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No. _____

Supreme Court, U.S.
FILED

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In The
Supreme Court of the United States

ANH NGUYET TRAN,
[Additional Petitioners continued on back of cover]
Petitioners,

v.

BANK OF NEW YORK, now known as BANK OF NEW
YORK MELLON by merger and/or acquisition,
DEUTSCHE BANK NATIONAL TRUST COMPANY, HSBC
BANK USA, N.A., U.S. BANK NATIONAL ASSOCIATION,
and WELLS FARGO BANK, NATIONAL ASSOCIATION,
Respondents,

and

PETER DELAMOS, PHOKHAM SOULAMANY, and
PHETSANOU SOULAMANY, SARAH M. YOUNG, TRI THIEN
NGUYEN,
Respondents.

On Petition for Writ of Certiorari To the United
States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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Additional Petitioners, continued from front cover:

CHRISTINA T. SOULAMANY, LAI SOMCHANMAVONG,
COLLEEN DWYER, ELAINE PHAN, HOA V. NGUYEN,
HUAN N. TRAN, HUNG V. NGUYEN, KAY APHAYVONG,
KIM-THUY NGUYEN, MAI L. PHAM, MINH A. TRINH, MY-
HANH HUYNH, NHIEU V. TRAN, PATRICIA GUNNESS,
PATRICIA S. ADKINS FKA PATRICIA S. OLSON, PETER
HA, TINA LE, SUONG NGOC NGUYEN, LONG LE, THAI
CHRISTIE, SEQUOIA HOLDINGS LLC, THIEM NGO,
THUAN T. TRAN, THU LAM TRAN, THUY-TRANG
NGUYEN, TUY T. HOANG, THOMAS T. HOANG, TUYEN T.
THAI, TUYETLAN T. TRAN, UYEN T. THAI, THONG NGO,
VAN LE, FKA VAN T. NGUYEN, and VU DINH,
Petitioners,

QUESTIONS PRESENTED

Owners of real property who had taken out mortgages brought federal claims against trustees of mortgage trusts alleging that such trustees falsely claimed ownership of, and initiated foreclosure proceedings on, Petitioners' mortgages. The trustees' alleged lack of ownership of the mortgages was based on their failure to comply with the requirements of the instruments establishing the mortgage trusts when purporting to transfer ownership of the mortgages to the trusts. Petitioners argued that, under applicable state law, such non-compliance rendered the transfers void and hence the trustees never owned the mortgages on which they later sought to foreclose. The Second Circuit held that Petitioners lacked both constitutional and prudential standing to bring their claims. The questions presented are:

1. Whether the Second Circuit's holding, that Petitioners suffered no Article III "injury" from having paid money to and been foreclosed on by entities that did not own their mortgages, improperly relied on speculation that other actual owners might have done the same?
2. Whether the Second Circuit improperly relied on its view of the merits of the embedded state-law questions to resolve the federal question whether plaintiffs had prudential standing to even raise claims arguing the transfers of their mortgages were void?

PARTIES TO THE PROCEEDINGS BELOW

Petitioners are: Anh Nguyet Tran, Christina T. Soulamany, Lai Somchanmavong, Colleen Dwyer, Elaine Phan, Hoa V. Nguyen, Huan N. Tran, Hung V. Nguyen, Kay Aphayvong, Kim-Thuy Nguyen, Mai L. Pham, Minh A. Trinh, My-Hanh Huynh, Nhieu V. Tran, Patricia Gunness, Patricia S. Adkins FKA Patricia S. Olson, Peter Ha, Tina Le, Suong Ngoc Nguyen, Long Le, Thai Christie, Sequoia Holdings LLC,¹ Thiem Ngo, Thuan T. Tran, Thu Lam Tran, Thuy-Trang Nguyen, Tuy T. Hoang, Thomas T. Hoang, Tuyen T. Thai, Tuyetlan T. Tran, Uyen T. Thai, Thong Ngo, Van Le, FKA Van T. Nguyen, and Vu Dinh.

Each was a plaintiff in the district court and an appellant in the court of appeals. Each was the mortgagor for mortgages that were purportedly transferred to mortgage-backed securities trusts of which the trustee defendants/respondents were the trustees.

