STANDING ON THE SIDELINES: HOW NONJUDICIAL FORECLOSURE LAWS PREVENT HOMEOWNER CHALLENGES TO FORECLOSURES—AND HOW JUDGES AND LEGISLATORS SHOULD RESPOND

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Chris lives in State A. Adam lives in State B. Following the 2008 financial crisis, Chris and Adam cannot afford their mortgage payments. The holder of Chris's mortgage sues Chris in State A's federal court. Chris successfully defends on the basis that the foreclosing party cannot prove ownership of the mortgage on Chris's residence. State B allows nonjudicial foreclosure, and when a financial institution tries to foreclose upon Adam's property, Adam sues the institution to enjoin the foreclosure, arguing that the institution cannot prove that it owns the mortgage on Adam's residence. The federal court in State B, however, dismisses Adam's claim because Adam lacks standing. Although Chris and Adam made the same legal argument, Chris prevailed, whereas Adam was barred from litigating his claim in federal court.

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Introduction

Home ownership has long been an inseparable part of the American Dream.[1] From the frontier farmer to the post-war veteran, millions of Americans have aspired to own their own homes.[2] Ownership is a source of pride and among the largest stores of wealth, especially for members of the middle class.[3] A home offers a

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[1] *See* Jill Patterson Forrester, *Still Mortgaging the American Dream: Predatory Lending, Preemption, and Federally Supported Lenders*, 74 U. CIN. L. REV. 1303, 1307 (2006) ("Home ownership is still the American dream . . . ."); *see also* Payton v. New York, 445 U.S. 573, 601 (1980) ("[T]he sanctity of the home . . . has been embedded in our traditions since the origins of the Republic."); A. Mechele Dickerson, *The Myth of Home Ownership and Why Home Ownership Is Not Always a Good Thing*, 84 IND. L.J. 189, 189 (2009) ("Home ownership is said to be a fundamental part of the American Dream because of the economic security it gives homeowners.").

[2] *See* U.S. Census Bureau, *Historical Census of Housing Table*, U.S. DEP'T OF COMMERCE, https://www.census.gov/hhes/www/housing/census/historic/owner.html (last visited Jan. 17, 2014), *archived at* http://perma.cc/VP9G-BUP9 (reviewing home ownership rates by state since 1900).

[3] *See* CHRISTOPHER E. HERBERT & ERIC S. BELSKY, U.S. DEP'T OF HOUSING AND URBAN DEV., THE HOMEOWNERSHIP EXPERIENCE OF LOW-INCOME AND MINORITY FAMILIES 4 (2006), *available at* http://www.huduser.org/publications/pdf/hisp_homeown9.pdf ("One of the principal financial benefits of homeownership is as a vehicle for wealth accumulation . . . . [E]quity in homes is the single largest source of wealth for all households . . . ."). *But see* WILLIAM M. ROHE & MARK LINDBLAD, HARVARD UNIV. JOINT CTR. FOR HOUSING STUDIES, REEXAMINING THE SOCIAL BENEFITS OF HOMEOWNERSHIP AFTER THE HOUSING CRISIS 2 (2013), *available at* http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/hbtl-04.pdf (questioning, in the wake of the 2008 financial crisis, the traditional conceptions of homeownership benefits).

foundation for one's financial future and a forum for a lifetime of priceless memories.[4]

At the turn of the new millennium, the dream of home ownership became a reality for many people who could not afford the homes they bought.[5] During the past seven years, however, foreclosure became the new reality for countless homeowners.[6] Because foreclosure pits the rights and interests of lenders and investors against the hopes and dreams of homeowners, a fair foreclosure process is essential.[7]

In the wake of the 2008 financial crisis, homeowners watched helplessly as they lost their homes to foreclosure.[8] Many homeowners tried to challenge the foreclosure process, only to be left standing on the sidelines as their federal lawsuits were dismissed for lack of standing to sue the foreclosing entity[9]—the same outcome that Adam faced in the scenario described above.

Although homeowners' personal stake in foreclosure litigation may seem intuitive,[10] what complicates many cases is that the mortgages were sold after origination and assigned one or more times in the secondary mortgage market.[11] Poor recordkeeping as mortgages travel through the secondary market often raises questions regarding the legal status of the entity seeking to foreclose.[12] Nevertheless,

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[4] *See generally* HERBERT & BELSKY, *supra* note 3, at 4-5 (discussing the financial and social benefits of home ownership).

[5] *See generally* FIN. CRISIS INQUIRY COMM'N, THE FINANCIAL CRISIS INQUIRY REPORT xxii (2011), *available at* http://www.gpo.gov/fdsys/pkg/GPO-FCIC/pdf/GPO-FCIC.pdf ("Lenders made loans that they knew borrowers could not afford and that could cause massive losses to investors in mortgage securities.").

[6] *See id.* at 23 ("[A]s many as 13 million households in the United States may lose their homes to foreclosure.").

[7] *See* Molly F. Jacobson-Greany, *Setting Aside Nonjudicial Foreclosure Sales: Extending the Rule to Cover Both Intrinsic and Extrinsic Fraud or Unfairness*, 23 EMORY BANKR. DEV. J. 139, 151 (2006) (proclaiming that "the nonjudicial foreclosure process should protect the debtor from a wrongful loss of property").

[8] *See infra* Part IV.A (summarizing an illustrative case).

[9] *E.g.*, Oum v. Wells Fargo, N.A., 842 F. Supp. 2d 407 (D. Mass. 2012), *abrogated by* Culhane v. Aurora Loan Servs. of Neb.,708 F.3d 282 (1st Cir. 2013).

[10] *See infra* Part III.A (discussing the "personal stake" requirement of standing).

[11] *See infra* Part IV.

[12] *See infra* Parts II, IV.

foreclosing entities have argued in federal courts across the nation that homeowners lack standing to challenge a nonjudicial foreclosure because homeowners seek to challenge a contract—the assignment—to which they were not a party.[13] As the hypothetical scenario with Chris and Adam illustrates, the idiosyncrasies of state nonjudicial foreclosure laws and federal standing doctrine combine in such a way that a foreclosure challenge turns not on the merits of the homeowner's legal argument, but on whether the foreclosure occurs in a state that allows nonjudicial foreclosure.[14] For a period of time, foreclosing entities were quite successful in winning dismissal for lack of standing.[15] In several landmark cases, however, Courts of Appeals have reversed this trend, holding that homeowners have standing to challenge the assignment of their mortgage to the foreclosing entity.[16] The issue has created a split among the federal circuits.[17]

This note argues that federal courts granting standing to homeowners have reached the correct result as a matter of jurisprudence and public policy. Part II reviews principles of mortgage and foreclosure law. Part III summarizes current standing doctrine in federal courts. Next, Part IV presents landmark cases addressing homeowner standing and analyzes their legal reasoning. Part V explores the policies that favor recognizing homeowner standing and outlines the judicial and legislative avenues available to address this problem. In conclusion, Part VI recommends that states reform their nonjudicial foreclosure statutes to guarantee homeowners the right to freedom from invalid foreclosure and ensure that homeowners have standing to challenge unlawful foreclosure practices.

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[13] *E.g.*, Jaimes v. Fed. Nat'l Mortg. Ass'n, 930 F. Supp. 2d 692, 696 (W.D. Tex. 2013) (holding that borrower lacked standing to challenge assignment of deed of trust); *Oum*, 842 F. Supp. 2d at 412 (summarizing parties' legal arguments).

[14] *See infra* Parts II-IV.

[15] *See* Culhane v. Aurora Loan Servs. of Neb., 708 F.3d 282, 289 (1st Cir. 2013) (collecting cases).

[16] *See, e.g.*, Reinagel v. Deutsche Bank Nat'l Trust Co., 735 F.3d 220, 224-25 (5th Cir. 2013) (holding that homeowner had standing to challenge assignment as void).

[17] *See id.* (holding that homeowner had standing to challenge assignment as void); *Culhane*, 708 F.3d at 291 (same). *But see* Robinson v. Select Portfolio Servicing, Inc., 522 F. App'x 309, 311-13 (6th Cir. 2013) (holding that plaintiffs lacked standing).

I. The Game and the Players: Principles of Mortgage and Foreclosure Law

Before discussing the homeowner standing problem, this part reviews fundamental principles of mortgage and foreclosure law.

Most people cannot afford to pay cash for a house and the land on which it sits.[18] They therefore enter into two contracts with a lender, usually a bank.[19] First, a prospective homeowner signs a promissory note for the amount of the loan in which he promises to repay the principal, plus interest.[20] Second, a prospective homeowner signs a mortgage, which secures the promissory note.[21] If the borrower defaults on his payments as specified in the note, the holder of the note and mortgage has the legal right to foreclose on the property and dispose of it to recover a portion of the amount that the homeowner owes.[22] For simplicity, this note generally uses the term "mortgage" to refer to the promissory note and the mortgage.

