IN THE DISTRICT COURT OF APPEAL
STATE OF FLORIDA, SECOND DISTRICT

GEORGE E. MERRIGAN,
Petitioner

v.

Case No.: 2D11-
L.T. Case No. 09-CA-055758

BANK OF NEW YORK MELLON,
FKA BANK OF NEW YORK,
Respondent.
_____/

PETITION FOR WRIT OF CERTIORARI OR WRIT OF PROHIBITION

Petitioner seeks an order from this Court ensuring that she receives a meaningful opportunity to be heard in defending her home against foreclosure. Petitioner Georgi Merrigan[1] is currently the defendant in a foreclosure proceeding in the Twentieth Judicial Circuit in Lee County. Her case has been assigned to a special "mass foreclosure docket" designed to speed through cases as quickly as possible. This petition seeks an extraordinary writ to prevent the violation of Petitioner's due process rights.

Lee County's mass foreclosure docket is not simply a vehicle for assigning foreclosure cases to a specially designated group of judges. Although it has not been authorized by any statute, local rule, or administrative order, the mass

[1] Petitioner's name is Georgi E. Merrigan, but the Circuit Court case caption erroneously refers to her as "George E. Merrigan."

foreclosure docket operates according to a set of alternative rules and procedures implemented by the Twentieth Circuit as de facto policy. The clearly established practice of the mass foreclosure docket is to force cases into a sui generis system of recurring hearings that rushes cases toward summary judgment or trial without giving homeowners a meaningful opportunity to develop their cases or present defenses. Widespread ex parte communications between the court and plaintiffs, as well as an express policy of categorically treating foreclosure cases differently than "individual cases," further deny homeowners any meaningful opportunity to defend their homes against foreclosure.

The procedural deficiencies on the mass foreclosure docket are systemic; they go beyond the occasional error subject to ordinary appellate review. In combination, they create a forum that is inconsistent with the requirements of due process under the Florida and U.S. Constitutions. Petitioner does not ask this Court to address the merits of her foreclosure case. Rather, she seeks only the guarantee that her case will be adjudicated in a forum that affords her due process. Without relief from this Court, Ms. Merrigan will be subject to a novel and unauthorized set of judicial procedures that will systematically undercut her ability to seek discovery, refute facts proffered against her, and press her legal arguments. Accordingly, she respectfully requests a writ from this Court removing her case from the mass foreclosure docket.

I. BASIS FOR INVOKING JURISDICTION

Certiorari Jurisdiction

This Court has jurisdiction to issue a writ of certiorari under article V, section 4(b) of the Florida Constitution and Rule 9.030(b)(2)(A) of the Florida Rules of Appellate Procedure. The order to be reviewed in this case was rendered March 9, 2011, *see* Order Setting Case for Docket Sounding, *Bank of N.Y. Mellon v. Merrigan*, No. 09-CA-55758 (Fla. 20th Cir. Ct. March 9, 2011) ("3/9/11 Merrigan Docket Sounding Order") (Appendix ("App.") 1), and this petition is therefore timely under Rule 9.100(c)(1).

Certiorari jurisdiction lies when an "interlocutory order creates material harm irreparable by postjudgment appeal." *Jimenez v. Rateni*, 967 So. 2d 1075, 1076-77 (Fla. 2d DCA 2007) (quoting *Parkway Bank v. Fort Myers Armature Works, Inc.*, 658 So. 2d 646, 649 (Fla. 2d DCA 1995)) (Canady, J.). A petitioner must also show that the challenged order departs "from the essential requirements of the law." *Belair v. Drew*, 770 So.2d 1164, 1166 (Fla. 2000).

Material harm irreparable on postjudgment appeal exists when, as here, the challenged order renders the very maintenance of pending proceedings an encroachment upon the constitutional rights of the petitioner. *Id.* (finding certiorari appropriate when incursion on petitioner's parental privacy rights would result from continuation of proceedings in the trial court). Further, such

irreparable harm exists when the order below affects the petitioner's presentation of her case in a manner and to a degree that will not be readily demonstrable to an appellate court after judgment. *See, e.g., Dimeglio v. Briggs-Mugrauer*, 708 So. 2d 637, 640 (Fla. 2d DCA 1998) (granting certiorari to quash order preventing deposition and finding harm "not remediable on appeal because there is no way to determine what the testimony . . . would have been or what effect it would have had on the case."); *Bon Secours-Maria Manor Nursing Care Center, Inc. v. Seaman*, 959 So. 2d 774, 775 (Fla. 2d DCA 2007) (granting certiorari to quash order disqualifying counsel). The manifold procedural violations that occur on the mass foreclosure docket affect every aspect of a homeowner's defense. Their impact, therefore, will not be readily apparent after judgment.

Adjudicating Petitioner's foreclosure case in a procedurally defective forum puts her at serious risk of suffering harm irreparable on post-judgment appeal for a second reason. It is within the trial court's discretion whether to stay a judicial sale pending appeal. Fla. R. App. P. 9.310(a). Without a stay, even success on appeal may not prevent the permanent loss of Petitioner's home.[2] Petitioner thus faces the possibility of being evicted from her home during the pendency of any post-

[2] Homeownership cannot be restored if the property has been sold to a bona fide purchaser who was a stranger to the underlying foreclosure litigation. *Sundie v. Haren*, 253 So.2d 857, 859 (Fla. 1971).

judgment appeal. Thus, even if she regained her home on post-judgment appeal, the associated disruptions and emotional distress could not be rectified.

Further, certiorari is appropriate where, as here, an order conflicts with "a clearly established principle of law." *Allstate Ins. Co. v. Kaklamanos*, 843 So. 2d 885, 889 (Fla. 2003). Thus, certiorari provides a mechanism for reviewing an administrative practice that is inconsistent with constitutional requirements, including the practice of setting cases on a mass foreclosure docket that violates due process. In *Jimenez v. Rateni*, 967 So. 2d 1075, this Court granted a petition for certiorari based on a conflict between the administrative practice embodied in the challenged order and a local rule of court. Similarly, in *Hatcher v. Davis*, 798 So. 2d 765 (Fla. 2d DCA 2001), the court found certiorari appropriate where an administrative order violated the Florida Family Law Rules of Procedure. If certiorari is available to cure an order that is inconsistent with a procedural rule, it follows that certiorari is available when an order violates the Florida and U.S. Constitutions. *See id.* at 766 (citing violation of petitioner's right of access to courts under the Florida Constitution in quashing challenged order). Thus, the order challenged here, which embodies Lee County's practice of setting foreclosure cases on a separate docket inadequately protective of due process rights, is properly reviewed under this Court's certiorari jurisdiction.

Prohibition Jurisdiction

This Court has jurisdiction in the alternative to issue a writ of prohibition under article V, section 4(b)(3) of the Florida Constitution and Rule 9.030(b)(3) of the Florida Rules of Appellate Procedure. Prohibition is appropriate to prevent an "inferior court or tribunal from exceeding jurisdiction or usurping jurisdiction over matters not within its jurisdiction." *English v. McCrary*, 348 So. 2d 293, 296 (Fla. 1977). Only the Supreme Court of Florida has the authority to adopt rules of practice and procedure. Art. V, § 2(a), Fla. Const.; *Citigroup Inc. v. Holtsberg*, 915 So. 2d 1265 (Fla. 4th DCA 2005). Thus, the chief judge of the circuit court exceeded his jurisdiction by creating a special foreclosure division that violates procedural rules and deprives litigants of constitutional rights.

Further, prohibition is used "to prevent an impending injury where there is no other appropriate and adequate legal remedy." *Mandico v. Taos Const., Inc.*, 605 So. 2d 850, 854 (Fla. 1992). The relief sought here is equitable and prospective: petitioner seeks to avoid the impending harm of having her foreclosure case adjudicated in a forum that systemically violates procedural due process. Prohibition is, therefore, an appropriate mechanism for review.

All Writs Jurisdiction

Article V, section 4(b)(3) of the Florida Constitution gives this court jurisdiction to issue "all writs necessary to the complete exercise of its

jurisdiction." *See also* Fla. R. App. P. 9.030(b)(3). This provision "operates as an aid to the Court in exercising its 'ultimate jurisdiction,' conferred elsewhere in the constitution." *Williams v. State*, 913 So. 2d 541, 543 (Fla. 2005). In this action, then, in aid of its certiorari and prohibition jurisdiction, this court may issue any additional writs necessary.

* * *

Finally, courts should grant the extraordinary relief that is appropriate to a particular petition, regardless of which writ is sought. Fla. R. App. P. 9.040(c); *Conner v. Mid-Florida Growers, Inc.*, 541 So. 2d 1252, 1254 (Fla. 2d DCA 1989). Prohibition and certiorari may both be appropriate in a single original proceeding. *Statewide Guardian Ad Litem Office v. Office of State Att'y Twentieth Judicial Circuit*, No. 2D10-3642, 2011 WL 923945, at *2 (Fla. 2d DCA Mar. 18, 2011).