The trustee Respondents are: Bank of New York, now known as Bank of New York Mellon by merger and/or acquisition; Deutsche Bank National Trust Company; HSBC Bank USA, N.A.; U.S. Bank National Association; and Wells Fargo Bank, National Association. Each was a defendant in the district court and an appellee in the court of appeals. Each was a trustee of one or more mortgage-backed securi-

¹ Petitioner Sequoia Holdings L.L.C. has no publicly traded stock and has no parents or subsidiaries. No publicly held corporation or other publicly held entity owns 10 percent or more of Petitioner's stock.

ties trust that claimed ownership the mortgages of Petitioners and the individual Respondents.

The individual Respondents are: Peter Delamos; Phokham Soulamany; Phetsanou Soulamany; Sarah M. Young, and Tri Thien Nguyen. Like Petitioners, each was a plaintiff below and an appellant in the court of appeals. Each was the mortgagor for mortgages that were purportedly transferred to mortgage-backed securities trusts of which the trustee defendants/respondents were the trustees.

In the district court and in the court of appeals, 37 separate trusts also were named as defendants and as appellees, though they are not included as appellees in the caption of the Second Circuit's orders. App. B2 n. 3; App. A1-A2, D1-D2, E2, F2, G2. The trustees of those trusts, Respondents here, argued on behalf of such trusts, noting that a trust is not a person that can sue or be sued, and all actions against a trust must be brought against the trustee in its capacity as such. App. B3 n. 4. Accordingly, it is the trustees that are Respondents in this Court, in their capacity as trustees for those 37 trusts.

The trusts named as defendants below are:

American Home Mortgage Assets (AHMA 2006-1), Securitized Asset Backed Receivables (SABR 2005-HE1), Impac Secured Assets Corp (IMSA 2006-5), Countrywide Alternative Loan Trust (CWALT 2005-17), CHL Mortgage Pass-Through Trust (CWHL 2007-HYB2), Alternative Loan Trust (CWALT 2006-OA6), RALI Series 2006-QS8 Trust (RALI 2006-QS8), CHL Mortgage Pass-Through Trust (CWHL 2005-HYB6), Citigroup Mortgage Loan Trust (CMLTI 2007-6), IXIS Real Estate Capital Trust (IXIS 2006-

HE3), Lehman Mortgage Trust (LMT 2007-6), Merrill Lynch Mortgage Investors Trust (MLMI 2006-HE6), CWALT, Inc., Alternative Loan Trust (CWALT 2005-58), Opteum Mortgage Acceptance Corp. (OMAC 2005-1), GSAA Home Equity Trust (GSAA 2006-12), CHL Mortgage Pass-Through Trust (CWHL 2007-HY6), Citigroup Mortgage Loan Trust (CMLTI 2005-11), Fremont Home Loan Trust (FHLT 2005-1), Merrill Lynch Alternative Note Asset Trust (MANA 2007-A2), First Franklin Mortgage Loan Trust (FFML 2005-FF9), First Franklin Mortgage Loan Trust (FFML 2007-FF2), First Franklin Mortgage Loan Trust (FFML 2007-FFC), CHL Mortgage Pass-Through Trust (CWL 2005-11), CHL Mortgage Pass-Through Trust (CWHL 2007-3), CWHEQ Home Equity Loan Trust (CWL 2007-S2), Bear Stearns ALT-A Trust Series (BALTA 2005-4), Structured Adj. Rate Mtg. Loan Trust (SARM 2008-8XS), Lehman XS Trust Mgt. Pass-Through Cert. (LXS 2005-2), GreenPoint Mortgage Funding Trust (GPMF 2005-AR4), Alternative Loan Trust (CWALT 2006-OA19), Banc of America Funding (BAFC 2006-6), CWALT, Inc., Alternative Loan Trust (CWALT-2005-22T1), Bear Stearns ALT-A Trust (BALTA 2006-3), CHL Mortgage Pass-Through Trust (CWHL 2006-HYB5), CSMC Mortgage-Backed Trust (CSMC 2006-5), Alternative Loan Trust (CWALT 2006-29T1), and GSAMP Trust (GSAMP 2006-HE1). (Am. Compl. ¶¶ 3-4.).