Foreclosure laws vary by state. The most significant difference among states, at least for the purpose of this note, is whether they require judicial approval for foreclosures.[23] In judicial foreclosure states, a foreclosing entity must sue the homeowner before proceeding with a foreclosure.[24] Statutes in approximately half of the states, however, authorize nonjudicial, or power-of-sale, foreclosure.[25] In

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[18] *See* JOSEPH WILLIAM SINGER, INTRODUCTION TO PROPERTY § 11.5.1 (2d ed. 2005).
[19] *See id.*
[20] *See id.*
[21] *See id.*
[22] *Id.* Under the traditional formulation, the holder of the note had the right to foreclose; the mortgage, whether formally assigned, followed the note. Dale A. Whitman & Drew Milner, *Foreclosing on Nothing: The Curious Problem of the Deed of Trust Foreclosure Without Entitlement to Enforce the Note*, 66 ARK. L. REV. 21, 24 (2013). For simplicity, this note generally assumes that the mortgage and note are transferred together and uses the term "mortgage" to refer to both instruments.
[23] *See* SINGER, *supra* note 18, § 11.5.1 (summarizing other differences among states).
[24] *Id.*
[25] Dale A. Whitman, *Learning from the Mortgage Crisis*, PROB. & PROP., July/August 2014, at 38, 42 ("All American states, as a matter of common law, permit judicial foreclosure of mortgages, but about 30 states also have statutes authorizing nonjudicial foreclosure by means of a sale conducted by the

these states, lenders often include a contractual provision in mortgages allowing for nonjudicial foreclosure.[26] Essentially, a lender may foreclose without prior judicial authorization if the lender has met the requirements set forth in the state's power-of-sale statute.[27] Requirements usually include some type of public notice, such as publication in a local newspaper for a period of time.[28] Nonjudicial foreclosure "is substantially less complicated and costly than its judicial counterpart."[29]

Another variation is whether a state subscribes to the lien theory or title theory of mortgages. In a lien theory state, "the purchaser/borrower obtains *title* to the property . . . while the lender obtains a *lien* on the property."[30] In a title theory state, "the bank, rather than the home owner, retains title to the property" until the loan is fully repaid.[31] Most states adhere to the lien theory of mortgages, although "[t]here is little, if any, functional difference between the approaches."[32]

Foreclosure typically involves three key players: a homeowner, a lender, and a servicer.[33] A homeowner is the person who lives[34] on the mortgaged property and is in default—that is, he has been unable to make payments on his mortgage for a period of time specified in the mortgage. A homeowner is also called a mortgagor, or the party

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mortgagee or by a separate trustee."); Whitman & Milner, *supra* note 22, at 32 ("Nonjudicial foreclosure is now authorized in thirty-five states and the District of Columbia.").

[26] Grant S. Nelson & Dale A. Whitman, *Reforming Foreclosure: The Uniform Nonjudicial Foreclosure Act*, 53 DUKE L.J. 1399, 1403 (2004) (describing power-of-sale foreclosure).

[27] *See* SINGER, *supra* note 18, § 11.5.1.

[28] Nelson & Whitman, *supra* note 26, at 1403-04 ("After varying degrees of notice, the mortgaged property is sold at a public sale by a third party, such as a sheriff or a trustee, or by the mortgagee."); *see also* SINGER, *supra* note 18, § 11.5.1 (describing deeds of trust).

[29] Nelson & Whitman, *supra* note 26, at 1403.

[30] SINGER, *supra* note 18, § 11.5.1.

[31] *Id.*

[32] *Id.*

[33] *See* JOHN RAO ET AL., FORECLOSURES: MORTGAGE SERVICING, MORTGAGE MODIFICATIONS, AND FORECLOSURE DEFENSE § 1.2.2.5 (4th ed. 2012) (discussing the "critical parties" in every mortgage transaction).

[34] This note focuses on first mortgages on residential properties and therefore does not address standing considerations associated with commercial mortgages or secondary residential mortgages.

responsible for making payments on the mortgage.[35] A lender, also called a mortgagee, is the company from which the homeowner borrowed the money to purchase his home.[36] A mortgagee has a contractual right to receive the mortgage payments.[37] A servicer is the company that collects the mortgage payments.[38] A servicer usually acts as the mortgagee's agent and charges a fee for its services.[39]

Decades ago, a mortgagee was often the company that made the original loan, also called the originator.[40] The originator would approve the homeowner's loan application and collect payments for the life of the loan, or until the mortgagor paid off the balance.[41] More recently, originators began selling mortgages and assigning the beneficial interest in the mortgage—that is, the right to receive payments—to third parties.[42]

When a homeowner defaults on his mortgage, one of the other players has the contractual right to initiate a foreclosure.[43] The foreclosing entity could be the lender, originator, current mortgagee, or servicer.[44] This note uses "foreclosing entity" to designate the entity that initiates foreclosure proceedings and becomes a party to foreclosure-related litigation.

Known as the "originate-to-distribute" model, the widespread sale of mortgages from originators into the secondary market was a

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[35] SINGER, *supra* note 18, § 11.5.1.
[36] *Id.*
[37] *See id.* ("By granting a security interest in the property, the mortgage contract authorizes the lender to arrange for the sale of the property if the borrower defaults on the loan (usually by failing to make the mortgage payments when due) to recover the unpaid debt.").
[38] *See* RAO, *supra* note 33, § 1.3.3.4.2.
[39] *See id.* (discussing servicer's general duties).
[40] *See id.* § 1.3.2.1.
[41] *See id.*
[42] *See* Kurt Eggert, *Held Up in Due Course: Predatory Lending, Securitization, and the Holder in Due Course Doctrine*, 35 CREIGHTON L. REV. 503, 535 (2002) ("Through securitization, investors have been able to channel huge sums of money into the lending industry, purchasing the beneficial interest in the loans produced.").
[43] *See* RAO, *supra* note 33, § 5.1.1 (discussing who has the right to foreclose and when).
[44] *See id.* § 1.3.3.1 (describing the "post-closing players" in a mortgage); *id.* § 5.1.1 (discussing who has the right to foreclose and when).

precipitating factor of the 2008 financial crisis.[45] The practice became so widespread that the mortgage was often assigned in the same transaction as the origination.[46] Once sold, mortgages were often resold numerous times in the secondary market.[47] Creative investment companies began pooling mortgages of different amounts and risk levels, packaging them into financial products, and selling the right to receive payments to investors.[48] The process of transforming mortgages into investment securities is called securitization.[49]

Securitization has presented a number of issues.[50] Financiers early recognized that transaction costs would become astronomical if a mortgage had to be recorded every time it was assigned in the secondary market.[51] Although a mortgage need not be recorded to be valid, recording is often required to protect the priority of a mortgagee's claims.[52] Mortgages are usually recorded in the county in

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[45] *See* Eamonn K. Moran, *Wall Street Meets Main Street: Understanding the Financial Crisis*, 13 N.C. BANKING INST. 5, 44 (2009) (explaining that the "financial crisis can be largely attributed to the emergence of the complex 'originate-to-distribute' banking model"). *But see* Steven L. Schwarcz, *The Future of Securitization*, 41 CONN. L. REV. 1313, 1319 (2009) (questioning whether "the originate-to-distribute model was a material cause of the subprime crisis").

[46] *See* Schwarcz, *supra* note 45, at 1318-19 (explaining that originate-to-distribute model "enable[ed] mortgage lenders to sell off loans as they were made").

[47] *See generally* Eggert, *supra* note 42, at 535-45 (detailing the multitude of transactions in the securitization process).

[48] *See* RAO, *supra* note 33, § 1.3.3.4.1 (describing how mortgage income can be pooled and packaged); Moran, *supra* note 45, at 44-45 ("Perhaps not surprisingly, the financial innovations which grew out of the mortgages—derivatives built on other derivatives—were packaged and repackaged until no one could identify what they contained and how much they were worth."); Schwarcz, *supra* note 45, at 1314 (stating that securitization "efficiently allocate[es] asset risks with investor appetite for risk").

[49] RAO, *supra* note 33, § 1.3.3.4.1 ("Securitization is the process of packaging loans as securities and selling the rights into the future income stream of investors.").

[50] *See id.* § 5.1.1 ("Foreclosure laws have been built on a foundation of state real property, contract, and commercial laws. The explosion in securitized mortgage debt occurred with little regard for the details of these fundamental state laws.").

[51] *See id.* § 5.9.1 (discussing genesis and purpose of MERS).

[52] SINGER, *supra* note 18, § 11.4.5.1 ("Although in almost all states recording is not required to validate the transfer of the property interest, it is essential

which the property is located, and counties charge fees for recording each mortgage.[53] A fee of $30 seems benign, but in a pool of a million mortgages, small fees add up quickly.[54]

Investors' aversion to transaction costs sparked a brainstorm in the banking industry, and the Mortgage Electronic Registration System ("MERS") was born.[55] Conceived in the early 1990s, MERS has become the mortgagee of record for millions of mortgages.[56] When a mortgage originates, MERS is designated as the mortgagee, records the mortgage once, and nominally holds the mortgage as its beneficial interest is sold and repackaged throughout the secondary market.[57] MERS essentially performs a record-keeping function, preserving creditors' priority while reducing transaction costs.[58] MERS earns revenue from membership fees but does not have the right to receive any portion of mortgage payments.[59]

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both to provide an official record of the state of the title and to protect the buyer against any competing claims that may be created by the grantor in others.").

[53] Christopher L. Peterson, *Two Faces: Demystifying the Mortgage Electronic Registration System's Land Title Theory*, 53 WM. & MARY L. REV. 111, 114 (2011) ("Since the founding of the American republic, each county in the United States has maintained records of who owns the land within that county.").

[54] *See id.* at 115 (stating that "a charge of about thirty-five dollars for a mortgage is typical").

[55] *See* Phyllis K. Slesinger & Daniel McLaughlin, *Mortgage Electronic Registration System*, 31 IDAHO L. REV. 805, 812 (1995) (summarizing study conducted in 1994, which estimated MERS would save mortgage industry $77.9 million in annual recording fees); *see also* MERS, https://www.mersinc.org (last visited Feb. 4, 2015), *archived at* http://perma.cc/EM3Z-2QQ5.

