹ That

¹ The petition neglects to mention that the Kansas and Tennessee legislatures abrogated those decisions by enacting statutes that require notice to MERS of events that might affect

argument fails for at least three reasons. First, MERS' statutory claim arises under *California* law—and courts applying California law have unanimously held, in a variety of different but related contexts, that MERS has enforceable rights in MERS deeds of trust such that it is entitled to the statutory notice.

For example, in *Gomes v. Countrywide Home Loans, Inc.*, 192 Cal. App. 4th 1149, 1157 (4th Dist. 2011), the California court rejected the borrower's wrongful foreclosure claim, finding it unnecessary to determine whether MERS was the "beneficiary" under California's nonjudicial foreclosure statute. That statute allows the "trustee, mortgagee, or beneficiary, or any of their authorized agents" to initiate foreclosure. CCP § 2924. This statute, as well as the deed of trust, "permit MERS to initiate foreclosure as a nominee (i.e. agent) of the noteholder." 192 Cal. App. 4th at 1157 n.9.

Further, California courts have consistently upheld MERS' right to enforce deeds of trust as agent for the lender. In *Fontenot v. Wells Fargo Bank, N.A.*, 198 Cal. App. 4th 256 (1st Dist. 2011), the court dismissed a wrongful foreclosure claim premised upon alleged ambiguity regarding MERS' role:

There is nothing inconsistent in MERS's being designated both as the beneficiary and as a nominee, i.e., agent, for the lender. The legal implication of the designation is that

the validity of a recorded MERS security interest. Kan. Stat. Ann. 60-219(e)(2010)(requiring joinder of a nominee of record on behalf of a beneficial owner of a claimed interest in the property that is the subject of the action.); Tenn. Code Ann. 67-5-2502(c)(Supp. 2015)("interested person" entitled to notice of a tax sale "includes a person or entity named as nominee or agent of the owner of the obligation that is secured by the deed or a deed of trust . . ."). So there is no conflict for that reason, too.

MERS may exercise the rights and obligations of a beneficiary of the deed of trust, . . . and there is nothing ambiguous or unusual about the legal arrangement.

198 Cal. App. 4th at 273 (emphasis added). Accord, e.g., *Calvo v. HSBC Bank USA, N.A.*, 199 Cal. App. 4th 118, 125 (2d Dist. 2011) (“MERS had the right to initiate foreclosure and instruct the trustee to exercise the power of sale as nominee (i.e., agent) of the original lender *and its successors and assigns*”) (emphasis original).

In fact, California courts have held that borrowers who agree to MERS’ role as beneficiary in their deeds of trust cannot later challenge MERS’ ability to exercise the rights granted therein. *E.g.*, *Siliga v. Mortgage Elec. Registration Sys., Inc.*, 219 Cal. App. 4th 75, 83 (2d Dist. 2013) (party who agreed under deed of trust that MERS, as the lender’s nominee, can exercise all of the rights and interests of the lender, including the right to foreclose, “is precluded from maintaining a cause of action based on the allegation that MERS has no authority to exercise those rights.”); *Herrera v. FNMA*, 205 Cal. App. 4th 1495, 1505 (4th Dist. 2012) (“plaintiffs agreed in the DOT that MERS had the right to exercise all rights of the lender, including foreclosing on and selling plaintiffs’ property”).²

Federal courts applying California law have reached the same conclusions. In *Pantoja v. Countrywide Home Loans, Inc.*, 640 F. Supp. 2d 1177 (N.D. Cal. 2009), plaintiffs argued that MERS had no legal or beneficial interest in the deed of trust and hence could

² *Fontenot, Siliga, and Herrera* were disapproved of on another ground in *Yvanova v. New Century Mortgage Corp.* 62 Cal.4th 919 n.13 (2016).

