IN THE SUPREME COURT OF OHIO

BANK OF AMERICA, NATIONAL ASSOCIATION,	:	**Case No. 2013-0304**
Appellant,	:	**On Appeal from the Medina County Court of Appeals, Ninth Appellate District**
v.	:	
GEORGE M. KUCHTA, et al.	:	**Court of Appeals Case No. 12CA0025-M**
Appellees.	:	

BRIEF OF AMICI CURIAE ADVOCATES FOR BASIC LEGAL EQUALITY, INC., COMMUNITY LEGAL AID SERVICES, INC., LEGAL AID OF WESTERN OHIO, INC., LEGAL AID SOCIETY OF CLEVELAND, LEGAL AID SOCIETY OF COLUMBUS, LEGAL AID SOCIETY OF SOUTHWEST OHIO, LLC, PRO SENIORS, SOUTHEASTERN OHIO LEGAL SERVICES, AND THE OHIO POVERTY LAW CENTER IN SUPPORT OF APPELLEES GEORGE AND BRIDGET KUCHTA

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STATEMENT OF INTEREST OF AMICI CURIAE

All of Ohio's civil legal services programs[1] join in submitting this brief urging this Court to answer the certified conflict questions in the affirmative. Amici have been on the forefront of the foreclosure crisis, coordinating litigation and non-litigation efforts to help Ohio's low- and

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[1] Advocates for Basic Legal Equality, Inc., is a non-profit civil legal service provider with the mission of providing high quality legal assistance to low-income persons in thirty-two counties in northwest and west central Ohio.

Community Legal Aid Services, Inc., serves eight counties in northeast Ohio. Its mission is to protect the rights of the poor and better their condition. Community Legal Aid Services represents low-income individuals in a variety of cases, including consumer and housing issues.

Legal Aid of Western Ohio, Inc., is a non-profit regional law firm that provides high quality legal assistance in civil matters to help eligible low-income individuals and groups in western Ohio achieve self-reliance, equal justice, and economic opportunity. LAWO's service area includes thirty-two counties of northwest and west central Ohio.

The Legal Aid Society of Cleveland is the law firm for low-income families in northeast Ohio. Its mission is to secure justice and resolve fundamental problems for those who are low income and vulnerable by providing high quality legal services and working for systemic solutions that empower those it serves.

The Legal Aid Society of Columbus is similarly committed to assisting low-income persons and seniors with legal problems in a variety of cases, including housing, consumer, public benefits, domestic relations, as well as basic life necessities, in a six county area of central Ohio.

The Legal Aid Society of Southwest Ohio, LLC, an affiliate of the Legal Aid Society of Greater Cincinnati, provides a broad range of civil legal services to low-income persons in southwest Ohio.

Pro Seniors is a non-profit civil legal service provider with the mission of providing legal assistance to seniors in Southwestern Ohio, as well as legal advice to any senior statewide.

Southeastern Ohio Legal Services is an LSC-funded legal services program whose mission is to act as general counsel to a client community residing throughout thirty rural counties in southeast Ohio and, as such, provide the highest quality of legal services to its clients toward the objective of enabling poor people to assert their rights and interests.

The Ohio Poverty Law Center, a non-profit limited liability corporation, provides assistance and consulting to the Ohio legal services community through project management, policy advocacy, litigation support, training, specialty assistance and consulting, task forces, publications and other activities.

moderate-income citizens retain homeownership. Amici are long-standing partners in Save the Dream Ohio, the statewide foreclosure intervention initiative, and have more recently partnered with the Ohio Attorney General in Moving Ohio Forward to provide assistance and representation to families struggling with foreclosure and the effects of foreclosure on children and family stability. Since Amici became Save the Dream partners in 2008, the programs have provided direct representation to over 17,000 Ohio homeowners. Amici and their volunteer attorney partners have participated in over 2,372 court supervised foreclosure mediations.

Unfortunately, Amici are all too aware of the finite resources available to provide legal help and foreclosure assistance to all the homeowners struggling with foreclosure. While the legal aid community has been able to assist over 17,000 homeowners since April 2008, there have been over 11,000 more homeowners who contacted legal aid for help but, because of limited resources, did not receive the assistance they sought. Although foreclosure filings have slowly declined from the peak of 89,061 new filings in 2009 to 70,469 in 2012, these filings are still unacceptably high. Ohio homeowners, and Ohio courts, will continue to struggle with record numbers of foreclosures, and the fallout from the foreclosure crisis, for years to come.

Because the legal aid community has been providing direct representation to homeowners, working in neighborhoods, and collaborating with community and housing counseling organizations to connect low-income Ohioans with the resources and assistance necessary to retain homeownership, Amici are well situated to provide the Court with information about the legal and social dynamics of homeowners facing foreclosure.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

Amici adopt by reference the statement of case and statement of facts of Appellees George and Bridget Kuchta.