[56] *See* RAO, *supra* note 33, § 5.9.1 ("Approximately two-thirds of all newly-originated residential mortgages in the United States are recorded in the name of Mortgage Electronic Registration Systems, Inc. (MERS)."); Peterson, *supra* note 53, at 117 (stating that "about 60 percent of the nation's residential mortgages are recorded in the name of MERS").

[57] *See* RAO, *supra* note 33, § 5.9.1 ("After MERS becomes the mortgagee of record, subsequent transfers of ownership or servicing rights in a mortgage loan are tracked within the MERS system.").

[58] *See id.* ("Though recording fees vary from county to county, MERS' one-time $11.95 registration fee is significantly less than the cost of recording even a single assignment of mortgage in most county land records.").

[59] *See id.* (discussing MERS's role in recording mortgage transactions).

MERS often took the additional step of initiating foreclosures on properties to which MERS held the mortgage.[60] In the years leading up to the financial crisis, this practice went largely unchallenged.[61] But in a rash of adverse rulings, several federal courts in the mid-2000s ruled that MERS lacked standing to foreclose.[62] Without a beneficial interest in the mortgages, MERS lacked the requisite "personal stake" in the foreclosure to initiate suit as plaintiff in federal court.[63] The cases in which federal courts found that MERS lacked standing arose in judicial foreclosure states.[64] In spite—or perhaps because—of record-keeping in the MERS age, foreclosing entities "often struggle[d] to assemble documents showing that in acquiring ownership of the underlying obligations they complied with state property and commercial law."[65]

In the years since the financial crisis, a related problem has arisen in states that allow nonjudicial foreclosure.[66] Homeowners, such as Adam in the opening example, have sued foreclosing entities alleging that their attempted foreclosures were invalid.[67] Although homeowners' legal claims have varied as to why the foreclosures are invalid,[68] many have encountered a similar problem: Foreclosing entities have won motions to dismiss on the ground that homeowners lack standing to sue.[69] Thus, many district courts have barred homeowners from litigating the merits of foreclosures in federal court.

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[60] *See* Whitman & Milner, *supra* note 22, at 23 n.6 ("In fact, MERS did foreclose in its own name until mid-2011.").

[61] *See* RAO, *supra* note 33, § 5.9.2 ("MERS had insisted that its members could lawfully conduct foreclosures in the name of MERS.").

[62] *Id.* (citing illustrative cases).

[63] *See infra* Part III.A (discussing "personal stake" requirement in standing doctrine).

[64] *Cf. In re Schwartz*, 461 B.R. 93, 98-99 (Bankr. D. Mass. 2011) (ruling that foreclosure sale was void under Massachusetts law because foreclosing entity published notice of sale *before* MERS assigned mortgage to foreclosing entity). *See generally* RAO, *supra* note 33, § 5.9 (describing MERS and collecting MERS-related cases).

[65] RAO, *supra* note 33, § 5.1.1.

[66] *See infra* Part IV (summarizing representative litigation). Indeed, lenders' challenges to homeowners' standing may have been a "reaction to standing challenges by borrowers in many [judicial] foreclosure cases." RAO, *supra* note 33, § 5.3.2.

[67] *See* cases cited *supra* note 13.

[68] *See* cases cited *infra* note 107.

[69] *See infra* Part IV (describing illustrative cases).

II. Getting on the Field: Standing Doctrine in Federal Courts

A plaintiff must have "standing" to litigate his case in federal court.[70] As American society evolved away from the common law and toward the regulatory state, the Supreme Court developed standing doctrine to limit the scope of potential federal court plaintiffs.[71] Standing is a threshold question of subject-matter jurisdiction[72] that focuses on the parties rather than the claims that a plaintiff advances.[73]

Standing has sparked vigorous debate among Justices and academics for decades.[74] At its core, the Supreme Court has read a

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[70] *See generally* 13A CHARLES ALLEN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3531 (3d ed. 2008). The complaint of a plaintiff who lacks standing may be dismissed for lack of subject-matter jurisdiction. Fed. R. Civ. P. 12(b)(1); Ballentine v. United States, 486 F.3d 806, 810 (3d Cir. 2007) ("A motion to dismiss for want of standing is also properly brought pursuant to Rule 12(b)(1), because standing is a jurisdictional matter.").

[71] *See* LARRY W. YACKLE, THE FEDERAL COURTS 323 (3d ed. 2009) ("The conception of standing as a feature of the separation of powers developed as a reflection of, and as a reaction to, the evolution of the modern administrative state. . . . Both the objects of regulation (chiefly industrial corporations) and its beneficiaries (primarily competitors, workers, and consumers) sought access to the courts to vindicate their interests.").

[72] *E.g.*, Linda R.S. v. Richard D., 410 U.S. 614, 616 (1973) ("Before we can consider the merits of appellant's claim or the propriety of the relief requested, . . . appellant must first . . . show that the facts alleged present the court with a 'case or controversy' in the constitutional sense and that she is a proper plaintiff to raise the issues sought to be litigated.").

[73] Raines v. Byrd, 521 U.S. 811, 818 (1997) ("The standing inquiry focuses on whether the plaintiff is the proper party to bring this suit, although the nature of that inquiry often turns on the nature and source of the claim asserted." (internal quotation marks and citations omitted)).

[74] *See, e.g.*, Warth v. Seldin, 422 U.S. 490, 519 (1975) (Douglas, J., dissenting) ("[C]ases such as this one reflect festering sores in our society; and the American dream teaches that if one reaches high enough and persists there is a forum where justice is dispensed. I would lower the technical barriers and let the courts serve that ancient need."); YACKLE, *supra* note 71, at 318, 394 ("Standing jurisprudence is notoriously hard to manage. . . . Some academics have never been fully reconciled to the harm-based model of standing."); Heather Elliott, *Congress's Inability to Solve Standing Problems*, 91 B.U. L. REV. 159, 168 & n.39 (2011) (summarizing academic criticism of constitutional standing); Cass R. Sunstein, *What's Standing after* Lujan*? Of Citizen*

constitutional standing requirement into the "case or controversy" language of Article III of the Constitution.[75] Additionally, the Court has created several "prudential" limitations on standing.[76] Finally, Congress is at liberty to alter prudential, but not constitutional, standing.[77] Although the legal skirmishes in federal courts over whether to allow homeowners onto the field implicate the prudential aspects of standing,[78] this part reviews both constitutional and prudential standing doctrines.

Suits, "Injuries," and Article III, 91 MICH. L. REV. 163, 167 (1992) (arguing that the "injury in fact" prong of constitutional standing is "not merely a misinterpretation of . . . Article III but also a large-scale conceptual mistake [that] . . . uses highly contestable ideas about political theory to invalidate congressional enactments, even though the relevant constitutional text and history do not call for invalidation at all.").

[75] *See* U.S. Const. art. III, § 2 ("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 . . . [and] to Controversies . . . between Citizens of different States . . . ."); Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) ("[S]etting apart the 'Cases' and 'Controversies' that are of the justiciable sort referred to in Article III—'serv[ing] to identify those disputes which are appropriately resolved through the judicial process,'—is the doctrine of standing. Though some of its elements express merely prudential considerations that are part of judicial self-government, the core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III." (quoting Whitmore v. Arkansas, 495 U.S. 149, 155 (1990))); Allen v. Wright, 468 U.S. 737, 751 (1984) ("The requirement of standing . . . has a core component derived directly from the Constitution."); Elliott, *supra* note 74, at 169 ("The [Supreme] Court has rooted standing doctrine in the text of Article III, which gives the federal courts authority to hear only 'Cases' and 'Controversies' and serves to maintain the constitutional balance between the branches.").

[76] *See, e.g.*, Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 11 (2004) ("[O]ur standing jurisprudence contains two strands: Article III standing, which enforces the Constitution's case-or-controversy requirement; and prudential standing, which embodies judicially self-imposed limits on the exercise of federal jurisdiction." (internal quotation marks and citations omitted)).

[77] *E.g.*, Bennett v. Spear, 520 U.S. 154, 162 (1997) (explaining that prudential standing requirements, "unlike their constitutional counterparts, . . . can be modified or abrogated by Congress").

[78] *E.g.*, Culhane v. Aurora Loan Servs. of Neb., 708 F.3d 282, 290-91 (1st Cir. 2013) (treating Article III standing as an easy question and focusing on prudential standing).

A. Constitutional Standing

Constitutional standing is a question of subject-matter jurisdiction[79] and is comprised of three elements: injury, causation, and redressability.[80] In short, the plaintiff must have a "personal stake" in the litigation to satisfy Article III's case or controversy requirement.[81] The injury must be an injury in fact.[82] Economic harm typically suffices as an injury in fact, but allegations of a violation of federal law do not.[83] The defendant's alleged conduct must have caused the plaintiff's factual injury, and the court must be able to grant relief that would redress the plaintiff's injury.[84] A plaintiff must have standing at every phase of litigation and for each form of relief sought.[85] For instance, a plaintiff who has standing to seek damages may lack

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[79] Linda R.S. v. Richard D., 410 U.S. 614, 616 (1973) ("Before we can consider the merits of appellant's claim or the propriety of the relief requested, . . . appellant must first . . . show that the facts alleged present the court with a 'case or controversy' in the constitutional sense and that she is a proper plaintiff to raise the issues sought to be litigated.").

[80] *E.g.*, Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 168 (2000) ("This Court has held that to satisfy Article III's standing requirements, a plaintiff must show injury in fact, causation, and redressability." (internal quotation marks omitted)).