not foreclose. Dismissing the complaint, the court held that “courts have been clear to allow MERS to conduct the foreclosure process when granted the power of sale provision.” 640 F. Supp. 2d at 1190 & n. 15, and cases there cited. Accord, *Morgera v. Countrywide Home Loans, Inc.*, No. 209CV01476MCEGGH, 2010 WL 160348 at *8 (E.D. Cal. 2010) (“courts have consistently found that MERS does in fact have standing to foreclose as the nominee of the lender”); *McFarland v. J.P. Morgan Chase Bank*, No. EDCV 13–01838–JGB, 2014 WL 4119399 (C.D. Cal. 2014) at *6 (“any argument that MERS lacked the authority to assign its rights under the loan based on its status as a ‘nominee’ cannot stand”); *Sandoval v. Cal-Western Reconveyance Corp.*, No. CV1300114GAFSHX, 2013 WL 12129395 (C.D. Cal. 2013) at *4 (“[b]y signing the deed of trust, the plaintiff agreed to the terms and were on notice of the contents” and “MERS quite plainly had the authority to make this assignment”) (internal punctuation omitted). So there is no conflict in the relevant law.

Second, even if there were a conflict about the existence of a claim entitling MERS to notice, which there is not, it would be purely a matter of *state* law, so there is no conflict for this Court to resolve for that reason, too.

Third, Petitioners’ broad assertion that courts “have created contradictory and confusing case law regarding MERS’ ability to act and litigate foreclosure matters” is vastly overstated. See Pet. at 10. The majority of courts interpreting their respective state laws recognize that MERS is both a beneficiary of the deed of trust and a nominee of the note owner. Even cases from outside California holding that MERS is not a

beneficiary also recognize that it ultimately makes no difference, because MERS has standing as a nominee.

For example, in *Weingartner v. Chase Home Finance*, 702 F. Supp. 2d 1276 (D. Nev. 2010), the court held that calling MERS the “beneficiary” was not necessary to uphold MERS’ right to act under the security instrument because MERS’ role as nominee “is sufficient to establish that MERS *is the agent of the lender with respect to administration of the deed of trust.*” *Id.* at 1280 (emphasis added).³ The court also noted that even courts that hold that MERS lacks standing as beneficiary find that MERS “does have standing as agent of the beneficiary where it is the nominee of the lender” *Id.*

Similarly, *James v. ReconTrust Co.*, 845 F. Supp. 2d 1145 (D. Or. 2012), held that MERS was not a beneficiary for purposes of the unique Oregon statute there at issue. This finding “does not, however, establish that MERS lacked authority to assign the trust deed”; as “‘nominee’ of the lender and the lender’s successors,” MERS could do anything “that a beneficiary (as principal) may do on its own.” *Id.* at 1165 n.20.

In sum, for multiple reasons, there is no conflict for this Court to resolve on an important, recurring issue of federal law. For that reason alone, the petition should be denied.

³ And, as Respondents have pointed out at each stage of this litigation, *Weingartner’s* interpretation of MERS’ rights in Nevada deeds of trust was effectively overruled by the Nevada Supreme Court. See *Edelstein v. Bank of N.Y. Mellon*, 286 P.3d 249, 260 (Nev. 2012) (“MERS is capable of being a valid beneficiary of a deed of trust, separate from its role as an agent (nominee) for the lender.”).

II. THE DECISION BELOW IS CORRECT.

With no conflict to resolve, the Petition boils down to a mere request for error correction. But there is no error, as the decision below is entirely correct. Under California law, MERS has enforceable rights under a MERS deed of trust recorded in that state. The California statute plainly required Petitioners to give notice to MERS, Petitioners admittedly did not provide that notice, and MERS has standing to set aside a judgment that purports to deprive it of those rights.

To qualify for standing, an injury in fact must be both “concrete and particularized.” *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540, 1548 (2016). An injury is “particularized” if it “affect[s] the plaintiff in a personal and individual way.” *Id.* It is “concrete” if it is “real, not abstract,” but the injury need not be tangible. *Id.* at 1548-49. The instant statutory violation easily satisfies both elements.