II. NATURE OF RELIEF SOUGHT

Petitioner respectfully requests that this Court grant certiorari and quash the order below setting Petitioner's case for docket sounding on the mass foreclosure docket, which compels her to present her case in a forum that violates her due process rights. Petitioner additionally requests that this Court issue a writ of prohibition, precluding the Chief Judge of the Twentieth Judicial Circuit from setting Petitioner's case on the mass foreclosure docket and directing that her case

be re-assigned to the general civil division and adjudicated according to the Florida Rules of Civil Procedure and Florida law.

Florida Rule of Appellate Procedure 9.100(g) requires that if a petition for an extraordinary writ "seeks an order directed to a lower tribunal, the petition shall be accompanied by an appendix." Petitioner has submitted an appendix with factual material necessary to resolve the issues raised herein. The Supreme Court of Florida has recognized "appellate courts' inherent authority to appoint a special magistrate to serve as commissioner for the appellate court to make findings of fact and oversee discovery" in actions for extraordinary writs. *In re Amendments to the Rules of Jud. Admin.*, 915 So.2d 157, 159 (Fla. 2005) (citing *State ex rel. Davis v. City of Avon Park*, 158 So. 159 (Fla. 1934) & *Wessells v. State*, 737 So.2d 1103 (Fla. 1st DCA 1998)). Petitioner respectfully submits that such a procedure may be warranted here, if the Court determines that additional factual development is necessary.

IV. STATEMENT OF THE FACTS

A. Petitioner' Foreclosure Case

Petitioner Georgi Merrigan is currently the defendant in a foreclosure case pending in the Twentieth Judicial Circuit in Lee County. Ms. Merrigan, who holds four jobs and strongly desires to keep her home, intends to vigorously contest her foreclosure case. She plans to pursue numerous discovery requests, challenge the

sufficiency of the complaint on multiple grounds, and contest Respondent's standing to institute a foreclosure action against her. She brings this petition to ensure that she can present those defenses in a constitutionally adequate forum.

The foreclosure concerns a loan she received from NBank, N.A. for $334,948.91 for her home in Cape Coral. Affidavit of Georgi Merrigan ¶¶ 1-3 (App. 82). Ms. Merrigan had also made a $110,000 down payment, which came primarily from an inheritance she received from her grandmother. *Id.* The house it purchased thus holds tremendous emotional significance for Ms. Merrigan. *Id.*

Beginning in 2005, Ms. Merrigan's husband had a series of grave medical emergencies. After suffering and recovering from a heart attack, he was in a catastrophic car accident. *Id.* ¶ 3 (App. 82). The accident caused massive injuries: his face was crushed, his back and legs were broken in multiple places, and he suffered injuries to his heart, lungs, and kidney. *Id.* The accident resulted in several months of hospitalization followed by extensive rehabilitation, during which time his heart condition worsened. *Id.* In February 2007, the couple traveled to the Mayo Clinic near Minneapolis, Minnesota so that Ms. Merrigan's husband could receive experimental heart surgery. *Id.*

While her husband's medical situation was deteriorating, Ms. Merrigan took time away from her job as a ground and flight paramedic pursuant to the Family and Medical Leave Act (FMLA). *Id.* ¶ 4 (App. 82). When her allotted time under

the FMLA expired, Ms. Merrigan resigned from her job and devoted herself full time to caring for her husband. *Id.* Although she was unemployed for almost two years, Ms. Merrigan now holds four jobs and is taking courses toward her nurse's degree. *Id.*

By October 2008, the financial strains brought on by her husband's health problems and her period of unemployment made it difficult for Ms. Merrigan to continue paying her mortgage. *Id.* ¶ 7 (App. 83). She attempted to negotiate a loan modification with Countrywide Home Loans, the servicer on her mortgage. *Id.* A Countrywide loan modification officer informed her that the company would only negotiate if she was 90 days delinquent on her mortgage payments. *Id.* Relying on that information, she intentionally fell 90 days behind on her payments. *Id.* Countrywide never offered a modification that Ms. Merrigan could realistically have afforded, and as a result, she went into default on her loan. *Id.*

On March 25, 2009, Bank of New York Mellon, N.A., which alleges that it is the assignee of Ms. Merrigan's mortgage, filed a foreclosure action against Ms. Merrigan in the Twentieth Judicial Circuit in Lee County. Complaint, *Bank of N.Y. Mellon v. Merrigan*, No. 09-CA-055758 (Fla. 20th Cir. Ct. Mar. 25, 2009) (App. 22). Ms. Merrigan has filed a motion to dismiss, which remains pending. *See* Docket Sheet, *Bank of N.Y. Mellon v. Merrigan*, No. 09-CA-055758 (Fla. 20th Cir. Ct.) (App. 2). Plaintiff filed an Ex Parte Motion to Abate Proceedings on June 9,

2010, which was granted the next day. *Id.* (App. 13). On January 11, 2011, though the case was ostensibly still in abatement, the court *sua sponte* set Ms. Merrigan's case for a docket sounding, which took place on March 9, 2011. *Id.* (App. 7). At that hearing, the court issued an order setting the case for a second docket sounding, to take place on April 27, 2011. *See* 3/9/11 Merrigan Docket Sounding Order (App 1).

B. The Establishment of Lee County's Mass Foreclosure Docket

In December 2008, Lee County began hearing a high volume of foreclosure cases on a specialized docket. Dick Hogan, *In Court: Boom Drops on Homeowners*, News-Press, Dec. 5, 2008, at A1 (noting 800 properties set for auction after first day of docket) (App. 264); Ryan Lengerich, *Courts Tackle Housing Crisis*, News-Press, Dec. 1, 2008, at A1 (noting 900 cases set on first day of foreclosure docket) (App. 267). No administrative order was issued setting forth the procedures governing this new system, which the court dubbed the "mass foreclosure docket." *See* Lee Cnty. Clerk of Courts, *Mortgage Foreclosure Analysis for Backlog and Dispositions* (undated) (estimating future "backlog" of foreclosure cases with and without "mass foreclosure docket") (App. 105); Lee County Foreclosure Information Page, Twentieth Judicial Circuit Website (instructing litigants seeking hearing time to email Massforeclosure@leeclerk.org) (App 269). Nonetheless, an alternate set of procedures, which deviate substantially

from the Florida Rules of Civil Procedure and Florida law, were put into place.[3] *See infra* Part IV.C.

In July 2010, Lee County received funding earmarked for clearing the foreclosure "backlog," with which it hired senior judges and magistrates focused on foreclosure cases. Fla. Office of the State Ct. Admin., *State Courts System FY 2010-2011 Foreclosure and Economic Recovery Funding Plan* (June 2010) (App. 280). Simultaneously, Lee County began *sua sponte* setting cases on the mass foreclosure docket for "docket sounding," Aff. of Michael Olenick ¶ 15 (App. 88), a novel administrative mechanism that ensures foreclosure cases are adjudicated under rules that differ substantially from those that govern the rest of Lee County's civil cases. *See infra* Part IV.C.1.

From the outset, these procedures were designed to push foreclosure cases through the litigation process as fast as possible, *see id.*, even though Lee County judges were aware of the extraordinary level of fraud and disarray in foreclosure-related paperwork, *see* Aff. of Lane Houk ¶¶ 7-11 (App. 71-73); *infra* Part IV.D.

[3] The practices described in this petition are so pervasive as to constitute official policy. *Cf. Pembaur v. City of Cincinnati*, 475 U.S. 469, 481 (1986) ("If the decision to adopt [a] particular course of action is properly made by that government's authorized decisionmakers, it surely represents an act of official government 'policy' as that term is commonly understood.") (plurality opinion).

C. Pervasive Procedural Deficiencies in the Mass Foreclosure Docket

Lee County's mass foreclosure docket operates as an auxiliary court system within the Twentieth Circuit. As there are no statutes, local rules, or administrative orders purporting to establish distinctive procedures, the mass foreclosure docket is ostensibly subject to the same procedural rules that govern civil cases generally. In fact, however, the ordinary procedural rules are effectively suspended in the mass foreclosure docket, and these unauthorized departures almost uniformly disadvantage homeowners. For these reasons, proceeding within the mass foreclosure docket would render futile Ms. Merrigan's efforts to defend her home.