[81] Warth v. Seldin, 422 U.S. 490, 498-99 (1975) ("In its constitutional dimension, standing imports justiciability: whether the plaintiff has made out a 'case or controversy' between himself and the defendant within the meaning of Art. III. This is the threshold question in every federal case, determining the power of the court to entertain the suit. As an aspect of justiciability, the standing question is whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf.").

[82] Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) ("[T]he plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." (quotation marks and citations omitted)).

[83] *See* James Leonard & Joanne C. Brant, *The Half-Open Door: Article III, the Injury-in-Fact Rule, and the Framers' Plan for Federal Courts of Limited Jurisdiction*, 54 RUTGERS L. REV. 1, 88-89 (2001) ("Plaintiffs asserting harm to economic interests such as property or contractual rights . . . will almost always be able to establish an injury-in-fact . . . .").

[84] *Defenders of Wildlife*, 504 U.S. at 560-61.

[85] *Id.* at 561.

standing to seek an injunction.[86] Although allegations may be sufficient at the pleading stage, a plaintiff must support his allegations with evidence at the summary judgment and trial stages.[87]

Although the Supreme Court has read a standing requirement into the Constitution, the text of Article III says nothing about standing.[88] Indeed, some commentators have questioned whether standing really has constitutional roots.[89] Nevertheless, the Supreme Court has justified constitutional standing on the basis of separation of powers, reasoning that standing is "founded in concern about the proper—and properly limited—role of the courts in a democratic society."[90]

A homeowner alleging the unlawfulness of a foreclosure satisfies constitutional standing.[91] Indeed, discussion of the constitutional aspects of standing in the mortgage cases is often brief or nonexistent.[92] The injury complained of is often an invalid foreclosure, or attempted foreclosure.[93] An invalid foreclosure would cause a homeowner factual harm because the homeowner would lose his home. If the plaintiff proves his case, a declaratory judgment, injunction, or damages would redress the homeowner's factual injury. Thus, homeowners will often, if not always, satisfy the constitutional triad of injury in fact, causation,

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[86] *See* City of Los Angeles v. Lyons, 461 U.S. 95, 105 (1983) (conceding that plaintiff who was choked by police officer had standing to seek damages, but holding that plaintiff lacked standing to seek an injunction because he failed to show that Los Angeles police officers were likely to choke him again in the future).

[87] *Defenders of Wildlife*, 504 U.S. at 561.

[88] *See* U.S. Const. art. III; Sunstein, *supra* note 74, at 180 ("The development of standing limitations in the early part of the twentieth century was indeed a novelty, in the sense that no separate body of standing law existed before this period.").

[89] *See, e.g.*, William A. Fletcher, *The Structure of Standing*, 98 Yale L.J. 221, 223 (1988) (proposing that "we . . . abandon the idea that Article III requires a showing of 'injury in fact'"); Sunstein, *supra* note 74, at 167-69, 177 (arguing that injury in fact, causation, and redressability are not constitutional requirements).

[90] Bennett v. Spear, 520 U.S. 154, 162 (1997); *see also* Leonard & Brant, *supra* note 83, at 23-33 (discussing separation of powers rationale).

[91] *E.g.*, Culhane v. Aurora Loan Servs. of Neb., 708 F.3d 282, 289-90 (1st Cir. 2013).

[92] *See* cases cited *infra* note 101.

[93] *See infra* Part IV.

and redressability. Accordingly, this note focuses primarily on prudential standing.

B. Prudential Standing

"Jurisdiction existing, . . . a federal court's 'obligation' to hear and decide a case is 'virtually unflagging.'"[94] Nevertheless, prudential aspects of standing also exist. Prudential standing is a product of "judicial self-government."[95] Prudential limitations include leaving the resolution of generalized grievances to Congress and, in the context of regulatory law, requiring that a plaintiff's claim fall within the "zone of interests" protected by the relevant statute.[96]

The most prominent prudential limitation—at least for the purpose of this note—is the so-called "third-party standing" limitation.[97] Generally, a party must assert his own legal interests and cannot gain standing to assert the interests of a third party.[98] The third-party standing limitation reflects the Supreme Court's policy against issuing

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[94] Sprint Commc'ns, Inc. v. Jacobs, 134 S. Ct. 584, 591 (2013) (quoting Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976)); *see also* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821) ("We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.").

[95] Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992); *see also* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 804 (1985) ("'[T]he judiciary seeks to avoid deciding questions of broad social import where no individual rights would be vindicated and to limit access to the federal courts to those litigants best suited to assert a particular claim.'" (quoting Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 99-100 (1979))).

[96] Allen v. Wright, 468 U.S. 737, 751 (1984) (explaining that prudential limitations on standing include "the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked").

[97] *See, e.g.*, WRIGHT, MILLER & COOPER, *supra* note 70, § 3531.9 ("Courts generally respond to these problems by stating that ordinarily a party may not assert the rights of others—not even a coparty—but that this rule is a matter of prudence, not Article III limits, and may be relaxed in appropriate circumstances." (footnotes omitted)).

[98] Kowalski v. Tesmer, 543 U.S. 125, 129 (2004) ("We have adhered to the rule that a party 'generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.'" (quoting Warth v. Seldin, 422 U.S. 490, 499 (1975))).

advisory, or hypothetical, opinions.[99] A party may assert another party's interests only when the parties have a "close" relationship and when doing so would not be a "hindrance" to the ability of the third party to assert his rights and interests.[100]

The question of whether homeowners have standing to sue foreclosing entities often turns on prudential standing considerations. The next part explores and critiques the prominent cases on point.

III. Stepping off the Sidelines: The First Circuit Holds Homeowners Have Standing to Challenge Nonjudicial Foreclosures

The aftermath of the financial crisis included myriad lawsuits in which homeowners challenged foreclosures on the theory that assignments of their mortgages to foreclosing entities were invalid.[101]

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[99] *Id.* ("It represents a healthy concern that if the claim is brought by someone other than one at whom the constitutional protection is aimed, the courts might be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights." (quotations and citations omitted)).

[100] *Id.* at 130 ("But we have limited this exception by requiring that a party seeking third-party standing make two additional showings. First, we have asked whether the party asserting the right has a 'close' relationship with the person who possesses the right. Second, we have considered whether there is a 'hindrance' to the possessor's ability to protect his own interests." (citations omitted)). The Court's third-party standing exceptions are not without criticism. *See id.* at 134-35 (Thomas, J., concurring) ("[O]ur third-party standing cases have gone far astray. . . . It is doubtful whether a party who has no personal constitutional right at stake in a case should ever be allowed to litigate the constitutional rights of others.").

[101] *See* In re Cook, 457 F.3d 561, 567-68 (6th Cir. 2006) (holding, with scant analysis, that bankruptcy trustee lacked standing to challenge legality of assignment "because neither the debtors nor the Trustee are parties to the Trust Agreement, nor were they even aware of it before this action" (internal quotation marks omitted)); Wenzel v. Sand Canyon Corp., 841 F. Supp. 2d 463, 477-79 (D. Mass. 2012) (dismissing action for declaratory judgment that assignment was invalid because no "actual controversy" existed between mortgagor and assignor and prudential standing considerations prevented plaintiff from seeking declaratory judgment against assignee of mortgage); Juarez v. U.S. Bank Nat'l Ass'n ex rel. Holders of the Asset Backed Sec. Corp. Home Equity Loan Trust, Series NC 2005–HE8, No. 11-10318-DJC, 2011 WL 5330465, at *4 (D. Mass. Nov. 4, 2011) (plaintiff "does not have a legally

At first, foreclosing entities prevailed.[102] But in its landmark decision in *Culhane v. Aurora Loan Servicers of Nebraska*,[103] the First Circuit held

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protected interest in the assignment of the mortgage to bring an action arising under the [Pooling and Servicing Agreement]," which is a contract between the assignor and assignee), *rev'd on other grounds sub nom.* Juraez v. Select Portfolio Servicing, Inc., 708 F.3d 269, 277 (1st Cir. 2013) ("We . . . note without deciding that many of the district courts that have addressed the issue have found no standing on the part of a mortgagor to challenge the validity of the assignment of their mortgage under a PSA."); Peterson v. GMAC Mortg., LLC, No. 11-11115-RWZ, 2011 WL 5075613, at *4 (D. Mass. Oct. 25, 2011) ("[P]laintiffs have no legally protected interest in the Mortgage assignment from MERS to GMAC and therefore lack standing to challenge it."); Kiah v. Aurora Loan Servs., LLC, No. 10-40161-FDS, 2011 WL 841282, at *6 (D. Mass. Mar. 4, 2011) ("[I]t is difficult to see why plaintiff has standing to assert [a claim that the assignment of his mortgage was defective] . . . ."); Bridge v. Aames Capital Corp., No. 1:09 CB 2947, 2010 WL 3834059, at *2 (N.D. Ohio Sept. 29, 2010) ("This court finds that neither Article III standing requirements nor the prudential limitations are called into question in this case. The standing referred to in this diversity action relates to whether Plaintiff has been granted authority under state law to raise the challenge she seeks to assert in this case."); Livonia Prop. Holdings v. Farmington Road Holdings, 717 F. Supp. 2d 724, 735 (E.D. Mich. 2010) ("Borrower disputes the validity of the assignment documents on several grounds outlined above. But, as a non-party to those documents, it lacks standing to attack them."); *see also* Liu v. T & H Mach., Inc., 191 F.3d 790, 797-98 (7th Cir. 1999) (finding that manufacturer lacked standing to challenge an assignment from broker to third party of broker's interest in commissions derived from contract between manufacturer and broker); Ifert v. Miller, 138 B.R. 159, 166 (Bankr. E.D. Pa. 1992) ("[W]hile the law permits the obligor to raise as a defense against the assignee the fact that the assignment contract between the assignor and the assignee was void, it does not permit the obligor to raise, as a defense, the claim that the assignment contract between the assignor and the assignee is voidable . . . ."). *But see* Cosajay v. Mortg. Elec. Registration Sys., Inc., 980 F. Supp. 2d 238, 245 (D.R.I. 2013) (finding, as a matter of first impression, that prudential standing limitations did not bar mortgagor form challenging validity of assignment under Rhode Island law); Culhane v. Aurora Loan Servs. of Neb., 826 F. Supp. 2d 352, 368 (D. Mass. 2011) (holding that mortgagor has standing to seek temporary restraining order against assignee), *aff'd*, 708 F.3d 282, 290-91 (1st Cir. 2013); Rosa v. Mortg. Elec. Registration Sys., Inc., 821 F. Supp. 2d 423, 429 n.5 (D. Mass. 2011) (noting that plaintiffs would have standing to challenge assignment if alleged defect would render attempted foreclosure void under Massachusetts law).