The violation is particularized, because MERS’ individual claim against the property was the target of the quiet-title action. It is concrete, because the lack of notice deprived MERS of the ability to object to Petitioners’ fraudulent claims, and the judgment deprived MERS of the ability to foreclose the property or file suit to enforce the lien.

To be sure, as both the District Court and the Court of Appeals recognized, MERS’ right to joinder in the action does not depend upon the validity of its claim against the property. The 1980 Law Revision Comments to § 760.010 state that the word “claim” is to be given the “broadcast [sic] possible sense” and there is no dispute that MERS *claimed* an interest in the property. As the District Court held, the whole point of a quiet-title action is “to determine the validity of

any adverse claims based upon asserted trusts.” App.-18 quoting *Fleishman v. Bleckman*, 148 Cal. App. 2d 88, 97 (1957). If plaintiffs could avoid joining known claimants in quiet-title actions based upon their independent determination that the claims are not valid, then every quiet title action could essentially be decided by default and the purpose of the statutory action would be defeated.

Petitioners’ argument that MERS has no ultimate economic interest in the proceeds of the foreclosure sale is beside the point. Indeed, in *Sprint*, the Court rejected a materially indistinguishable argument. In that case, payphone operators assigned their claims against long distance carriers to the plaintiffs. Plaintiffs in turn agreed to remit 100 percent of the proceeds back to the payphone operators. The Court held that plaintiffs did have standing:

[F]ederal courts routinely entertain suits which will result in relief for parties that are not themselves directly bringing suit. Trustees bring suit to benefit their trusts; guardians ad litem bring suit to benefit their wards; receivers bring suit to benefit their receiverships; assignees in bankruptcy bring suit to benefit bankrupt estates; executors bring suit to benefit testator estates; and so forth.

554 U.S. at 287-88.

Petitioners claim that *Sprint* is distinguishable, Pet. at 17-18, but the distinctions are ephemeral. Petitioners argue that, unlike *Sprint*, there was no assignment to MERS. But the plain language of the deed of trust directly contradicts this assertion (stated under the heading, “TRANSFER OF RIGHTS IN THE PROPERTY,” that “[t]he beneficiary of this Security

Instrument is MERS . . .”). Moreover, like the pay-phone operators in *Sprint*, MERS has been granted legal title to the interest at issue (the deed of trust) and the right to enforce that interest on behalf of the parties entitled to the economic proceeds. And as this Court recognized in *Sprint*, courts “have always permitted the party with legal title alone to bring suit.” 554 U.S. at 285.

Petitioners also claim that the promissory note and deed of trust or mortgage are inseparable. They do not explain why that would prevent MERS from acting as nominee or agent for the holder of the note and that is exactly what their deed of trust provides. Because MERS holds the deed of trust as agent for the note owner, the note owner retains the right to enforce the payment of the note through the deed of trust and there is no improper separation of those interests.⁴

In sum, none of Petitioners’ arguments alter the conclusion that the decision below is correct. In addition, the decision rests on alternative, additional grounds that neither the District Court nor the Court of Appeals needed to reach: i.e., wholly apart from the California statute, the due process clause of the Fourteenth Amendment provides constitutional protection to the interests MERS has in the deed of trust. That is an additional reason why the Court should deny the petition.

⁴ The Restatement recognizes that “a mortgage may be enforced only by, or *in behalf of*, a person who is entitled to enforce the obligation the mortgage secures.” RESTATEMENT (THIRD) OF PROPERTY § 5.4(c), p. 380 (emphasis added). The named mortgagee “may be a trustee or agent of [the note holder] with responsibility to enforce the mortgage at [the note-holder’s] direction.” *Id.* at 385.

The first requirement of due process is notice and an opportunity to be heard before being deprived of property. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). And the source of the property right here, as in many cases, is the “existing rules or understandings that stem from an independent source such as state law.” *Perry v. Sindermann*, 408 U.S. 593, 602 n.7 (1972), quoting *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972).