From its inception, the goal of the mass foreclosure docket has been to dispose of as many cases as possible as quickly as possible. Indeed, the Twentieth Circuit observes a specific—and very high—numerical monthly goal for clearing foreclosure cases: the number of cases filed that month plus an additional 1,040 cases. Email from Nancy Aloia, Family/Civil Court Director, to Judge Keith Cary, et al. (Oct. 5, 2010) (App. 108); *see also* Lee Cnty. Clerk of Courts, *Mortgage Foreclosure Analysis for Backlog and Dispositions* (undated) (estimating it will be possible to dispose of 523 foreclosure cases per month without mass foreclosure docket and 2100 per month with mass foreclosure docket) (App. 105); Dick Hogan, *In Court: Boom Drops on Homeowners*, News-Press, Dec. 5, 2008, at A1

(reporting on first day of Lee County's month-long push to clear the backlog and stating Carlin's goal of clearing 4,000 cases in that month alone) (App. 264).

As a result, an extraordinary number of cases are heard at any given session of the mass foreclosure calendar. *See* Email from Judge Carlin to Nancy Aloia, Family/Civil Court Director (Aug. 20, 2010) (approving creation of calendar with 175 hearing slots per day per senior judge) (App. 113-14); Email from Judge Carlin to Linda Johnston, Senior Court Clerk (Feb. 17, 2009) (proposing 200 cases per senior judge session) (App. 120); Email from Judge Carlin to Judge McHugh (Apr. 23, 2009) (App. 123) (discussing scheduling 400 cases per senior judge day). At these mass foreclosure docket sessions, judges instruct litigants that case-clearance is the priority for the mass foreclosure docket. Aff. of Charles W. Cadrecha ¶¶ 3-5 (App. 64-65); Aff. of Shannon Anderson ¶¶ 6-7 (App. 51-52).

As described in detail below, this focus on clearing the backlog comes at the expense of compliance with procedural rules. Yet the de facto suspension of the ordinary procedural rules conflicts with clear instruction from the Chief Justice of the Supreme Court of Florida. On November 17, 2010, Chief Justice Charles T. Canady issued a memorandum to the Chief Judges of Florida's twenty judicial circuits regarding mortgage foreclosure proceedings. *See* Memorandum from Chief Justice Canady to Chief Judges of the Circuit Courts (Nov. 17, 2010) (App. 271). In that memorandum, Chief Justice Canady wrote that the goal of reducing

the backlog of foreclosure cases should not "interfere with a judge's ability to adjudicate each case fairly on its merits," and he instructed that "[e]ach case must be adjudicated in accordance with the law." *Id.* at 2 (App. 272). The Chair of the Trial Court Budget Commission had also issued a separate memorandum, cited approvingly by the Chief Justice, in which he made clear that the Commission's articulated goal of reducing the backlog of foreclosure cases by 62% "is not a quota" but "simply a goal," which "was never intended to interfere with [judges'] ability to adjudicate each case fairly on its merits." Memorandum from Judge John Laurent, Trial Court Budget Commission Chair, to Chief Judges of the Circuit Courts (Oct. 28, 2010) (App. 278).

The mass foreclosure docket, however, does precisely what the Chief Justice warned against. Judges have explicitly articulated the supposed difference between foreclosure cases and "individual" cases. In *BankUnited v. Connolly,* No. 09-CA-069295, when defense counsel objected to plaintiff's attorney's failure to submit a notice of appearance, the judge declined to enforce that requirement. Hr'g Tr. 2-4, Oct. 5, 2010 (Fla. 20th Cir. Ct.). He stated, "it would be different if it was one individual case. But the worst thing I would want to do is have anybody file any extra on legal paperwork [sic] in a foreclosure case." *Id.* at 3 (App. 170); *see also* Hr'g Tr. 8, *U.S. Bank v. Webster*, No. 09-CA-063473, Feb. 10, 2011 (Fla.

20th Cir. Ct.) (contrasting practice in foreclosure cases with that in "individual cases") (App. 244).

Since the implementation of the mass foreclosure docket, repeated public statements by judges and by the Clerk of Court have revealed bias against defendants, or, at the very least, created the appearance of bias against defendants. *See* Anderson Aff. ¶ 4 (reporting judge's statement from bench, in response to attorneys' reference to Florida Rules of Civil Procedure, that "[r]ules are made for those who do not have a better way around them") (App. 51); Liza Fernandez, *4 In Your Corner Investigates Lee County's "Rocket Docket" Program,* Fox 4, Sept. 15, 2010, *available at* http://tinyurl.com/5t5uwu9 (reporting defense attorney's statement that he was "specifically told by one judge, counselor stop. I have 180 cases on my docket this morning. I've heard all the evidence I'm going hear. The defendant didn't pay the mortgage, we're done here.") (App. 256); Dick Hogan, *Move is on for Non-Court Florida Foreclosures,* News-Press, Jan. 31, 2010, at A1 (quoting Lee County Clerk of Court, speaking about homeowners who have not made recent mortgage payments, as saying, "I agree with the banks: Those people need to go.") (App. 257); Michael Corkery, *A Florida Court's 'Rocket Docket' Blasts Through Foreclosure Cases,* Wall Street Journal, Feb. 18, 2009, at A1 (quoting Chief Judge Lee Cary saying "A guy hasn't paid his mortgage in over a year. What's there to talk about?") (App. 262).

In addition to the general climate of procedural irregularity and anti-defendant bias, several procedural deficiencies have become so routine in Lee County as to amount to de facto policy.

1. *Lee County's docket sounding system puts homeowners facing foreclosure at a structural disadvantage and systematically violates Florida Rule of Civil Procedure 1.440.*

It is now the general practice for all parties in residential foreclosure cases to receive an order setting that case for a "docket sounding." Petitioner's case is currently set for a docket sounding hearing April 27, 2011. No other proceedings in Lee County involve anything resembling the docket sounding system used on the mass foreclosure docket.[4]

The docket sounding order states that the "court on its own motion determines this cause is at issue and ready for trial." *See* Order Setting Docket Sounding, *Bank of N.Y. Mellon v. Merrigan*, No. 09-CA-55758 (Fla. 20th Cir. Ct. Jan. 11, 2011) ("1/11/11 Merrigan Docket Sounding Order") (App. 7); *see generally* Model Docket Sounding Order, Twentieth Judicial Circuit (App. 148). However, Florida Rule of Civil Procedure 1.440 states that "[a]n action is at issue

[4] It is not clear what authority the court relies on in setting docket soundings. On one occasion, a judge asserted that "the Court is taking the position and I'm taking the position that the Court has the inherent authority in the management of its docket to move cases forward and compel the parties to move them forward." Hr'g Tr. 7-8, *BAC Home Loans v. Hanes*, No. 09-CA-070652, Oct. 27, 2010 (Fla. 20th Cir. Ct.) (App. 188-89).

after any motions directed to the last pleading served have been disposed of or, if no such motions are served, 20 days after service of the last pleading." Thus, where a motion to dismiss is pending and no answer has been filed, the case is not at issue. Nonetheless, such cases, and others not at issue, are routinely set for docket sounding. *See* Aff. of Thomas E. Ice ¶ 8 (App. 79); Aff. of Matthew Toll ¶ 3 (App. 154); Aff. of Mark P. Stopa ¶ 2 (App. 151); Hr'g Tr. 4, *U.S. Bank v. Webster*, No. 09-CA-063473, Dec. 8, 2010 (Fla. 20th Cir. Ct.) (stating that "[t]his case is not at issue because you haven't filed an answer yet" and setting for docket sounding nonetheless) (App. 250); Def.'s Objection to Referral to Magistrate and Mot. to Vacate Order Setting Case for Docket Sounding ¶¶ 1-5, *Citimortgage v. Galpin*, No. 10-CA-055328 (Fla. 20th Cir. Ct. Nov. 4, 2010) (giving chronology of case, which was set for docket sounding while motion to dismiss was pending and no answer had been filed) (App. 176-77); Aff. of Melva Rozier ¶¶ 4-8 (same) (App. 94-95). Further, once on the docket sounding calendar, cases not yet at issue are also set for trial. Order, *Onewest Bank v. Garcia*, No. 09-CA-068784 (Fla. 20th Cir. Ct. Dec. 29, 2010) (waiving defendant's motion to dismiss and *sua sponte* setting case for trial although no answer had been filed) (App. 182); Exceptions to Report and Recommendations of Magistrate ¶¶ 1-6, *Aurora Loan Svcs. v. Schaaff*, No. 10-CA-050448 (Fla. 20th Cir. Ct. Dec. 20, 2010) (giving chronology of case, which was set for docket sounding and then trial while motion to dismiss was

pending and no answer had been filed) (App. 233). The docket sounding system is the de facto mandatory framework for all foreclosure cases in Lee County; any effort by Ms. Merrigan to have her case taken off the system would be futile.