[102] *See* cases cited *supra* note 101.

[103] 708 F.3d 282 (1st Cir. 2013).

that prudential standing limitations did not bar homeowners from challenging assignments as void.[104] Section A of this part summarizes a case illustrating a common fact pattern in foreclosure-related litigation.[105] Section B reviews the split among federal circuits on the issue of homeowner standing to challenge their mortgage assignments.[106]

A. *Oum*: An Illustrative Case in Which Homeowners Lacked Standing

Although plaintiffs' legal claims vary,[107] lawsuits challenging assignments in nonjudicial foreclosure states follow a fairly standard fact pattern. Ordinarily, a homeowner alleges that the foreclosure is invalid due to a defect in the assignment of the mortgage from the originator to a third party.[108] This section summarizes an illustrative case and analyzes the underlying legal rationale. In addition to representing a standard fact pattern, the selected case offers in-depth analysis of the standing issue.[109]

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[104] *Id.* at 290-91.

[105] *See infra* Part IV-A.

[106] *See infra* Part IV-B.

[107] *See* Oum v. Wells Fargo, N.A., 842 F. Supp. 2d 407, 413 n.11 (D. Mass. 2012) (quiet title); Wenzel v. Sand Canyon Corp., 841 F. Supp. 2d 463, 477-79 (D. Mass. 2012) (declaratory judgment); Bridge v. Aames Capital Corp., No. 1:09 CB 2947, 2010 WL 3834059, at *1 (N.D. Ohio Sept. 29, 2010) (declaratory judgment and quiet title under Ohio law).

[108] *But see* Giuffre v. Deutsche Bank Nat'l Trust Co., No. 12-11510-JLT, 2013 WL 4587301, at *1 (D. Mass. Aug. 27, 2013). *Giuffre* offers an intriguing twist on this standard fare. A victim of a foreclosure rescue scheme, Giuffre conveyed title to his property to a third-party fraudster. *Id.* The fraudster originated a mortgage in his own name, which was subsequently assigned in the secondary market. *Id.* When his scheme fell through, the fraudster filed for bankruptcy. *Id.* Giuffre received a release deed from the bankruptcy court conveying equitable title to Giuffre. *Id.* In the meantime, the assignee of the fraudster's mortgage was attempting to foreclose on Giuffre's property because the fraudster had defaulted on his mortgage. *Id.* Giuffre sued, alleging that the mortgage was void due to fraud. *Id.* Although the district court ultimately granted the foreclosing entity's motion to dismiss for failure to state a claim, Judge Tauro held that Giuffre, in a post-*Culhane* era, had standing to file the suit. *Id.* at *2.

[109] *Cf.* In re Cook, 457 F.3d 561, 567 (6th Cir. 2006) (summarily affirming bankruptcy court's finding that bankruptcy trustee lacked standing to challenge legality of assignment).

In *Oum v. Wells Fargo, N.A.*,[110] Joseph O'Brien and Chantha Oum (collectively, "Plaintiffs") saw their mortgages assigned to Wells Fargo, N.A. ("Wells Fargo") after origination.[111] Plaintiffs alleged that Wells Fargo's later foreclosure attempts were invalid due to defects in the assignments of their mortgages.[112]

O'Brien alleged that his mortgage was originated by Mortgage Solutions, Inc., which later assigned the mortgage to Option One Mortgage Corp. ("Option One"), which in turn assigned the mortgage to Wells Fargo.[113] The alleged defect was that Option One had never assigned the mortgage to its successor, Sand Canyon Corp. ("Sand Canyon"), even though the assignment to Wells Fargo listed Sand Canyon as the assignor.[114]

Oum's case also involved an assignment from Option One, the originator, to Sand Canyon, and again to Wells Fargo.[115] Oum claimed that she was fraudulently induced to sign the mortgage, and that no witnesses had signed the mortgage in the space provided for their signatures.[116] Plaintiffs sought to enjoin Wells Fargo's foreclosures, to quiet title, and to receive damages for breach of the duty of good faith and reasonable diligence.[117] Wells Fargo moved to dismiss, arguing that Plaintiffs lacked standing to challenge the assignments of their mortgages.[118]

Beginning with the premise that an assignment is a contract, the district court held that Plaintiffs lacked standing because they were neither parties to, nor third party beneficiaries of, the assignment from the mortgage originator to subsequent assignees.[119] Although Judge Stearns recited familiar standing requirements,[120] whether his holding relied on principles of constitutional standing, prudential standing, or contract law was unclear. Plaintiffs' legal claim was to quiet title,[121] and the applicable Massachusetts statute required a plaintiff in a quiet

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[110] 842 F. Supp. 2d 407 (D. Mass. 2012), *abrogated by* Culhane v. Aurora Loan Servs. of Neb., 708 F.3d 282 (1st Cir. 2013).
[111] *Id.* at 409-10.
[112] *Id.* at 414.
[113] *Id.* at 409-10.
[114] *Id.* at 410.
[115] *Id.*
[116] *Id.*
[117] *Id.* at 408.
[118] *Id.* at 409.
[119] *Id.* at 413.
[120] *Id.* at 411.
[121] *Id.* at 412.

title action to hold legal title to the property.[122] But in this case, the mortgagee held legal title because Massachusetts is a title theory state.[123] Because the mortgagee, not the Plaintiffs, held legal title to Plaintiffs' properties, Judge Stearns reasoned that Plaintiffs would have failed to state a claim to quiet title even if they had standing. "The remedy would thus have no effect on plaintiffs as defaulting mortgagors."[124]

Accordingly, one could read the *Oum* opinion several ways. Perhaps the holding implicates the constitutional standing requirement of redressability. Yet, the thrust of the opinion is hardly that Plaintiffs might have had standing had they stated a claim other than to quiet title. Perhaps the opinion turns on the prudential standing limitation on asserting the rights of a third party; any dispute over the validity of the assignment would presumably be between the parties to that contract. Perhaps the case hinges on the closely related contract law principle that only a party to, or third-party beneficiary of, a contract may assert rights under that contract.

Each of these possibilities is problematic. First, whether redressability is truly a constitutional requirement, Supreme Court rhetoric aside, may be questionable.[125] Moreover, the redressability formulation rests on one sentence in the opinion, and the standing issue is, at least formally, independent of a plaintiff's legal claim. Finally, it was unclear whether the third-party limitation was a product of prudential standing or contract law. In any event, the decision in *Oum* was not to survive for long. The following year, the First Circuit abrogated the outcome of *Oum*.

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[122] *See* MASS. GEN. LAWS ch. 240, §§ 1, 10 (2004 & Supp. 2015); Bevilacqua v. Rodriguez, 955 N.E.2d 884, 888 & n.5 (Mass. 2011) (requiring actual possession of property and legal title to state claim in try title or quiet title action).

[123] *Oum*, 842 F. Supp. 2d at 412 ("In a title theory state like Massachusetts, a mortgagor does not in fact hold legal title to the mortgaged property. Rather, the mortgagee holds the legal title. The mortgagor possesses only an equitable title to the property so long as the debt remains unpaid." (citing U.S. Bank Nat'l Ass'n v. Ibanez, 941 N.E.2d 40, 51 (2011)); *see also supra* Part II (contrasting lien theory and title theory).

[124] *Oum*, 842 F. Supp. 2d at 415.

[125] *See* Sunstein, *supra* note 74, at 209 (stating that "[a]s an independent Article III requirement . . . the notion of redressability makes little sense" in the administrative law context).

B. *Culhane*: The First Circuit Allows Homeowners to Step off the Sidelines

The First Circuit resolved a split among Massachusetts district courts over whether homeowners had standing to challenge the assignments in *Culhane v. Aurora Loan Servicers of Nebraska*[126] in favor of the homeowners.[127] But, although the substance and rhetoric of the opinion strongly favored plaintiffs, homeowners have struggled to state viable claims on the merits of their cases.