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The Opinion and Order of the District Court for the Southern District of New York is available at 2014 U.S. Dist. LEXIS 40261 and is attached at Appendix B1-B18. The Judgment of the District Court for the Southern District of New York is attached at Appendix C1-C2. The initial Summary Order of the Second Circuit affirming the district court's Judgment is unpublished but available at 592 Fed. Appx. 24 and is attached at Appendix D1-D4. The Second Circuit's initial Order denying the petition for rehearing *en banc* is attached at Appendix E1-E2. The Second Circuit's Order granting appellants' motion to amend and correct the caption is attached at Appendix F1-F2. The Second Circuit's Amended Summary Order affirming the district court's Judgment is unpublished but available at 2015 U.S. App. LEXIS 12611 and is attached at Appendix A1-A4. The Second Circuit's Corrected Order denying the petition for rehearing *en banc* is attached at Appendix G1-G3.

JURISDICTION

The court of appeals issued its initial Summary Order on January 30, 2015, and denied a timely petition for rehearing or rehearing *en banc* on April 3, 2015. App. D & E. Appellants sought an extension of time to and including August 31, 2015 to file a Petition for a Writ of Certiorari, which Justice Ginsburg granted.

On July 21, 2015, the Second Circuit granted an earlier motion to correct the parties listed on the docket, the Summary Order, and the Order denying rehearing *en banc*, all of which had mistakenly excluded 10 of the individual plaintiffs who had appeared on the complaint and on the notice of appeal but mistakenly been excluded from the court of appeals docket and the ensuing orders. App. F. Accordingly, on July 21, 2015, the Second Circuit issued an Amended Summary Order affirming the district court Judgment and a Corrected Order denying the petition for rehearing *en banc*. App. A & G.

The overlooked plaintiffs/appellants added to the docket and caption are: My-Hanh Huynh; Sarah M. Young; Suong Ngoc Nguyen; Long Le; Thiem Ngo; Thuan T. Tran; Thu Lam Tran; Tri Thien Nguyen; Thomas T. Hoang; and Vu Dinh.

Of the 10 appellants added to the corrected docket and captions, 8 join this Petition: My-Hanh Huynh; Suong Ngoc Nguyen; Long Le; Thiem Ngo; Thuan T. Tran; Thu Lam Tran; Thomas T. Hoang; and Vu Dinh.¹

¹ Because they were not part of the Second Circuit's docket and not listed on the Second Circuit's orders, these additional individuals were not listed as parties on the request for an extension of time. Conversations with the Clerk's office suggested that no correction could be made until the Second Circuit had first corrected its own docket and orders, which eventually occurred after the initial 90 days from the first denial of rehearing *en banc*. Again, per conversations with the Clerk's office, the added parties were included in the current Petition, filed under the time-frame as extended by Justice Ginsburg rather than per a re-started clock from the later date of the Amended Summary Order and Corrected Order denying rehearing *en banc*.

The two added appellants not joining this Petition – Sarah M. Young and Tri Thien Nguyen – are included as individual Respondents.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). The district court had jurisdiction under 18 U.S.C. § 1964 and 28 U.S.C. §§ 1331 and 1367.

CONSTITUTIONAL PROVISION INVOLVED

Article III, section 2, of the U.S. Constitution provides, in relevant part, that: “the judicial Power shall extend to all Cases, in Law and Equity, arising under * * * the laws of the United States * * *.”

STATEMENT OF THE CASE

1. This case involves a RICO suit by Petitioner property owners against Respondent banks in their capacity as trustees of residential mortgage-backed securities trusts. App. B3. Such trusts are formed to

Insofar as this Court might determine that the extension of time granted by Justice Ginsburg does not apply to the additional Petitioners because they were not included in the request for an extension (which was filed and granted well before the Second Circuit corrected its docket), S. Ct. R. 13.5, then as to such Petitioners, the Petition is timely because it is filed within 90 days of the Amended Summary Order and Corrected Order denying rehearing *en banc*, which are the only orders applying to those previously excluded parties.

In the alternative, if this Court concludes that the time for such added Petitioners nonetheless runs from the initial denial of rehearing *en banc* and that they are not covered by the extension granted by Justice Ginsburg, then such persons would be deemed Respondents and their joining in this Petition should be deemed either (1) a timely cross-petition pursuant, S. Ct. R. 12.5, or (2) a timely response by such putative individual Respondents in support of the Petition, S. Ct. R. 12.6.

pool and securitize a group of mortgages and thereafter to issue mortgage-backed securities to investors. App. B4. The trustees in this case purport to own the pooled mortgages on Petitioners' properties, and have collected mortgage payments and initiated foreclosure proceedings based on their claimed ownership of such mortgages. App. B4.