The pressure created by the docket sounding system to quickly advance cases imposes a structural disadvantage on Ms. Merrigan in her efforts to defend her case. The docket sounding system is designed to resolve cases through summary judgment; the order setting the case for docket sounding provides that "either party" may notice a motion for summary judgment to be heard at the docket sounding, and that, otherwise, the case will be set for trial. *See* 1/11/11 Docket Sounding Order (App. 7). Additionally, it states that, while a motion to continue may also be heard at a docket sounding, "[n]o other motions will be heard." *Id.* Since summary judgment is overwhelmingly a plaintiff's motion in the foreclosure context, this structure puts homeowners at a disadvantage. It imposes a system where the defining feature of foreclosure cases – the recurring appearances required for docket soundings – can result in a victory for plaintiffs but provides defendants with no opportunity to advance their cases. Defendants pressing their own motions may only set hearings by utilizing a mass foreclosure email address, and as a practical matter defendants often find that no hearing date is available that will not be preempted by the docket sounding. *See* Rozier Aff. ¶ 9 (App. 95); Stopa Aff. ¶ 4 (App. 152). Indeed, even the formal possibility that defendants may

set motions to continue at the docket soundings appears, in practice, to be hollow. *See* Email from Judge Lee Ann Schreiber to Judge George Richards (Sept. 10, 2010) (stating that judge uniformly denies requests for trial continuance based on argument that discovery is not concluded) (App. 125-26).

As a practical matter, the docket sounding system creates a significant obstacle to any outcome other than summary judgment. There are typically two docket soundings in a case, with the second between four and six weeks after the first. Aff. of Todd Allen ¶ 17 (App. 48). If the case has not concluded by the second docket sounding, it is generally set for trial on a date between one and two months later. *Id.* This system does not provide adequate time to notice depositions and complete discovery, and it often precludes filing and setting other motions (including motions to dismiss) in advance of docket sounding deadlines. *Id.* ¶ 18 (App. 48); Hr'g Tr. 7, *Fed. Nat'l Mortg. Ass'n v. Champelovier*, No. 09-CA-68753, Feb. 21, 2011 (Fla. 20th Cir. Ct.) (court stating that "the problem seems to me that the court processes are insufficient to allow motion time") (App. 166).

By undercutting her ability to pursue discovery, the docket sounding system will limit Petitioner's ability to oppose summary judgment. Analysis of the dockets in Lee County reveals that this happens frequently: between January 1, 2009 and January 8, 2011, Lee County judges entered a final judgment of foreclosure 253 times when a motion to compel discovery was pending but the

court had not ruled on it. Olenick Aff. ¶ 14 (App. 88); *cf. Abbate v. Publix Super Mkts, Inc.*, 632 So. 2d 1141, 1142 (Fla. 4th DCA 1994) (reversing summary judgment because appellate court was "at a loss to understand how the summary judgment was entered with the plaintiffs' motion to compel still pending").

The brick walls homeowners encounter when attempting to conduct discovery are a product of the docket sounding orders, which provide that "[a]ll discovery shall be completed prior to the docket sounding," and permit subsequent discovery "only on the order of the Court for good cause shown and which will not delay the trial of this cause." 1/11/11 Merrigan Docket Sounding Order (App 8). Thus, the compressed timeframe mandated by the docket sounding system often precludes defendants from setting hearings on motions to compel before the docket sounding clock runs out. Stopa Aff. ¶ 5-6 (App. 152). As a result, homeowners' attempts to develop factual evidence through discovery are routinely short-circuited by the court. In some instances, cases are set for trial when homeowners are actively pursuing discovery. Rozier Aff. ¶¶ 5-9 (discussing case set for trial when motion to dismiss was pending, rendering discovery and hearing on defendants' motions impossible) (App. 94-95); Toll Aff. ¶ 4 (describing cases on docket sounding calendar set for trial when motion to compel has been granted but no responsive discovery produced) (App. 154-55); Email from Judge Lee Ann Schreiber to Judge George Richards (Sept. 10, 2010) (stating that judge uniformly

denied requests for trial continuance based on argument that discovery is not concluded) (App. 125). Moreover, judges on the mass foreclosure docket routinely grant plaintiffs' motions for summary judgment even while defendants' discovery requests remain outstanding. Allen Aff. ¶¶ 14-15 (App. 47-48); Anderson Aff. ¶ 6 (App. 51-52); Request for Stay of Entry of Judgment ¶¶ 6-8, *HSBC Bank USA v. Ordonez*, No. 09-CA-052969 (Fla. 20th Cir. Ct. Sept. 13, 2010) (detailing chronology of case in which summary judgment was granted for plaintiff six days after plaintiff filed Motion for Extension of Time to respond to defendant's discovery requests) (App. 214).

The orders setting a case for docket sounding also prohibit telephonic appearances, placing an asymmetric burden on homeowners. *See* 1/11/11 Merrigan Docket Sounding Order (App. 7); *see also* Email from Judge John S. Carlin to Nancy Aloia, Family/Civil Court Director (June 25, 2010) (instructing that telephonic appearances will not be allowed in foreclosure hearings) (App. 128). Because docket soundings in dozens of cases are set for the same date and time, an attorney or pro se defendant appearing for a hearing that may last only a few minutes is often required to spend an entire morning or afternoon in court. Aff. of W. Justin Cottrell ¶ 5 (App. 67); Stopa Aff. ¶ 3 (App. 151-52). This vastly increases the expense of litigation for homeowners, whether measured in the cost of attorney time or lost wages for pro se homeowners who must take time off from

work to appear. Ice Aff. ¶¶ 10, 13 (App. 80); Cottrell Aff. ¶¶ 4-5 (App. 67); Stopa Aff. ¶¶ 3, 9 (App. 151-52). This burden has led some attorneys to seriously contemplate refusing foreclosure defense cases in Lee County. Ice Aff. ¶¶ 13-14 (App. 80-81); Cottrell Aff. ¶ 6 (App. 68); Stopa Aff. ¶ 9 (App. 152). In contrast, plaintiffs are generally represented in court by "covering counsel" who litigate large numbers of foreclosure cases and are not required to put in notices of appearance in specific cases. Ice Aff. ¶¶ 10 (App. 80). Consequently, homeowners absorb the cost of mandatory, recurring, in-person hearings.

This disparity is further exacerbated by the court's treatment of non-appearing litigants at docket sounding. When no representative for the plaintiff is present, judges allow "covering counsel" who happen to be in the courtroom to appear on behalf of plaintiffs with whom they have no preexisting relationship. Hr'g Tr. 3, Feb. 15, 2011, *Chase Home Fin. v. Ashgar*, No. 09-CA-71071, (Fla. 20th Cir. Ct.) (setting case for trial when neither plaintiff nor defendant appeared and allowing another plaintiff's attorney to represent plaintiff) (App. 158-59); Hr'g Tr. 3-4, *Bank of N.Y. Mellon v. McCarty*, No. 10-CA-50102, Feb. 15, 2011 (Fla. 20th Cir. Ct.) (setting case for docket sounding when neither plaintiff nor defendant appeared and allowing another plaintiff's attorney to "stand in" for plaintiff's attorney) (App. 201); Aff. of Mark P. Stopa ¶ 8 (observing that other attorneys present in court are typically allowed to stand in for non-appearing

plaintiffs) (App. 152). In contrast, when the defendant fails to appear, summary judgment motions may be heard and granted. Anderson Aff. ¶ 11 (App. 53-54); *see also* Rozier Aff. ¶ 10 (App. 96); Aff. of Larry Bradshaw ¶¶ 7-10 (App. 56).

Even if Ms. Merrigan were able to avoid a summary judgment ruling despite the hydraulic pressure encouraging that outcome, the docket sounding process also pushes cases prematurely to trial. Trials routinely occur when a defendant has outstanding discovery requests, the court has issued an order compelling the plaintiff to respond, and the request remains unanswered. Toll Aff. ¶ 4 (App. 154-55). Cases are also often set for trial when the pleadings remain open and when mediation has not been completed. *Id.*; *see also* Allen Aff. ¶ 10 (App. 46). Moreover, trials on the mass foreclosure docket typically last only a few minutes. Rozier Aff. ¶ 3 (App. 93-94). Judges presiding over these trials will issue final judgments when no one appears on behalf of a defendant, but typically defer proceedings when the plaintiff's counsel fails to appear. *Id.*; Anderson Aff. ¶ 11 (App. 53-54). Trials go forward when plaintiffs have simply failed to comply with the trial order's requirements regarding submission of witness and exhibit lists, notwithstanding the obvious prejudice to defendants' ability to prepare. Toll Aff. ¶ 5 (155); *see also* Hr'g Tr. 6, *U.S. Bank v. Shively*, No. 09-CA-059070, Mar. 24, 2011 (Fla. 20th Cir. Ct.) (App. 241).

2. *The Lee County mass foreclosure docket systematically violates the rules governing summary judgment*

In the foreclosure context, summary judgment is the primary tool for disposing of cases. In the first quarter of Fiscal Year 2010-2011, the Twentieth Judicial Circuit disposed of 9,613 foreclosure cases, and 7,859 of those dispositions were through summary judgment. *See* Fla. Office of the State Court Admin., *Foreclosure and Economic Recovery Status Report* (reporting for July 1, 2010-Sept. 30, 2010) (App. 289). In contrast, during that same period, the Twentieth Judicial Circuit dismissed 643 foreclosure cases and held zero trials.[5] *Id.* As described above, the docket sounding system drives cases toward summary judgment. Yet despite the primacy of summary judgment as a tool for disposing of foreclosure cases, important aspects of the summary judgment rule are effectively vitiated.