Here, due process protects each of the three interests that MERS asserts. First, having enacted § 760.010, California may not arbitrarily deprive MERS of its right to notice. See, e.g., *Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980) (defendant has a “substantial and legitimate expectation” that State will honor a State-created procedural right, “and that liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation”).

Second, the right to enforce the lien on the property via a power of sale in the trustee has long been protected. See, e.g., *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 590 & 594 (1935) (holding that such a lien is a “substantive right[] in specific property,” including the “right to retain the lien until the indebtedness thereby secured is paid”). This Court has repeatedly reaffirmed that holding. E.g., *United States v. Security Industrial Bank*, 459 U.S. 70, 76 (1982); *Armstrong v. United States*, 364 U.S. 40, 44 (1960).

Third, the right to file suit to enforce the lien or to protect its priority position is a “constitutionally recognized property interest.” *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 807 (1985). It violates due process to deprive MERS of that “protected property interest” as agreed to by Petitioners without notice

and an opportunity to be heard. *Richards v. Jefferson County, Ala.*, 517 U.S. 793, 804 (1996). And it is “axiomatic that one has standing to litigate his or her own due process rights.” *Campbell v. Louisiana*, 523 U.S. 392, 400 (1998).

The judgment below thus rests on this alternative, addition ground—which neither the District Court nor the Court of Appeals needed to analyze or address—and the petition should be denied for that reason, too.⁵

⁵ As a further alternative basis for affirmance, the District Court held that an injury “to an entity’s business model constitutes sufficient injury for purposes of Article III standing.” Pet. App. 13. MERS’ business model depends on its members’ confidence that persons seeking to infringe on a MERS security interest must notify MERS so that MERS can notify the members. The fraud perpetrated by Petitioners’ former counsel directly threatens that business model, that is precisely the kind of concrete injury that satisfies the first element of standing, and MERS thus has standing here for that additional reason, too. Any ruling that MERS is not entitled to notice of the quiet title action “affects MERS’ fundamental business model and creates a realistic danger that it will lose customers,” see, e.g., *Mortgage Elec. Registration Sys., Inc. v. Bellistri*, No. 4:09-CV-731 CAS, 2010 WL 2720802 (E.D. Mo. 2010) at *16, and the same is true for MERSCORP, the entity that operates the MERS® System. That is precisely the kind of concrete injury that satisfies the first element of standing. See *Ass’n of Data Processing Service Orgs., Inc. v. Camp*, 397 U.S. 150, 152 (1970) (holding that where the Comptroller of the currency authorized banks to perform data processing services in competition with the Association’s members, there was “no doubt” that plaintiffs had sustained concrete injury, because the competition “might entail some future loss of profits.”). *Accord, Investment Co. Institute v. Camp*, 401 U.S. 617, 620-21 (1971).

It is equally clear that MERS and MERSCORP would sustain injury from a quiet-title judgment that casts doubt on MERS’ ability to protect the security interests that MERS holds as the beneficiary as the nominee for MERS® System members. The

III. EVEN IF A CONFLICT EXISTED, WHICH IT DOES NOT, THIS CASE IS A POOR VEHICLE FOR RESOLVING IT.

Even if there were a conflict to resolve or error to correct, which there is not, the petition should be denied because this case is an exceedingly poor vehicle.

The Court of Appeals' decision is unpublished, and contains no analysis of the due process or beneficiary issues raised by Petitioners as the Court of Appeals did not need to reach those issues. Further, that the Court of Appeals' decision rests on an interpretation of *state* law is an additional complication that renders this case a poor vehicle.

If the issues are truly recurring, as Petitioners claim, they will no doubt arise in subsequent cases that will present this Court with better vehicles to address the issues. For now, however, there is no conflict to resolve or error to correct, so the petition should be denied.

judgment below setting aside the quiet title judgment will end the doubt and thereby redress this injury. For this reason alone, MERS and MERSCORP have standing and the petition should be denied.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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