The amended complaint alleges that such trusts do not in fact own Petitioners' mortgages, have falsely represented otherwise, have thereby fraudulently collected mortgage payments from Petitioners and foreclosed on Petitioners' properties, and through such pattern of activities have violated and conspired to violate the Federal Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962. App. B6-B7. The amended complaint sought damages and injunctive relief. App. B7.

A central issue in the case is whether Respondents in fact owned Petitioners' mortgages. That question turned primarily on whether the mortgages were validly transferred from the originating banks to the mortgage trusts. Petitioners argued that the purported transfers failed to comply with the terms of the Pooling Service Agreements ("PSAs") creating the trusts because, *inter alia*, the trusts had already closed at the time of the attempted transfers. App. B4-B6. According to Petitioners, such failure rendered the transfers void under New York law and hence the trusts did not own their mortgages. App. B12-B13; *see, e.g.*, NEW YORK EPTL § 7-2.4 ("If the trust is expressed in the instrument creating the estate of the trustee, every sale, conveyance or other act of the trustee in contravention of the trust, except as

authorized by this article and by other provision of law, is void.").

2. The district court dismissed the amended complaint with prejudice, holding that Petitioners lacked standing to challenge the validity of the transfer of the mortgages to the trusts, and hence the validity of the trustees' claimed ownership of those mortgages. App. B9. The court agreed with Respondents that Petitioners were neither parties to, nor third-party beneficiaries of, the PSAs with which they claimed the trustees failed to comply and thus had no right to assert breaches of those trust-creating instruments. *Id.* In reaching that conclusion the court addressed a hotly disputed issue going to the merits of Petitioners' case: whether the trustees' failure to comply with the PSAs rendered the transfers at issue fully *void* under New York law, or instead merely *voidable* at the election of a party to the PSAs. App. B12-B16.

This issue was significant because if non-compliance merely rendered the transfers voidable at the election of the parties to the PSAs, and such parties had not so elected, Petitioners (if not themselves parties to or third-party beneficiaries of the PSAs) might arguably be characterized as asserting the rights of third parties rather than their own rights. However, if New York law declared such transfers *void* regardless of any election by the other parties to the PSAs, then Petitioners would not be asserting third-party rights, but instead relying upon New York law's determination of the validity *vel non* of such defective transactions, as they are fully entitled to do.

The district court, however, ruled that transactions allegedly failing to comply with the PSAs were merely voidable, notwithstanding the terms of a New York statute declaring such transactions void. B12-B15 (discussing EPTL § 7-2.4's provision declaring that certain non-compliant trust transactions are "void," but reasoning that non-compliant actions could be ratified by the parties to the PSAs and hence were merely voidable, not void).²

Finding that the transfers of Petitioners' mortgages were voidable rather than void, and hence that whether the trustees in fact owned the mortgages turned on an assertion of the rights of the beneficiaries of the trusts, the court concluded that Petitioners "have no standing to bring any claim based on alleged breaches of the PSAs" and dismissed the amended complaint with prejudice. App. B17.

Petitioners appealed.

3. On January 30, 2015, the Second Circuit affirmed by a brief and unpublished summary order. App. D1-D4. The court of appeals began by holding that it was reviewing the decision below *de novo* and could affirm on any basis supported by the record. App. D3, A3.³

² Curiously, the notion that an action could be ratified implies that it is *not* valid unless it is in fact ratified by the relevant parties, while an action that is voidable *is* valid unless rejected by the relevant parties. Such illogic in treating the two as the same, while unfortunate, properly goes to the merits of the underlying claims, not the standing questions presented here.

³ Because the final decision in this case is technically the substantively identical Amended Summary Order rather than the initial Summary Order, Petitioners will provide parallel cites to

The court then held that the claims in this case were indistinguishable from the claims in *Rajamin v. Deutsche Bank Nat'l Trust Co.*, 757 F.3d 79, 81 (2d Cir. 2014), which held that similarly situated plaintiffs disputing whether mortgage trusts validly owned their mortgages lacked constitutional and prudential standing to bring claims where the trusts' alleged lack of ownership was based on defective compliance with the PSAs setting up the trusts. App. D4, A3-A4. The court declined plaintiffs' invitation to overrule, overturn, or modify its *Rajamin* decision. *Id.*

Petitioners sought rehearing *en banc*.