First, the mass foreclosure docket brushes aside the rules designed to ensure that the party opposing a summary judgment motion has adequate time respond to the submissions made in support of the motion. Florida Rule of Civil Procedure 1.510(c) requires that the party moving for summary judgment "shall serve the

[5] Though more recent statistics have not been released, practice on the mass foreclosure docket now does involve setting cases for "trial." As discussed *supra*, however, those trials often last only a few minutes and systematically deprive homeowners of an opportunity to be heard. *See* Section III.1.

motion at least 20 days before the time fixed for the hearing, and shall also serve at that time a copy of any summary judgment evidence on which the movant relies that has not already been filed with the court."

Analysis of dockets in Lee County foreclosure cases, however, reveals that, between January 1, 2009 and January 8, 2011, final judgment of foreclosure was entered more than 6,950 times where some piece of essential evidence, like the note or mortgage, was filed with the court fewer than twenty days before judgment was entered. Olenick Aff. ¶ 12 (App. 87). In fact, summary judgment is often granted where the note or other crucial documents are not filed until the day of the hearing; in more than 5,290 of these cases, the plaintiffs filed summary judgment evidence on the same day judgment was entered. *Id.*

Indeed, in an electronic correspondence about keeping track of original notes and mortgages filed with the court, one judge who had presided over the mass foreclosure docket wrote that his practice was to return notes and mortgages filed before hearing and to tell local counsel that it is "wiser filing the original [note and mortgage] on the day of hearing." Email from Judge George Richards to Judge Lee Ann Schreiber (Apr. 13, 2010). (App. 130) This judge noted that "[y]ou may get an objection from a defense attorney, but those are few and far between." *Id.* For Petitioner, the significance of this de facto policy is clear: she is at imminent

risk of facing a potentially dispositive motion without the ability to scrutinize and challenge the evidence submitted by her adversary.

Florida Rule of Civil Procedure 1.510(e) requires that, for all affidavits supporting or opposing summary judgment, "[s]worn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith." However, this rule is routinely disregarded in Lee County foreclosure proceedings. Certified copies of supporting documents are rarely attached to affidavits. Allen Aff. ¶ 4-5 (App. 45-46); Anderson Aff. ¶ 5 (App. 51); Houk Aff.¶ 12 (App. 73); Cotrell Aff. ¶ 2 (App. 66). But when defendants move to strike affidavits and thereby contest summary judgment based on violations of this rule, the court routinely overlooks the violation. Allen Aff. ¶ 5 (App. 45-46); Anderson Aff. ¶ 5 (App. 51); Cottrell Aff. ¶ 2 (App. 66).

Petitioner thus faces the prospect of defending against foreclosure in a forum where her adversary may prevail without actually submitting the evidence that purportedly proves its case. Indeed, judges on the mass foreclosure docket have repeatedly indicated that, as a policy, Rule 1.510(e) does not apply in foreclosure proceedings. On one occasion, after hearing a judge articulate that policy, defense counsel attempted to preserve the issue for appeal in the order he prepared. Allen Aff. ¶¶ 6-7 (App. 46). A second judge signed the order, which stated, "Lee County is not requiring that Plaintiff's [sic] comply with Fla.R.Civ.Pro 1.510(e)."

Order, *HSBC Bank USA v. Shinneman,* No. 10-CA-50089 (Fla. 20th Cir. Ct. Dec. 2, 2010) (App. 238). Subsequently, the court issued an "Ex Parte Corrective Order" stating that "all parties are required to comply with Fla. R. Civ. P 1.510(e)." Ex Parte Corrective Order, *HSBC Bank USA v. Shinneman,* No. 10-CA-50089 (Fla. 20th Cir. Ct. Dec. 30, 2010) (App. 236); Allen Aff. ¶¶ 8-9 (App. 46). However, the judge who signed that order later stated from the bench that he did not understand Rule 1.510(e) to apply in foreclosure cases and would continue to deny motions invoking the rule. *Id.* ¶¶ 12-13 (App. 47). Further, in response to a reporter's question about the enforcement of the rule, the Clerk of Court stated, "We have not required, in the past, nor do I think we will, to have copies (of those documents) attached. It's not mandatory." Liza Fernandez, *Rocket Docket Investigation,* Fox 4, Dec. 13, 2010 (App. 254).

3. *Critical and even dispositive motions are frequently decided without notice to defendants in Lee County foreclosure cases.*

If forced to litigate her case on the mass foreclosure docket, Ms. Merrigan will have to navigate a system in which ex parte contacts between plaintiffs and the court are routine. Indeed, in Ms. Merrigan's case, the court has already granted a motion that was explicitly denominated as ex parte; by granting the motion the day after it was filed, the court denied Ms. Merrigan any opportunity to be heard. *See* Ex Parte Mot. to Abate, *Bank of N.Y. Mellon v. Merrigan,* 09-CA-055758 (Fla.

20th Cir. Ct. June 7, 2010) (App. 13); Order to Abate Proceedings, *Bank of N.Y. Mellon v. Merrigan*, 09-CA-055758 (Fla. 20th Cir. Ct. June 8, 2009) (App. 12).

Judges routinely rule on plaintiff-initiated motions filed ex parte. Homeowners litigating on the mass foreclosure docket frequently learn of plaintiffs' motions or proposed orders only after the court has granted them, including plaintiffs' proposed orders denying defendants' motions to dismiss. Toll Aff. ¶ 7 (App. 155). Indeed, one judge informed a defendant's attorney, who sought to vacate an order which granted plaintiff's ex parte motion to substitute party plaintiff by purporting to "correct [a] scrivener's error," that it was the policy of the foreclosure judges to grant such motions ex parte. Hr'g Tr. 4-8, *U.S. Bank v. Webster*, No. 09-CA-063473, Feb. 10, 2011 (Fla. 20th Cir. Ct.) (App. 243-44). The judge stated that, in foreclosure cases, the court does not "have the luxury on every thing that if we had individual cases we may say, yes, we'll set up a hearing on this." *Id.* at 8 (App. 244). Because he would entertain subsequent motions seeking reconsideration of ex parte orders, however, the judge suggested this practice was harmless. *Id.* At 6-7 (App. 244); *see also* Order Granting Mot. to File Amended Complaint, *U.S. Bank Nat'l Ass'n v. Olsson*, No. 09-CA-066527 (Fla. 20th Cir. Ct.) (granting motion to amend complaint changing name of plaintiff three days after motion was filed and before plaintiff served notice of motion)(App. 208); Cross-Notice of Hearing, *U.S. Bank Nat'l Ass'n v. Olsson*, No.

09-CA-066527 (Fla. 20th Cir. Ct.) (App. 205-06). The policy of granting ex parte motions to substitute party-plaintiff substantially prejudices the homeowners, because disarray in the mortgage securitization process routinely leads banks to attempt to foreclose on the basis of notes they do not own. *See infra* Part IV.D.

Finally, extensive coordination between the court and attorneys for plaintiffs contributes to structural asymmetries in the docketing system that disadvantage homeowners. The law firm of David J. Stern, which represented plaintiffs in many of Lee County foreclosure cases, was involved in the implementation of the mass foreclosure docket from its inception. *In re: Investigation of Law Offices of David J. Stern, P.A.,* AG No. L10-3-1145, Tammie Lou Kapusta Dep. 56:24-59:4, Sept. 22, 2010 (App. 404-407). After the mass foreclosure docket was up and running, judges and court staff continued to collaborate with attorneys representing foreclosure plaintiffs on the administration of the docket. *See* Email from Judge Sherra Winesett to Judge McHugh (Mar. 16, 2010) (confirming meeting to discuss new procedures with plaintiffs' attorneys) (App. 133); Email from Judge Carlin to Sandi Sauls, Civil Division Manager (May 5, 2010) (App. 137) (requesting that someone "contact the big foreclosure firms and get them to schedule at least 500 cases each Friday") (App. 137); Email from Judge Carlin to Penelope Rose (May 21, 2010) (App. 139) (instructing staff member to let Florida Default Law Group know about available hearing times and suggesting outreach to other firms) (App.