The facts of *Culhane* were unremarkable.[128] Plaintiff Oratai Culhane refinanced her home, and her mortgage was assigned in the secondary market.[129] When Culhane defaulted, the servicer, Aurora Loan Servicers of Nebraska ("Aurora"), initiated foreclosure proceedings under the Massachusetts nonjudicial foreclosure statute.[130] Culhane sued in state court seeking an injunction and damages.[131] Aurora removed the suit to federal court, which granted summary judgment in Aurora's favor.[132]

What *was* remarkable about *Culhane*, aside from the typically witty prose of Judge Selya, was its thorough trouncing of the district court cases that had denied homeowners standing to sue foreclosing entities.[133] Judge Selya treated constitutional standing as an easy question because "the foreclosure of the plaintiff's home is unquestionably a concrete and particularized injury" that "can be traced directly to Aurora's exercise" of its authority as servicer and redressed via the remedies that Culhane sought.[134]

Prudential standing was a more difficult question. Relying on recent authority from the Massachusetts Supreme Judicial Court, the First Circuit stated that "a Massachusetts mortgagor has a legally cognizable right under state law to ensure that any attempted

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[126] 708 F.3d 282 (1st Cir. 2013).
[127] *Id.* at 291.
[128] *See supra* Part IV.A (summarizing a typical case).
[129] *Culhane*, 708 F.3d at 286-87.
[130] *Id.* at 288.
[131] *Id.*
[132] *Id.*
[133] *Id.* at 289 (abrogating, *inter alia*, Oum v. Wells Fargo, N.A., 842 F. Supp. 2d 407 (D. Mass. 2012)).
[134] *Id.* at 289-90.

foreclosure on her home is conducted lawfully."[135] Because Massachusetts law required strict compliance with the power-of-sale statute, a purported foreclosing entity's noncompliance would render the foreclosure void.[136] Accordingly, the First Circuit held that Culhane had standing to challenge the assignment of her mortgage to the extent that a void assignment would render Aurora's attempted foreclosure invalid.[137]

Although a victory for homeowners, the holding in *Culhane* was very narrow.[138] The First Circuit expressly applied Massachusetts law.[139] Moreover, the holding applied only to allegations that the assignment was *void*, not "merely *voidable*."[140] The rationale appears to be that a voidable assignment would be voidable at the option of the *assignor*, not the homeowner.[141]

Whether the void/voidable limitation was a matter of constitutional or nonconstitutional standing was ambiguous. Under the constitutional standing rubric, a homeowner challenge to a voidable assignment would lack redressability because the homeowner could not exercise the option to invalidate the assignment.[142] But the First Circuit expressly held that Culhane had constitutional standing and discussed this limitation on its holding in the context of prudential standing.[143] More likely, then, was that the limitation was a product of prudential standing because a plaintiff was essentially attempting to exercise another party's right.[144]

Although *Culhane* offers the most in-depth treatment of the standing issue, at least two other federal circuit courts have addressed

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[135] *Id.* at 290 (citing MASS. GEN. LAWS ch. 183, § 21; MASS. GEN. LAWS ch. 244, § 14; and U.S. Bank Nat'l Ass'n v. Ibanez, 941 N.E.2d 40, 50 (Mass. 2011)).
[136] *Id.*
[137] *Id.* at 291.
[138] *See id.* ("We caution that our holding, narrow to begin with, is further circumscribed."); Giuffre v. Deutsche Bank Nat'l Trust Co., No. 12-11510-JLT, 2013 WL 4587301, at *1 (D. Mass. Aug. 27, 2013) ("The First Circuit ruled narrowly in *Culhane*.").
[139] *Culhane*, 708 F.3d at 290 (applying Massachusetts law).
[140] *Id.* at 291 ("Withal, a mortgagor does not have standing to challenge shortcomings in an assignment that render it merely voidable at the election of one party but otherwise effective to pass legal title.").
[141] *See id.*
[142] *See supra* Part III.A (discussing redressability).
[143] *See Culhane*, 708 F.3d at 290.
[144] *See supra* Part III.B (discussing prudential standing).

the same question. In *Reinagel v. Deutsche Bank National Trust Co.*,[145] the Fifth Circuit reached the same result as the First Circuit, holding that plaintiffs had standing to challenge as void the assignment of their mortgage.[146] The Sixth Circuit, however, reached a contrary result in *Robinson v. Select Portfolio Servicing, Inc.*,[147] treating the issue as a foregone conclusion and supplying scant analysis of the standing issue.[148] Given the prevalence of foreclosure-related litigation, the federal appeals courts will likely continue addressing this issue in the near future.[149]

Even when plaintiffs have standing to bring their cases, however, they often lose on other grounds. For instance, the First Circuit in *Culhane* ultimately affirmed summary judgment in favor of Aurora because Culhane had failed to produce any facts suggesting that the assignment was void.[150] Assuming that homeowners only have standing to challenge assignments as void, not voidable, the set of circumstances in which they can plead successful claims appears quite limited.

An invalid mortgage assignment would create one such circumstance. Under the classic property principle of *nemo dat*, an assignment would be void if the assignor did not have the right to assign the mortgage.[151] For instance, if a mortgage assignee seeks to foreclose on a mortgage with an anti-assignment clause, the homeowner could argue that the assignee received no rights as a result of the putative assignment. But most mortgages do not include an anti-assignment clause, and one is hard-pressed to find a standing-related case in which an anti-assignment clause plays a role.[152] Alternatively, homeowners may allege that inaccurate or incomplete recordkeeping prevents the foreclosing entity from proving its lawful authority to

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[145] 735 F.3d 220 (5th Cir. 2013).
[146] *Id.* at 225.
[147] 522 F. App'x 309 (6th Cir. 2013).
[148] *Id.* at 312 ("[P]laintiffs were not a party to the MERS assignment to U.S. Bank. Thus, they have no standing to contest that transfer.").
[149] That the three federal appeals cases discussed in this section, *Culhane*, *Reinagle*, and *Robinson*, were decided in 2013 suggests that the issue will continue gaining traction.
[150] *Culhane*, 708 F.3d at 294.
[151] *See* Donald J. Kochan, *Certainty of Title: Perspectives After the Mortgage Foreclosure Crisis on the Essential Role of Effective Recording Systems*, 66 ARK. L. REV. 267, 267 (2013) ("A venerable maxim in our law is expressed in Latin as *nemo dat quod non habet*—one who does not have cannot give.").
[152] *See* cases cited *supra* note 101.

foreclose.[153] Homeowners may, however, suffer from inadequate access to documentation, which may prevent homeowners from alleging facts sufficient to plead a *prima facie* case.[154]

Accordingly, although *Culhane* represents a victory for homeowners in that it allows homeowners to step off the sidelines, it remains to be seen whether homeowners will achieve a winning record. In the next part, this note argues that *Culhane* was correctly decided because the interests of homeowners and society are best served by allowing homeowners to litigate their claims on the merits rather than leaving them standing on the sidelines.

IV. How Judges and Legislators Should Address Homeowner Standing to Challenge Nonjudicial Foreclosures

The interests of homeowners and society are best served by allowing homeowners to litigate their foreclosure-related claims on the merits. To that end, this part reviews the policy justifications for granting standing to homeowners to challenge the assignments of their mortgages. Because legislatures and courts generally share rule-making functions, this part then discusses how judges and legislators should approach the issue of homeowner standing to challenge assignments.

A. Policy Justifications for Homeowner Standing

Strong policy justifications exist for allowing homeowners to challenge attempted foreclosures on their homes. First, fundamental fairness demands that homeowners have standing to challenge nonjudicial foreclosures.[155] To challenge a nonjudicial foreclosure, a homeowner necessarily becomes the plaintiff in a lawsuit.[156] But in a state that requires *judicial* foreclosure, the homeowner would become the *defendant* in a foreclosure lawsuit.[157] Because a defendant need not

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[153] *Cf.* RAO, *supra* note 33, § 5.1.1 (asserting that foreclosing entities' efforts to prove authority to foreclose "can be haphazard, and the documentation they produce frequently turns out to be defective").

[154] *See* Gomes v. Countrywide Home Loans, Inc., 121 Cal. Rptr. 3d 819, 825 (Cal. Ct. App. 2011) (dismissing homeowner's suit in part because plaintiff failed to identify specific factual basis for alleging improper foreclosure).

[155] *See supra* Part II (contrasting judicial and nonjudicial foreclosure laws).

[156] *See* cases cited *supra* note 101.

[157] Kasey Curtis, Note, *The Burst Bubble: Revisiting Foreclosure Law in Light of the Collapse of the Housing Industry*, 36 W. ST. U. L. REV. 119, 123-24

establish standing,[158] a homeowner in a judicial foreclosure state could defend against a foreclosure by asserting the exact same claim—invalid assignment—that the plaintiffs advanced in *Oum*, *Culhane*, and numerous similar cases.[159] Thus, a ridiculous result occurs if a homeowner's ability to assert the foreclosing entity's lack of authority to foreclose depends entirely on whether the property is situated in a state that allows nonjudicial foreclosure. The hypothetical scenario with Chris and Adam described at the outset of this note illustrates such a result.

The homeowner's status as a plaintiff or defendant also implicates the burden of proof. In a judicial foreclosure, the foreclosing entity bears the burden of proving that the homeowner is in default and that the foreclosure is valid.[160] Nonjudicial foreclosure states, in contrast, shift the burden of proof to the homeowner to prove that the foreclosure is invalid or illegal.[161] To shift the burden to homeowners but deny them standing to sue is fundamentally unfair. The fortuitousness of a homeowner's state of residence should not determine whether he can advance a potentially meritorious claim when defending against a foreclosure. The burden-shifting aspect is especially acute in states that recognize a right to freedom from invalid foreclosure.[162] Denying a homeowner standing would obfuscate any meaningful private enforcement of this legal right and effectively insulate foreclosing entities from judicial review of their methods.