4. On April 3, 2015, the Second Circuit denied Petitioners' petition for rehearing *en banc*. App. E1-E2.

5. On July 21, 2015, the Second Circuit granted a motion to correct the docket and the caption on the orders disposing of the case. App. F1-F2. Ten appellants had erroneously been left off the docket and the captions. The Court's order corrected that oversight.

6. Also on July 21, 2015, the Second Circuit issued its Amended Summary Order affirming the district court judgment and its Corrected Order denying rehearing *en banc*. App. A1-A4, G1-G3. The content, other than the date, the caption, and the titles of those new orders was identical to the court's earlier orders.

7. Petitioners now petition this Court for a writ of certiorari.

both given that the determination was first made on January 30, 2015, even though reissued on July 21, 2015.

REASONS FOR GRANTING THE WRIT

This Court should grant the petition for a writ of certiorari because the decision below conflicts with a decision of the First Circuit in its method of determining whether there is constitutional and prudential standing for plaintiffs bringing claims against mortgage trusts that turn on the validity of the transfer of mortgages to those trusts.

I. The Circuits Are Split Regarding the Method for Determining the Standing of Property Owners to Challenge Foreclosures Based on Defective Assignments of Mortgages.

The decision below, based entirely on the Second Circuit's decision in *Rajamin*, applies a broad rule denying constitutional and prudential standing to property owners who, while making payments to and facing foreclosure from large mortgage trusts claiming to own their mortgages, are precluded from challenging whether such trusts in fact validly own their mortgages. Although the ultimate resolution of the merits of such ownership disputes turns on state law, whether plaintiffs have standing to litigate such questions in federal court is squarely a question of federal law.

A. Article III Standing.

On the question of Article III standing, the Second Circuit in *Rajamin* analyzed the basic standing question whether plaintiffs suffered an “injury in fact * * * which is (a) concrete and particularized, * * * and (b) actual or imminent, not conjectural or hypothetical.” 757 F.3d at 85 (quoting *Lujan v. Defenders*

of Wildlife, 504 U.S. 555, 560 (1992)). The court reasoned that the injuries alleged by plaintiff property-owners were merely “hypothetical” because, although they made payments to and faced foreclosure from trusts that allegedly lacked rights to their mortgages, plaintiffs did not dispute the underlying debt in general, did not claim they paid more than they owed or were subject to competing claims for payment from the original owner of the loan, and did not deny that they were in default of such loans or allege they were subject to competing foreclosure claims. *Id.* at 85-86. Absent allegations of such imminent competing obligations, the court concluded that plaintiffs did not allege “sufficient injury to show constitutional standing.” *Id.*

That approach misconceives the notion of a concrete injury for constitutional purposes. Paying money or losing one's property to an entity lacking the rights to such property is a concrete injury regardless whether some third party who *did* have the rights to seek payment or foreclosure might have exercised those rights in a similar manner.⁴

Addressing constitutional standing to raise a similar claim based on a defective assignment of a mortgage, the First Circuit in *Culhane v. Aurora Loan*

⁴ Ironically, under the Second Circuit's reasoning, that the trustees, if not the owners of the mortgages, are purportedly only exercising rights that third parties (the original owners) could have exercised and hence causing no injury seems in painful tension with the notion that the trusts are somehow harmed by Petitioners' purported exercise of the rights of third parties (the beneficiaries of the trusts who are parties to the PSAs) against the trustees for failure to comply with the terms of the PSAs.

Services of Nebraska, 708 F.3d 282 (1st Cir. 2013), found more than sufficient injury for constitutional standing. In that case, Judge Selya, joined by Retired Justice Souter (sitting by designation) and Judge Lynch, held that a plaintiff facing foreclosure of her mortgage has constitutional standing to challenge the validity of the assignment of her mortgage and hence whether the foreclosing party properly owns her mortgage, even where she is neither a party-to nor a third-party beneficiary of the transaction by which her mortgage was assigned. 708 F.3d at 289-90.

Noting that the “essence of standing is that a plaintiff must have a personal stake in the outcome of the litigation,” the court held that the “foreclosure of the plaintiff’s home is unquestionably a concrete and particularized injury to her.” *Id.* at 289. The *Culhane* court further found that the “identified harm — the foreclosure — can be traced directly to Aurora’s exercise of the authority purportedly delegated by the assignment.” *Id.* at 290. That the original owner of the mortgage might have had the right to foreclose if the assignment to the defendant was invalid was of no moment.