139); Email from Judge Hugh Starnes to Judge Carlin (Aug. 13, 2010) (reporting hearing from two local plaintiff attorneys that they are "getting burned out" by pace of mass foreclosure docket and seeking discussion from judges on "ways to give them some relief or help them in some way") (App. 141); Email from Judge John S. Carlin to Sandi Sauls and Linda Johnston (Sept. 1, 2010) (asking staff to call "contacts at the foreclosure firms" to request they set hearings for particular mass foreclosure docket dates) (App. 144). By allowing plaintiffs to schedule large blocks of time, the court creates an uneven playing field: as discussed earlier, homeowners or their attorneys often wait for hours to be called for a short hearing (including where no substantive business is conducted), Ice Aff. ¶¶ 10, 13 (App. 80); Cottrell Aff. ¶¶ 4-5 (App. 67), while firms representing plaintiffs benefit from consolidated blocks of time they have scheduled ex parte with the court.

D. Error, Disarray, and Fraud in the Foreclosure Process

These manifold procedural deficiencies would be significant under any circumstances, but they pose a particularly substantial threat to accurate adjudication in the context of the current foreclosure crisis. Systemic problems with the foreclosure process, including massive disarray and well-documented fraud, illustrate the need for meaningful judicial review.

Mortgage Documentation and the Securitization Process

Traditionally, when a borrower took out a mortgage, a local bank lent the borrower the money and then retained the original note and mortgage. *See generally* Adam J. Levitin & Tara Twomey, *Mortgage Servicing*, 28 YALE J. ON REG. 1, 11 (2011). The borrower then submitted monthly payments to that bank. *Id.* In the age of mortgage securitization, however, the process became much more complicated. After a lender originates the mortgage, it usually sells the loan to another large institution. Subsequent holders of the mortgage might deal directly with the borrower, but more often they hire servicing companies to collect payments. *Id.* at 15. Mortgages often pass through multiple banks and servicing companies before being bundled into trusts with thousands of other mortgages and packaged into residential mortgage-backed securities. *See id.* at 13-14.

During this tangled assignment and re-assignment of mortgages, banks often lose track of who actually holds the mortgage. "In a mortgage foreclosure action, a lender is required to either present the original promissory note or give a satisfactory explanation for the lender's failure to present it prior to it being enforced." *Nat'l Loan Investors, L.P. v. Joymar Associates*, 767 So. 2d 549, 551 (Fla. 3d DCA 2000) (citing *Downing v. First Nat'l Bank of Lake City*, 81 So. 2d 486 (Fla.1955)). Despite this basic requirement, however, "experience during the

past several years has shown that, probably in countless thousands of cases, promissory notes were never delivered to secondary market investors or securitizers, and, in many cases, cannot presently be located at all." Dale A. Whitman, *How Negotiability Has Fouled Up the Secondary Mortgage Market, and What to Do About It*, 37 PEPP. L. REV. 737, 758 (2010).

For example, when U.S. Bank foreclosed on Antonio Ibanez in July 2007, it claimed that the mortgage he received from Rose Mortgage, Inc. in 2005 had changed hands five times before being assigned to a pool of mortgage-backed securities of which U.S. Bank was a trustee. *U.S. Bank Nat'l Ass'n v. Ibanez*, 941 N.E. 2d 40, 46 (Mass. 2011). However, the Massachusetts Supreme Judicial Court invalidated this foreclosure and others by Wells Fargo, holding that because neither bank had produced evidence demonstrating that the borrowers' mortgages were actually among those assigned to them in the securitization process, these banks did not have the right to foreclose. *Id.* at 51-53.

Fraudulent Assignments

Each time a mortgage changes hands in the securitization process, the bank must appoint an individual to execute an assignment of the mortgage. These assignments must be signed by a corporate officer with proper authority and notarized.

The assignment documents, however, are riddled with fraud. As the Fourth District Court of Appeal recently noted, in certifying a question of great public importance to the Supreme Court of Florida, "many, many mortgage foreclosures appear tainted with suspect documents." *Pino v. Bank of N.Y. Mellon*, No. 4D10-378, slip op. at 6, 2011 WL 1135541 (Fla. 4th DCA March 30, 2011). According to the Florida Attorney General, banks and mortgage servicing companies routinely employ individuals who know nothing about the documents they are signing to execute thousands of mortgage assignments each day. In its investigation of the three largest Florida law firms representing lenders in foreclosure actions, the Attorney General found evidence of many "robo-signers" like Linda Green whose "signature" appears on hundreds of thousands of mortgage documents, which list her as an officer of dozens of different banks and mortgage companies. *See* Office of the Att'y Gen. of Fla., Economic Crimes Div., *Unfair, Deceptive and Unconscionable Acts in Foreclosure Cases* (App. 292). The report contains examples of five dramatically different signatures of "Linda Green," suggesting at least five people were signing documents under her name. *Id.* It also contains examples of forged signatures, stamped signatures, fraudulent notarizations, assignments dated "9/9/9999," documents with blank lines that have been witnessed and notarized, and assignments executed after the filing of lis pendens. *Id.* A former employee at one of the law offices representing mortgage

companies testified that multiple employees signed the name "Cheryl Samon" on stacks of motions for summary judgment and assignments of mortgage without reading them. *In re: Investigation of Law Offices of David J. Stern, P.A.,* AG No. L10-3-1145, Tammie Lou Kapusta Dep. 24:5-25:10, Sept. 22, 2010 (App. 401-02); *see also GMAC Mortg. v. Neu*, No. 08-CA-040805, Jeffrey Stephan Dep. 7:9-11:15, 13:17-14:19 (Fla. 15th Cir. Ct. Dec. 9, 2010) (estimating 10,000 documents signed each month without personal knowledge of contents) (App. 417-24) .

This pervasive fraud and disarray vividly illustrates the need for rigorous court procedures to ensure that judicial decisions are not contaminated by the systemic problems infecting the mortgage-financing and foreclosure processes.

IV. ARGUMENT

A. The Mass Foreclosure Docket Violates Petitioner's Due Process Rights.

The systemic procedural deficiencies in Lee County's mass foreclosure docket violate Petitioner's right to due process under the 14th Amendment to the U.S. Constitution and article I, section 9 of the Florida Constitution. As detailed above, Lee County has designed a specialized foreclosure docket that privileges perceived efficiency over substantive fairness. Petitioner seeks relief from this Court so that her defenses will not be adjudicated using the defective procedures described above. With a docket sounding date impending, Petitioner will not have

a reasonable opportunity to develop and present her defenses as long as her case remains on the mass foreclosure docket.

"Procedural due process imposes constraints on governmental decisions that deprive individuals of liberty or property interests." *Massey v. Charlotte Cnty.*, 842 So. 2d 142, 146 (Fla. 2d DCA 2003). The core demand of procedural due process is that an individual facing deprivation of a protected interest "is entitled to a proceeding" characterized by "fundamental fairness." *Akridge v. Crow*, 903 So. 2d 346, 350 (Fla. 2d DCA 2005). The U.S. Supreme Court has "consistently held that some form of hearing is required before an individual is finally deprived of a property interest" by government action and that the "opportunity to be heard at a meaningful time and in a meaningful manner" is indispensable. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (internal quotations omitted); *see also Keys Citizens For Responsible Gov't, Inc. v. Fla. Keys Aqueduct Auth.*, 795 So. 2d 940, 948 (Fla. 2001) ("Procedural due process requires both fair notice and a real opportunity to be heard."). Due process requires procedures designed to "minimize substantively unfair or mistaken deprivations of property, a danger that is especially great when the State seizes goods simply upon the application of and for the benefit of a private party." *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972).

Procedural due process encompasses "more than simply being allowed to be present and to speak"; it also implies "the right to 'introduce evidence at a

meaningful time and in a meaningful manner.'" *Vollmer v. Key Dev. Props., Inc.*, 966 So. 2d 1022, 1027 (Fla. 2d DCA 2007) (quoting *Brinkley v. Cnty. of Flagler*, 769 So. 2d 468, 472 (Fla. 5th DCA 2000). "In other words, '[t]o qualify under due process standards, the opportunity to be heard must be meaningful, full and fair, and not merely colorable or illusive.'" *Dep't of Highway Safety & Motor Vehicles v. Hofer*, 5 So. 3d 766, 771 (Fla 2d DCA 2009) (quoting *Rucker v. City of Ocala*, 684 So.2d 836, 841 (Fla. 1st DCA 1996)). In adjudicating a creditor-debtor dispute implicating property rights, it is the meaningfulness of the procedural forum that counts, not the fact that a particular litigant may have, in fact, defaulted on a debt. *Fuentes*, 407 U.S. at 87 ("But even assuming that the appellants had fallen behind in their installment payments, and that they had no other valid defenses, that is immaterial here. The right to be heard does not depend on an advance showing that one will surely prevail at the hearing.").

In *Mathews*, the U.S. Supreme Court identified the three factors to be balanced in considering a procedural due process claim:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

424 U.S. at 335. The same three-part balancing test guides analysis of procedural due process claims under the Florida Constitution. *See Hofer*, 5 So. 3d at 771 ("A court faced with a procedural due process challenge . . . must employ the balancing test mandated by *Mathews v. Eldridge*."). Measured against this standard, the mass foreclosure docket cannot withstand constitutional scrutiny.