Second, the Supreme Court often comments in standing cases that "better" plaintiffs exist.[163] If a homeowner cannot challenge a

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(2008) (explaining that, "[i]n judicial foreclosure, an action in equity is brought to foreclose upon the property," but nonjudicial foreclosure "permits the mortgagee to foreclose without initiating a judicial action").

[158] *See, e.g.*, Raines v. Byrd, 521 U.S. 811, 818 (1997) ("The standing inquiry focuses on whether the plaintiff is the proper party to bring this suit . . . .").

[159] *See supra* Part IV.

[160] RAO, *supra* note 33, § 5.1.4.4 ("In judicial foreclosures, the burden of proving all elements of a foreclosure claim is typically on the plaintiff-lender.").

[161] *See id.* ("When a homeowner files a lawsuit seeking to enjoin a pending non-judicial sale, the burden of proof landscape can appear fundamentally different, and often confusing.").

[162] *See supra* Part IV.B (describing *Culhane*).

[163] In *Raines v. Byrd*, for instance, the Supreme Court held that members of Congress lacked standing to challenge the constitutionality of the Line Item Veto Act of 1996 because no personal injury existed. 521 U.S. at 830. The Supreme Court commented, however, that "someone who suffers [a] judicially

foreclosure, then who can? Perhaps the neighbors could assert a claim based on possible economic harm in the form of decreased property values,[164] but such a claim would be far more attenuated than the homeowner's claim. Alternatively, if an assignment were voidable, the party holding the option to void the assignment probably has little interest in the foreclosure. In the universe of potential plaintiffs to challenge a foreclosure, the homeowner is the best prospect.

A closely related concept is zealous advocacy. Courts reach the best decisions, so the argument goes, when the parties to a case have a strong interest in presenting their side of the case as persuasively as possible.[165] The "best" plaintiff is likely to present the best argument.[166] And in litigation challenging a foreclosure, the most zealous advocate is the homeowner himself.

Third, denying standing to homeowners could permit foreclosure despite the foreclosing entity's failure to comply with state law.[167] In other words, state power-of-sale statutes would allow any

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cognizable injury as a result of the Act" could challenge the Act's constitutionality. *Id.* at 829. That very challenge occurred one year later, and the Supreme Court invalidated the Act. Clinton v. City of New York, 524 U.S. 417, 429-36, 447-49 (1998) (concluding that beneficiaries of appropriation, which President Clinton canceled through exercise of line item veto, had standing to challenge Act's constitutionality).

[164] *See* RAO, *supra* note 33, § 1.4.3 (stating that "a single-family home foreclosure lowers the value of homes located within one-eighth of a mile by an average of almost one percent").

[165] *See* Arthur H. Abel, Note, *The Burger Court's Unified Approach to Standing and Its Impact on Congressional Plaintiffs*, 60 NOTRE DAME L. REV. 1187, 1189 (1985) ("During the Warren Court years, the standing requirement was designed simply to ensure that plaintiffs pursued their claims vigorously.").

[166] *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 804 (1985) ("Generally stated, federal standing requires an allegation of a present or immediate injury in fact, where the party requesting standing has alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues." (internal quotation marks omitted)); 46 MASSACHUSETTS PRACTICE, FEDERAL CIVIL PRACTICE § 6.2 (2d ed. 2013).

[167] *See* Reinagel v. Deutsche Bank Nat'l Trust Co., 735 F.3d 220, 225 (5th Cir. 2013) ("Texas courts follow the majority rule that the obligor may defend on any ground which renders the assignment void. A contrary rule would lead to the odd result that Deutsche Bank could foreclose on the Reinagels' property though it is not a valid party to the deed of trust or promissory note . . . ." (internal quotation marks omitted)).

party purporting to have legal authority to foreclose.[168] This would be a preposterous state of affairs. Avoiding this absurd result favors granting standing to homeowners. In sum, public policy justifications support allowing homeowners to challenge attempted foreclosures on their homes.

B. How Judges and Legislators Should Respond: Possible Approaches

This section outlines the various avenues that judges and legislators can follow to address homeowner standing. Because prudential limitations on standing are the product of court-made policy, federal courts can, and should, decline to dismiss homeowner lawsuits for lack of prudential standing. Further, state legislatures should reform their nonjudicial foreclosure statutes to ensure that homeowners uniformly have standing to challenge attempted foreclosures in nonjudicial foreclosure states.

1. Judicial Approaches

As *Oum* and *Culhane* illustrate,[169] the outcomes of cases in which homeowners seek to challenge nonjudicial foreclosures correspond to different perspectives from which judges view the cases. In part, this reflects the wide discretion of federal district courts in the realm of prudential standing.[170] This section describes the prevailing

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[168] Presumably, a homeowner could refuse to leave his property after foreclosure, forcing the foreclosing entity to file an action for ejectment or eviction. *See* RAO, *supra* note 33, § 5.1.4.6 ("Under most non-judicial foreclosure systems, the party acquiring title to the property through the foreclosure sale must go through the courts to obtain a judgment for possession of the property, authorizing eviction of the borrowers by government officials."). The homeowner may be able to defend on the grounds that the foreclosure was invalid. *See id.* (explaining that extent to which homeowner can challenge foreclosure during post-sale eviction proceedings varies by state). Additionally, or alternatively, a state attorney general could take enforcement action against the foreclosing entity in response to a homeowner's complaint. But these challenges would likely be after the fact, depriving the homeowner of the most efficient means of ensuring the foreclosing entity's compliance with state law.

[169] *See supra* Part IV.

[170] *See* S. Todd Brown, *The Story of Prudential Standing*, 42 HASTINGS CONST. L.Q. 95, 95 (2014) (stating that a district court may "decide[], in its

perspectives and argues that one viewpoint better serves the policies favoring homeowner standing.

To the extent that lenders' arguments implicate prudential standing,[171] the divergence in holdings on the issue of homeowner standing largely reflects the selection of different major premises in judges' syllogistic reasoning.[172] Courts finding that homeowners lack standing begin with the major premise that mortgages, promissory notes, and assignments are contracts. They add the minor premise that one must be a party to a contract, or an intended third-party beneficiary, to challenge the contract. Finally, they conclude that, because homeowners are neither parties nor third-party beneficiaries, homeowners lack standing to challenge the assignment of their mortgages.[173]

In contrast, courts holding that homeowners have standing, exemplified in *Culhane*,[174] begin their reasoning from a different point. The major premise is that state law grants to homeowners freedom from invalid foreclosure. The minor premise is that homeowners are in the best position to enforce compliance with state statutes that permit nonjudicial foreclosure. The inevitable conclusion is that homeowners have standing to sue the foreclosing entity in an effort to protect their legal interest, or right, in freedom from invalid foreclosure. To frame it another way, some courts have characterized homeowners' lawsuits as challenges to an *assignment*, whereas other courts have treated them as challenges to a *foreclosure*.

A more difficult case occurs when neither a state's statutes nor a state's courts recognize a state-law right to freedom from invalid foreclosure. Even absent this particular right, however, homeowners still have property rights at stake.[175] More precisely,

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sole discretion, that it would not be prudent to recognize [a plaintiff's] standing").

[171] *See* RAO, *supra* note 33, § 5.3.3 ("The lenders' use of the 'standing' label in these arguments is misplaced. In fact, the lenders' contentions go to the merits of the borrowers' claims, not their standing to raise them.").

[172] *See* PAUL TOMASSI, LOGIC 23-25 (1999) (explaining syllogistic logic).

[173] *See, e.g.*, Oum v. Wells Fargo, N.A., 842 F. Supp. 2d 407 (D. Mass. 2012), *abrogated by* Culhane v. Aurora Loan Servs. of Neb.,708 F.3d 282 (1st Cir. 2013).

[174] *See, e.g.*, *Culhane*, 708 F.3d at 289-91.

[175] *See* RAO, *supra* note 33, § 5.3.2 (explaining that foreclosure "terminates the borrower's interest in the property and subjects the borrower to physical eviction").

> [i]n a title theory state, a foreclosure terminates the borrower's . . . right to obtain legal and equitable title . . . by paying off the debt. In a lien theory state, a foreclosure sale terminates the borrower's title to the property. In either type of jurisdiction, an *invalid* sale leaves the borrower with these significant legal rights still intact.[176]

Accordingly, when viewed from the perspective of challenging a foreclosure rather than a contract, that the homeowner asserts his own rights becomes clear.

Because the cases illustrate that the choice of perspective—challenge to an assignment, or challenge to a foreclosure—drives the outcome of the cases, federal judges should select the perspective that standing doctrine and underlying policy considerations best support. A rote recitation of the principle that one must be a party to, or third-party beneficiary of, a contract scantly serves any of the underlying purposes. Rather, granting homeowner standing checks the power of foreclosing entities and comports with fundamental fairness, zealous advocacy, and the principle that "a federal court's 'obligation' to hear and decide a case is 'virtually unflagging.'"[177]

2. Legislative Approaches

State legislatures[178] should amend their nonjudicial foreclosure statutes to grant homeowners a legally protected right to a valid foreclosure process. As a matter of common sense, a homeowner's

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[176] *Id.*

[177] Sprint Commc'ns, Inc. v. Jacobs, 134 S. Ct. 584, 591 (2013) (quoting Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976)).