The decision in *Culhane* regarding the existence of concrete injury in cases alleging improper foreclosure by non-owners of mortgages squarely conflicts with the decisions in *Rajamin* and in this case that such plaintiffs face no injury because somebody else might have sought payment or foreclosed instead. Furthermore, the First Circuit has it right — paying money and facing foreclosure are immediate and concrete injuries. It is only the Second Circuit’s suggestion

that such injuries would have occurred anyway, and hence involve no net harm, that is speculative.

B. Prudential Standing.

On the question of prudential standing, the Second Circuit in *Rajamin* cited this Court’s decision in *Warth v. Seldin*, 422 U.S. 490, 498 (1975), for the proposition that plaintiffs may only assert their own rights, not the rights of third parties, but failed to look to what rights were *asserted*, instead looking to the merits of such rights in deciding whether there was standing. 757 F.3d at 86-90. That, of course, gets things backwards.

The court, for example, recognized that plaintiffs had *asserted* they had the right to claim voidness due to non-compliance with the PSA provisions governing transfer of their mortgages into the trusts. But the court simply rejected the merits of that assertion by concluding that only parties or third-party beneficiaries of the PSA could void the transactions. *Id.* at 86-87. Claiming that a party is *wrong* about the rights they are asserting does not negate the fact that they are asserting their own rights and thus have prudential standing to do so. It merely means that they might (or might not) lose their case on the merits, once those merits are given full consideration.

The court in *Rajamin* similarly addressed plaintiffs’ claim that by not complying with the terms of the PSAs, the assignments of their mortgages were void under the express provisions of New York trust law. *Id.* 87 (noting plaintiffs reliance on EPTL § 7-2.4, the same provision raised in the present case). After a brief bout of circular reasoning over

whether a claim that a transaction was void *in toto* was the same as invoking the rights of the parties to that transaction,⁵ the court turned to the merits of plaintiffs' voidness argument and concluded that the under the statute unauthorized actions "are not void but voidable." *Id.* at 88-90. Based on that view of the merits of plaintiffs' claim, the court concluded that plaintiffs lacked standing to assert claims based on non-compliance with the PSAs.

The approach in *Rajamin* once again conflicts with the First Circuit's approach in *Culhane*. There, the court also considered whether the property-owner challenging a foreclosure based on an alleged defect in the assignment of her mortgage had prudential standing. Recognizing cases in other courts holding that mortgagers lack prudential standing to challenge mortgage assignments because they are neither parties nor third-party beneficiaries to such assignments, the First Circuit concluded that such cases "paint with too broad a brush." 708 F.3d at 290. Although looking at Massachusetts rather than New York law, the court held that a plaintiff would have

⁵ The court's suggestion that a claim of voidness under § 7-2.4 actually involved only the rights of the parties to the PSA, 757 F.3d at 87-88, assumed the court's subsequent conclusion that the provision merely makes a transaction voidable rather than void. If plaintiffs' assertion was correct that the statute renders non-compliant transactions void, then it has nothing to do with the rights of the parties to the PSA insofar as *none* of those parties could enforce (or excuse) a transaction that is void as a matter of law. If the law renders transactions fully void, regardless whether beneficiaries elect to claim a breach of the PSA, then the rights it creates belong to *anyone* seeking to challenge that transaction, not merely to the parties to the PSA.

standing to challenge a mortgage assignment as "invalid, ineffective, or void," and that "[i]f successful, a challenge of this sort would be sufficient to refute an assignee's status qua mortgagee." *Id.* at 291. By contrast, a mortgager would not have standing to assert that an assignment was merely voidable at the election of a party to that assignment. *Id.* What is notable for present purposes is that the First Circuit finds *standing* to raise "a challenge of this sort," regardless whether such a challenge is ultimately "successful." If the challenge is successful the plaintiff would win; if unsuccessful the plaintiff would lose. Those are merits questions, but the plaintiff has prudential standing to *raise* such a challenge in either event.

It is on this critical point that the First and Second Circuits diverge. The Second Circuit denies standing to even raise a voidness challenge the merits of which it questions, whereas the First Circuit allows such a challenge and then gives due consideration to that challenge on the merits. Once again, the First Circuit has it right.