1. The Private Interest at Stake

Ms. Merrigan's interest in this case – maintaining ownership of her home – is entitled to weighty consideration. An individual's "right to maintain control over his home, and to be free from governmental interference, is a private interest of historic and continuing importance." *U.S. v. James Daniel Good Real Prop.*, 510 U.S. 43, 53-54 (1993). Property rights "are among the basic substantive rights expressly protected by the Florida Constitution." *Dep't of Law Enforcement v. Real Prop.*, 588 So. 2d 957, 964 (Fla. 1991); *see also Osterndorf v. Turner*, 426 So. 2d 539, 541 (Fla. 1982) ("The home has a history of special significance in Florida law."). Further, these interests "are particularly sensitive where residential property is at stake, because individuals unquestionably have constitutional privacy rights to be free from governmental intrusion in the sanctity of their homes and the maintenance of their personal lives." *Real Prop.*, 588 So. 2d at 964. The private interest at stake in Ms. Merrigan's foreclosure litigation thus ranks among the most substantial interests implicated by due process considerations.

2. The Risk of Erroneous Deprivations in the Mass Foreclosure Docket

By employing stripped-down procedures, the mass foreclosure docket substantially increases the risk that Ms. Merrigan will be erroneously deprived of her home. In an effort to clear the "backlog" of foreclosure cases, the Lee County court system devised the alternative procedures described above. This scaling back of procedural safeguards would be disturbing under any circumstances. But the due process implications of these diminished procedures must be assessed in the particular context in which they are being applied. *See Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) ("[D]ue process is flexible and calls for such procedural protections as the particular situation demands."); *Hofer*, 5 So. 3d at 771 (same). The "particular factual situation" defining the requirements of due process in the foreclosure context include pervasive error, disarray, and fraud in the foreclosure system. *See supra* Part IV.D. Considered against that backdrop, Ms. Merrigan's ability to meaningfully defend her home depends on her ability to test the factual evidence arrayed against her in a manner that is "meaningful, full and fair, and not merely colorable or illusive.'" *Hofer*, 5 So.3d at 771.

Resolving a foreclosure case requires more than merely "determining the existence of a debt or delinquent payment." *Connecticut v. Doehr*, 501 U.S. 1, 14 (1991). Technical and potentially complex issues arising from mortgage securitization often make it difficult to determine the threshold question of whether

a plaintiff has standing to prosecute a foreclosure case. For example, in situations where an affidavit purporting to document conveyance of a note is undercut by deposition testimony, courts must make credibility determinations or otherwise resolve conflicting factual allegations. Similarly, in many cases, homeowners point to evidence that the documents underlying a foreclosure are fraudulent, or that the signature purporting to verify the allegations in a complaint is faulty. And affirmative defenses available to a homeowner will in some instances require a court to examine the ongoing relationships between homeowner, lender, and servicer. Yet several aspects of the mass foreclosure docket distort the adjudication process to the point that error is practically inevitable.

Each element of the mass foreclosure docket described in this petition increases the risk of substantive error. But they should not be analyzed in isolation. Instead, the due process analysis should take into account the cumulative effect of these procedural deficiencies. The U.S. Court of Appeals for the Fifth Circuit's decision in *Haitian Refugee Center v. Smith*, 676 F.2d 1023 (5th Cir. Unit B 1982), is instructive in analyzing the due process implications of the multiple shortcuts instituted by the mass foreclosure docket.[6] *Haitian Refugee Center* involved a challenge to expedited administrative procedures for processing the

[6] *Haitian Refugee Center* was decided by the department of the Fifth Circuit that covered the states now falling within the U.S. Court of Appeals for the Eleventh Circuit. *See Wang v. U.S. Atty. Gen.*, 2010 WL 3565735 (11th Cir. 2010) (citing *Stein v. Reynolds Sec., Inc.*, 667 F.2d 33, 34 (11th Cir. 1982)).

asylum applications of Haitian refugees. The challenged program "embodied the government's response to a tremendous backlog of Haitian deportation cases," and involved "the assignment of additional immigration judges to Miami, the instructions to immigration judges to effect a three-fold increase in productivity, and orders for the blanket issuance of show-cause orders in all pending Haitian deportation cases." *Id.* at 1030.

As a result, disposition of Haitian asylum cases took place "at an unprecedented rate," increasing from an average of one to ten deportation hearings per day to a rate of fifty-five hearings per day, reaching a peak of as many as eighty per day. *Id.* at 1031. Asylum interviews revealed a similar spike in clearance rates, with the time allotted to each interview falling from about an hour and a half to just one-half hour for each applicant. *Id.* Ratcheting up the pace of deportation hearings and asylum interviews also affected the ability of applicants to effectively participate in these proceedings. Because the government scheduled simultaneous deportation and asylum hearings at different locations, it was sometimes "impossible for counsel to attend the hearings." *Id.*

Faced with the combined effects of these changes, the Fifth Circuit found that asylum applicants suffered a violation of due process. The court concluded that "it strains credulity to assert that these plaintiffs were given a hearing on their asylum claims at a meaningful time and in a meaningful manner." *Id.* at 1039-40.

Addressing the risk of erroneous deprivations of protected interests, the court explained:

> [T]he risk that the INS will make an erroneous asylum determination under the procedures used here is unacceptably high. The speed alone with which the entire program was pursued undermined the probability that a record could be assembled to afford a basis for informed decisionmaking. When speed was combined with knowingly creating scheduling conflicts and unattainable filing deadlines, uninformed and unreliable decisions were almost assured.

Id. at 1040. Ultimately, the court found that "the government created conditions which negated the possibility that a Haitian's asylum hearing would be meaningful in either its timing or nature." *Id.*

The analogy to the mass foreclosure docket is apparent. In both instances, a "backlog" of cases led to the development of novel procedures that privileged speed above reliability. Like the INS policies invalidated in *Haitian Refugee Center*, the mass foreclosure docket achieves its goal of radically increasing its case-disposition rate by scaling back the ability of homeowners to develop and present their defenses. In both cases, a series of measures designed to promote "efficiency" combined to severely impair the ability of one side to be heard. Focusing on the procedures challenged in this petition, a similar risk of error becomes vividly evident.

First, the docket sounding system rushes cases toward disposition regardless of whether they are ready. *See supra* Part IV.C.1. "General principles of due

process prohibit entry of an order affecting the parties' legal rights before the parties have been given a full opportunity to litigate all factual and legal issues pertaining to those rights." *Dep't Fin. Servs. v. Branch Banking*, 40 So. 3d 29, 833 (Fla. 1st DCA 2010). The docket sounding system contravenes those principles. It advances cases toward trial even where the pleadings remain open, the homeowner has not had a fair chance to obtain discovery, or the parties seek to abate litigation to discuss settlement or to cure defects in the foreclosure process. *See* Ice Aff. ¶ 8 (App. 79); Toll Aff. ¶ 4 (App. 154-55); Rozier Aff. ¶¶ 5-9 (App. 94-95); Email from Judge John S. Carlin to Judge Stella Diamond (Oct. 15, 2010) (judge stating policy against abating cases to allow parties to negotiate) (App. 146). In combination, these procedures often lead to fifteen-minute trials where no meaningful factual contest occurs. Rozier Aff. ¶ 3 (App. 93-94); Toll Aff. ¶¶ 4-6 (App. 154-55); Stopa Aff. ¶¶ 7 (App. 152). In other words, the docket sounding system creates the overarching structure for foreclosure cases in Lee County. It will undercut every aspect of Ms. Merrigan's efforts to defend her house, from her ability to obtain discovery to her opportunity to present her legal arguments before the case is disposed of via summary judgment or trial.

Second, systematic violations of the summary judgment rule impair Ms. Merrigan's ability to test the factual allegations made in support of foreclosure. As described *supra*, Part IV.C.2, judges on the mass foreclosure docket routinely

disregard the requirements of Rule 1.510 and grant motions for summary judgment where supporting documents are submitted untimely – including on the same day that final judgment issues – or are never attached to affidavits purporting to describe them. Olenick Aff. ¶ 12 (App. 87); Allen Aff. ¶ 5 (App. 45-46); Cottrell Aff. ¶ 2 (App. 66). In effect, the mass foreclosure docket suspends the rules governing summary judgment. The result is final disposition of cases on the ground that "there is no genuine issue as to any material fact," Fla. R. Civ. P. 1.510(c), where the non-movant has had no opportunity to respond to the evidence proffered in support of summary judgment.