[178] Because prudential limitations on standing are a product of court-made policy, Congress may alter them by enacting legislation that expands standing as broadly as Article III allows. Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 100 (1979) ("Congress may, by legislation, expand standing to the full extent permitted by Art. III, thus permitting litigation by one 'who otherwise would be barred by prudential standing rules.' In no event, however, may Congress abrogate the Art. III minima . . . ." (quoting Warth v. Seldin, 422 U.S. 490, 501 (1975))). That Congress, however, would abrogate the entire prudential standing doctrine in response to the homeowner standing problem seems unlikely. Thus, because state law applies to property, mortgages, and foreclosures, the onus is on state legislatures, rather than Congress, to address the problem of homeowner standing.

right to a valid foreclosure process may seem a logical corollary to a nonjudicial foreclosure statute.[179] The right, however, is far from absolute among states with nonjudicial foreclosure statutes.[180] Shockingly, not only do the nonjudicial foreclosure statutes in at least eight states fail to guarantee homeowners the right to a valid foreclosure process, but courts in those states "have held that the foreclosing party need not demonstrate or establish in any way that it has the right to enforce the obligation."[181]

Decisions in Massachusetts and California illustrate this conundrum. The First Circuit's decision in *Culhane* emphasized the plaintiff's right to freedom from an invalid foreclosure under Massachusetts law.[182] The right was not, however, a statutory creation. Rather, prior to *Culhane*, the Massachusetts Supreme Judicial Court interpreted the state power-of-sale statute as encompassing such a right.[183] In contrast, the California Court of Appeal refused to infer from California's nonjudicial foreclosure statute a private right of action to challenge the authority of a foreclosing entity.[184] Although private rights of action and standing are distinct concepts, the existence of a right of action would almost certainly alleviate any prudential standing concern in the nonjudicial foreclosure context.[185] The

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[179] *See* RAO, *supra* note 33, § 5.1.1 ("Homeowners have a legitimate interest in ensuring that the party seeking to foreclose, and not some other entity, is the proper one to proceed under a state's foreclosure laws.").

[180] *See* Whitman & Milner, *supra* note 22, at 34-35 ("If the party requesting the foreclosure is not the named beneficiary or mortgagee in the deed of trust or mortgage—thus indicating that a secondary-market transfer has occurred—[and if no party] has a duty to verify that the foreclosing party is the [person entitled to enforce] the promissory note[,] . . . there would be nothing to prevent a complete imposter from directing a foreclosure sale to occur! . . . Surely, it seems to us, no sensible legal system would expose borrowers to such a risk.").

[181] Whitman, *supra* note 25, at 42.

[182] Culhane v. Aurora Loan Servs. of Neb., 708 F.3d 282, 290 (1st Cir. 2013).

[183] *Id.* (citing U.S. Bank Nat'l Ass'n v. Ibanez, 941 N.E.2d 40, 50 (Mass. 2011)).

[184] *See* Gomes v. Countrywide Home Loans, Inc., 121 Cal. Rptr. 3d 819, 824 (Cal. Ct. App. 2011).

[185] The Supreme Court elaborated on the relationship between legal rights, rights of action, and standing in *Warth v. Seldin*, 422 U.S. 490, 500-01 (1975). The Court explained that "Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules." *Id.* at 501. "Of course, Art. III's requirement remains: the plaintiff still must allege a distinct and palpable injury to himself . . . ." *Id.* Accordingly, a homeowner-

California case also illustrates that state legislatures should act because state courts may be reticent to infer rights that statutes do not explicitly grant.[186]

Accordingly, either an explicit statutory right to freedom from invalid foreclosure or a private right of action to enforce compliance with nonjudicial foreclosure statutes would solve the prudential standing problem in these cases. State legislatures should reform states' nonjudicial foreclosure laws to provide uniformity within and among states.

3. Going the Distance: Rethinking the Concepts of Nonjudicial Foreclosure and Prudential Standing

The homeowner standing problem described in this note illuminates larger problems endemic in the legal system. Nonjudicial foreclosure and prudential standing are problematic in their own right, and scholars have called for their abolition.[187] When these doctrines come to a head, as in homeowner standing cases, their respective deficiencies are exacerbated.

Nonjudicial foreclosure has been widely criticized as a relic of a bygone era when homeowners had established relationships with the financial institutions that held their mortgages.[188] "Most of the nonjudicial foreclosure statutes were enacted when secondary mortgage

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plaintiff would establish Article III standing based on the personal injury stemming from losing his home, and a right of action under state law to challenge the foreclosing entity's legal authority would alleviate the prudential standing concern that the homeowner asserts another party's rights.

[186] *See Gomes*, 121 Cal Rptr. 3d at 824 ("Gomes is attempting to interject the courts into this comprehensive nonjudicial [foreclosure] scheme."). In the federal realm, some commentators posit that the "full consequence" of the Supreme Court's decision in *Alexander v. Sandoval*, 532 U.S. 275 (2001), is "no more implied rights of action." *E.g.*, Benjamin Labow, Note, *Federal Courts:* Alexander v. Sandoval*: Civil Rights Without Remedies*, 56 OKLA. L. REV. 205, 225 (2003).

[187] *See* Brown, *supra* note 170, at 98 (proclaiming that "prudential standing should be removed from standing doctrine"); Jacobson-Greany, *supra* note 7, at 151 (asserting that "nonjudicial foreclosure sales are harsh remedies because debtors lose their property in a proceeding devoid of judicial oversight").

[188] *See* RAO, *supra* note 33, § 5.1.1 (listing ways in which mortgage securitization "add[s] new complexities to the question of who has the authority to foreclose").

market transfers were uncommon, and some of them are completely inadequate in their treatment of proof of the right to enforce the note when a transferee forecloses."[189] In other words, nonjudicial foreclosure was a simpler matter before the proliferation of secondary mortgage markets.[190] Additionally, "[m]ortgage foreclosure law is in a state of pronounced disarray."[191] The disarray stems in part from the wide variation in state laws governing foreclosure.[192] Further, efficiency is the primary—if not the only—justification for nonjudicial foreclosure.[193] Simply put, power-of-sale statutes enable cheaper and faster foreclosures.[194] But the confusion that MERS-style recordkeeping and nonjudicial foreclosure create may cloud the title to real property.[195]

Accordingly, state legislatures should consider repealing statutes that permit nonjudicial foreclosure. Requiring judicial foreclosure in every case alleviates the homeowner standing problem altogether because the *foreclosing entity* will be the plaintiff, and the homeowner can challenge the assignment as a defendant in the foreclosure action. Judicial foreclosure also eliminates the burden-shifting problems by placing the burden of proof on the party with the best access to prove

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[189] Whitman, *supra* note 25, at 42.

[190] *Id.*

[191] Nelson & Whitman, *supra* note 26, at 1403.

[192] *See id.* at 1403-06 (positing that the "absence of uniformity" creates a messy "hodgepodge" of state foreclosure laws).

[193] RAO, *supra* note 33, § 5.1.4.1 ("States enacted non-judicial foreclosure statutes as a boon to creditors, giving them a speedier alternative to the more cumbersome judicial process."); *see also* Gomes v. Countrywide Home Loans, Inc., 121 Cal. Rptr. 3d 819, 824 (Cal. Ct. App. 2011) ("Significantly, [n]onjudicial foreclosure is less expensive and more quickly concluded than judicial foreclosure, since there is no oversight by a court, [n]either appraisal nor judicial determination of fair value is required, and the debtor has no possible right of redemption." (alterations in original) (internal quotation marks omitted)).

[194] RAO, *supra* note 33, § 5.1.4.1.

[195] *See id.*, § 5.1.1 (stating that "purchasers at a foreclosure sale need to know that the sale is conveying valid title to the real property" and asserting that "[s]ervicers' lack of care in conducting foreclosures can harm the interests of investors as well, by impairing title in properties subject to foreclosure sales"); Jacobson-Greany, *supra* note 7, at 151 (stating that nonjudicial foreclosures "should ensure that properly conducted sales are final between the parties and conclusive as to bona fide purchasers").

its legal authority to foreclose.[196] In short, judicial foreclosure avoids the absurd result of leaving homeowners standing on the sidelines with no means of challenging foreclosures on their homes.

V. Conclusion

In America today, nonjudicial foreclosure statues and prudential standing doctrine insulate foreclosing entities from challenges to their legal authority to foreclose, leaving homeowners standing on the sidelines as questionable institutions initiate foreclosure proceedings. Federal courts and state legislatures should to correct this injustice. When foreclosing entities challenge homeowners' standing, federal district courts should decline to dismiss their cases for lack of prudential standing and adjudicate their claims on the merits.[197] Moreover, state legislatures should enact legislation guaranteeing homeowners the legal right to freedom from invalid foreclosure.[198] Such legislation clarifies that homeowners seek to assert their own rights, rather than the rights of any third parties, and thereby ensures that homeowners have standing to challenge foreclosures.

Recognizing that homeowners have standing serves important public policies. First, placing the burden of proving noncompliance on homeowners via a nonjudicial foreclosure statute, but denying homeowners standing to challenge foreclosures, is fundamentally unfair.[199] Second, homeowners are the best plaintiffs to challenge compliance with nonjudicial foreclosure statutes because they have the greatest personal stake in the litigation.[200] Third, denying homeowners standing allows foreclosing entities to foreclose without demonstrating their lawful authority to do so.[201] In summary, federal courts and state legislatures should allow homeowners to litigate their claims on the merits rather than leaving them standing on the sidelines.

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[196] *See* Montes v. Vail Clinic, Inc., 497 F.3d 1160, 1168 (10th Cir. 2007) (placing burden of proof on party that "enjoy[s] superior access to the evidence necessary to prove" its case).
[197] *See supra* Part V.B.1.
[198] *See supra* Part V.B.2.
[199] *See supra* Part V.A.
[200] *See supra* Part V.A.
[201] *See supra* Part V.A.