Turning back to the present case, Petitioners argued that the transfer of their mortgages to the trusts was fully void, not merely voidable. That argument, whether ultimately determined after full consideration to be correct or incorrect under New York law, is an assertion not of the contractual rights of the parties to the PSAs, but of a statutory declaration of the invalidity of certain transactions, which may be relied upon by anyone. It is only if the transfers are viewed as valid but voidable solely at the option of the trusts' beneficiaries that Petitioners arguably would be asserting the rights of third parties

who had not themselves elected to void the transactions.

Given that Petitioners *argued* that the contracts were void, they were thus asserting their own rights to be free from the demands of non-owners, rather than the rights of beneficiaries to the trusts to potentially declare the transfers void.

By deciding the question of prudential standing on a superficial consideration of the merits of the claim — *i.e.*, whether the transfers were indeed void or merely voidable — the Second Circuit approach gave short shrift to state-law issues better addressed fully on the merits.⁶

Because the holdings in this case, and in *Rajamin* on which they relied, conflict with the holdings in *Culhane* on both Article III and prudential standing, this Court should grant certiorari.

II. The Second Circuit's Conflation of Standing with the Merits Is Unsound Judicial Procedure that Should Be Corrected by this Court.

The issues in this case are worthy of this Court's attention because allowing a preliminary merits determination to control the question of constitutional standing is unsound and leads to untenable results. Here, the Second Circuit effectively reached the mer-

⁶ In a sense, the Second Circuit's approach is similar to disfavored unpublished dispositions, which encourage shallow analysis given their lack of precedential effect. In a comparable manner, resolving a state-law merits question as part of the federal prudential standing analysis tends to mask the underlying substantive issues and encourage less attention to and care with the state-law issues.

its of an issue while simultaneously claiming that the parties before it were not suitable to present those issues to it in the first place. The contradiction in such an approach is palpable and calls into question the integrity of the decision-making process.

The purpose of the prudential standing doctrine is act as “a shield to protect the court from any role in the adjudication of disputes that do not measure up to a minimum set of adversarial requirements” by ensuring that the parties are sufficiently motivated to contest the issues and give the pointed presentations needed. *Culhane*, 708 F.3d at 291. “There is no principled basis for employing standing doctrine as a sword to deprive mortgagors of legal protection conferred upon them under state law.” *Id.* If the parties assert rights based on state statute rather than the elections of third parties, they should be allowed to litigate such claimed rights. If the parties are thought to be unsuitable to litigate whether transfers are void or voidable, and hence whether they can form the basis for ownership, then the court should not be resolving that very same issue in a case involving such parties.

The Second Circuit analysis thus swallows its own tail and makes no sense.

The Second Circuit approach also would lead to bizarre results in cases, such as *Culhane*, that are removed to federal court. *See* 708 F.3d at 288 (case removed from state court). State courts are not constrained by federal standing doctrine and thus could easily address the merits of a plaintiff's state-law challenge to the validity of an assignment or transfer of a mortgage. But once removed to federal court, the

Second Circuit would dismiss the case on *federal* grounds that nonetheless address the merits of state-law issues for which the plaintiffs are then deemed inadequate proponents. Rather than simply remanding the case to state court because the federal court is unwilling to let such plaintiffs in the door, the Second Circuit approach actually dismisses the case on the merits. That result thus prevents the state courts, which arguably have no such federal standing concerns and are the proper authorities on the merits of state law, from ever hearing the plaintiff's claims. Such a bait and switch is unreasonable and is disrespectful of state courts by denying them the ability to rule on claims that federal courts then refuse to rule on due to a supposed lack of "prudential" standing. There is nothing "prudent" about such an approach.

Finally, even if this Court thought that standing might occasionally turn on the merits of a state law claim, rather than on the nature of the right *asserted* – meritoriously or not – under state law, the more sensible answer in many such cases would be to certify the question to the highest state court, which could decide the merits question without the constraint of federal standing doctrine. The New York Court of Appeals, for example, has discretionary authority to accept certified questions from this Court or from a federal court of appeals where it appears that "determinative questions of New York law are involved in a case pending before that court for which no controlling precedent of the Court of Appeals exists." 22 NYCRR § 500.27. In this case, such certification would be the more sensible answer if a court felt un-

able to determine standing without reaching the merits of the embedded state-law questions.

CONCLUSION

For the reasons above, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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