An unacceptable risk of error exists where challenged procedures allow decisions based on "one-sided, self-serving, and conclusory submissions." *Doehr*, 501 U.S. at 14. When a decision implicating the continued enjoyment of property rights involves even "moderately complex issues," the property owner must have a meaningful opportunity to contest the moving party's facts. *Massey*, 842 So. 2d at 147. Otherwise, there is "a serious risk of an erroneous deprivation." *Id.* This requirement cannot be short-circuited on the basis of an across-the-board judgment that foreclosure cases are "easy" or straightforward. For example, in *Chalk v. State*, 443 So. 2d 421 (Fla. 2d DCA 1984), the Supreme Court of Florida found a due process violation where a party was denied the opportunity to present a closing statement after a 20-minute hearing. The full protections of due process were

required, the Court held, "regardless of . . . the apparent simplicity of the issues presented." *Id.* at 423. *See also Huff v. State*, 622 So. 2d 982, 984 (Fla. 1993) ("When a procedural error reaches the level of a due process violation, it becomes a matter of substance.").

Third, exposure to the pervasive ex parte decision-making in the mass foreclosure docket, described *supra* in Part IV.C.3, violates Petitioner's due process rights. Judges hearing foreclosure cases in Lee County routinely grant plaintiffs' motions on an ex parte basis – including motions governing the conduct of discovery, allowing substitution of party-plaintiff where defendants have raised standing, and disposing of defendants' motions to dismiss. Ice Aff. ¶ 7 (App. 79); Toll Aff. ¶ 7 (App. 155). Judges have even stated in open court that granting ex parte motions as a matter of course is harmless so long as parties may subsequently set a hearing to seek reconsideration of an ex parte order. Hr'g Tr. 4-9, *U.S. Bank v. Webster*, No. 09-CA-063473, Feb. 10, 2011 (Fla. 20th Cir. Ct.) (App. 243-45). This casual attitude stands in stark contrast to the strict ethical canons governing ex parte communications. *See* Fla. Code of Jud. Conduct Canon 3(B)(7) (2011) (prohibiting ex parte communications except in limited circumstances not applicable here). Moreover, the Florida Supreme Court has made clear that "[n]othing is more dangerous and destructive of the impartiality of the judiciary than a one-sided communication between a judge and a single litigant." *Rose v.*

State, 601 So. 2d 1181, 1183 (Fla. 1992). The strong suspicion of ex parte communications applies whether or not "an ex parte communication *actually* prejudices one party at the expense of the other." *Id.* (emphasis in original); *see also Shishley the Best, Inc. v. CitiFinancial Equity Servs., Inc.*, 14 So. 3d 1271 (Fla. 2d DCA 2009) (holding that ex parte order granting bank's motion to cancel foreclosure sale violates due process); *Pearson v. Pearson*, 870 So. 2d 248, 249 (Fla. 2d DCA 2004) ("Petitioner's allegation of an ex parte communication alone adequately established a reasonable basis to fear that she would not receive a fair hearing in subsequent proceedings."). Indeed, it is an axiom of due process that "fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights." *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 170 (1951) (Frankfurter, J., concurring).

3. The Government's Interest

Petitioner acknowledges the Twentieth Judicial Circuit's interest in responding to the unprecedented surge in foreclosure cases by efficiently managing its docket. But that interest falls far short of outweighing the severe risk of erroneously subjecting Ms. Merrigan to foreclosure. This Court has explained that, while it "sympathize[s]" with a trial court's "need to keep the process moving as quickly as possible[,] . . . due process rights must prevail." *Chalk*, 443 So. 2d at 424; *see also Akridge v. Crow*, 903 So. 2d 346, 352 (Fla. 2d DCA 2005) (a

"heavily burdened judicial system" is not "a reason to deny an individual the due process to which the individual is entitled.") (citing *Amends to Florida Family Law Rules*, 723 So. 2d 208, 215 (Fla. 1998)).

The Florida Supreme Court's decision in *J.B. v. Florida Department of Children and Family Services*, 768 So. 2d 1060 (2000), is instructive. There, the Court found a due process violation where a party had only 24 hours notice of a parental termination proceeding. It reached this conclusion notwithstanding "the backlog inherent in termination cases" and the "monumental burden" the Legislature faced in addressing that backlog. *Id.* at 1065. And as the Fifth Circuit noted in *Haitian Refugee Center*, while the government has a legitimate interest "in acting with dispatch, it is also in the government's interest to make informed determinations." *Haitian Refugee Ctr.*, 676 F.2d at 1040. It bears emphasizing that the only "additional" procedures sought in this petition are the procedures ordinarily governing civil litigation in the State of Florida. It is hard to identify any extraordinary burden in observing "the regulations and procedures normally applicable . . . but largely ignored in this case." *Id.*

B. The Docket Sounding System Violates Petitioner's Right of Access to Courts.

The Florida Constitution guarantees that "[c]ourts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay." Art. I, § 21, Fla. Const. The Florida Supreme Court has held that

"in order to find that a right has been violated it is not necessary for the statute to produce a procedural hurdle which is absolutely impossible to surmount, only one which is significantly difficult." *Mitchell v. Moore*, 786 So. 2d 521, 527 (Fla. 2001). The structure of the mass foreclosure docket imposes a significant difficulty on homeowners seeking to have their claims heard. Consequently, it deprives Petitioner of her right of access to courts.

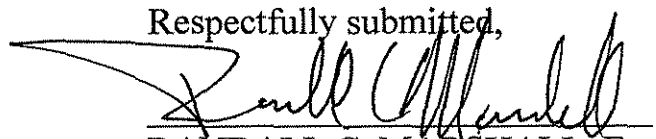
In *Hatcher v. Davis*, 798 So. 2d 765, 766 (Fla. 2d DCA 2001), this Court reviewed an administrative order that created the position of Enforcement Hearing Officer for child support enforcement hearings. The challenged order provided that "All notices of hearing and proposed orders shall be prepared by the plaintiff's attorney, unless otherwise directed by the hearing officer." *Id.* When the defendant's lawyer attempted to schedule a motion for hearing, the hearing officer's assistant directed the attorney to contact plaintiff's counsel, who would schedule the hearing. On review of the order, this Court granted petitioner's writ of certiorari, quashing the administrative order insofar as it deprived defendants of access to the courts unless the plaintiff's attorney prepared a notice of hearing. *Id.* As the Court explained, "by generally allowing only the plaintiff's attorney to notice matters for hearing, thereby precluding the defendant from noticing a matter for hearing, the defendant is *effectively deprived* of access to the courts unless the plaintiff's attorney prepares a notice for hearing." *Id.* (emphasis added).

The mass foreclosure docket similarly operates to effectively deprive Ms. Merrigan of equal access to the courts. This deprivation is effected primarily through the docket sounding system. Docket sounding orders provide that only motions for summary judgment (and motions to continue) will be entertained at docket sounding hearings, but that "[n]o other motions will be heard." *See* 1/11/11 Merrigan Docket Sounding Order (App. 7). This facially neutral restriction has drastically uneven effects, since the vast majority of summary judgment motions in foreclosure cases are filed by plaintiffs. Homeowners, on the other hand, cannot schedule motions they wish to pursue – including motions to compel and motions to dismiss – at docket soundings. The docket sounding therefore creates a significant asymmetry: the parties are forced to appear at recurring hearings where plaintiffs may win final judgment, while defendants are forced to set their motions through a secondary set of procedures. The result, in some instances, is that the scheduling framework allows plaintiffs to prevail before homeowners have even had a chance to be heard. Rozier Aff. ¶¶ 5-9 (App. 94-95); Allen Aff. ¶ 18 (App. 48). As in *Hatcher*, this scheduling system gives plaintiffs a systematic advantage, and the resulting asymmetry deprives homeowners of equal access to courts.

Conclusion

For the reasons stated above, Petitioner respectfully requests an extraordinary writ to ensure that her foreclosure case is heard in a constitutionally adequate forum. Petitioner further requests that this Court issue an order to show cause why the petition should not be granted; order Respondents to reply to this petition; and set a briefing schedule for a response and reply. Finally, Petitioner requests that this Court order any other relief it deems necessary and appropriate.

Respectfully submitted,



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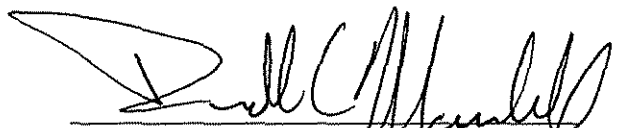
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this petition was furnished to those parties and counsel listed on the attached Service List by Federal Express, this 6th day of April, 2011.



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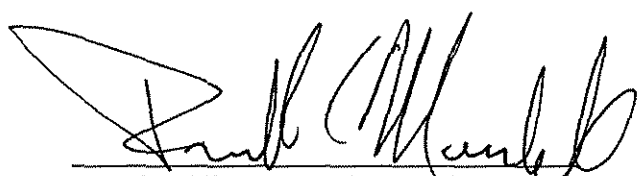
CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this petition complies with the font requirements of rule 9.100(l) of the Florida Rules of Appellate Procedure.



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