ARGUMENT

I. Question Presented

This case comes before the Court on a certified conflict between the Ninth and Tenth Districts on this question: "When a defendant fails to appeal from a trial court's judgment in a foreclosure action, can a lack of standing be raised as part of a motion for relief from judgment?"

II. Introduction

Ohio, like much of the nation, has experienced a foreclosure boom over the past decade. Foreclosure filings more than quintupled between 1995 and 2009. Supreme Court of Ohio, *2009 Ohio Courts Statistical Summary*, 53 (2010). By that time, it had become apparent that banks were sometimes suing and foreclosing on notes and mortgages they did not own. *See, e.g., Wells Fargo Bank, N.A. v. Byrd*, 178 Ohio App.3d 285, 2008-Ohio-4603, 897 N.E.2d 722, ¶ 23 (1st Dist.). This Court addressed that abuse in *Fed. Home Loan Mtge. Corp. v. Schwartzwald,* establishing unequivocally that standing is a constitutionally-mandated jurisdictional requirement, that a plaintiff suing to foreclose without having an interest in the note or mortgage does not have standing, and that plaintiffs cannot cure that jurisdictional defect with post-filing corrective measures. 134 Ohio St.3d 13, 2012-Ohio-5017, 979 N.E.2d 1214, ¶ 22, 28, 39.

The issue now before this Court is whether a defendant waives that jurisdictional defect by failing to recognize or pursue it until after the appeal period has expired on an adverse judgment based on a claim the plaintiff was not entitled to bring in the first place.

Although the abusive practice addressed by *Schwartzwald* has generally been regarded as widespread, there has been no flood of post-*Schwartzwald* cases seeking to avoid or set aside foreclosure judgments. However, several cases have reached the courts of appeals, and the district courts have not been consistent in their reading and application of this Court's holding.

In each of the two conflict cases, homeowners were unrepresented in foreclosure cases until after judgment had been granted to the plaintiffs and the time for appeal had passed. *PNC Bank, Natl. Assn. v. Botts*, 10th Dist. 12AP-256, 2012-Ohio-5383, ¶ 4-5; *Bank of Am. v. Kuchta*, 9th Dist. No. 12CA0025-M, 2012-Ohio-5562, ¶ 4-7. In both cases, the plaintiffs lacked standing as defined by *Schwartzwald* because they acquired their interests in the note and mortgage instruments only after they had sued to foreclose. *Botts* at ¶ 12; *Kuchta* at ¶ 12, 15. In *Kuchta*, the homeowners filed a pro se answer that questioned plaintiff's standing, but did not file anything in the court case until moving three months after judgment to stay the sale and set aside the judgment. *Id.* at ¶ 4-7. The Ninth District reversed the trial court's denial of the homeowners' 60(B) motion, and remanded for a decision applying this Court's holding in *Schwartzwald. Id.* at ¶ 15. In *Botts*, the homeowner defendants did not appear in the foreclosure case until two months after default judgment, when they moved to set aside the judgment, and stay the sheriff's sale. *Botts* at ¶ 5. The Tenth District affirmed the trial court's denial of the motion, holding that lack of standing could not be challenged by either a post-judgment motion to dismiss or a motion to set aside the judgment. *Id.* at ¶ 19, 23. The Ninth District correctly applied *Schwartzwald.*

Schwartzwald left no doubt that a foreclosing plaintiff with no interest in the note or mortgage lacks standing to invoke the court's subject matter jurisdiction. *Schwartzwald* at ¶ 42. As Amici will discuss, it is well established that a judgment granted by a court that lacked jurisdiction to hear the case is void. Bank of America would now have this Court abandon that logical and sound maxim and, instead, hold that failure to appeal a void judgment is in effect legal alchemy, transforming a void judgment into its opposite—an unassailable judgment.

Far from being revolutionary, *Schwartzwald* was a limited, conventional decision that does nothing more than hold foreclosing plaintiffs to the same standards as all other litigants. *Id.* at ¶ 41. The decision does not alter, let alone expand, the bases to attack judgments entered without jurisdiction.

In a motion for reconsideration before this Court, the appellant in *Schwartzwald* urged the Court to limit its holding to future cases, predicting that retroactive application would result in chaos, putting in jeopardy of collateral attack not only some 320,000 foreclosure judgments, but also "every judgment ever rendered in this state." Memorandum in Support of Motion for Reconsideration, Case Nos. 2011-1201 and 2011-1362 dated Nov. 26, 2012, at 8. As it turns out, however, the sky has not fallen and ex-homeowners have not flooded the court with motions for relief. Cases like *Kuchta* and *Botts* have been the exception.

This Court should not be concerned that answering the certified question in the affirmative will encourage some challenges to the validity of foreclosure judgments. Whether pursuing a 60(B) motion or a common law motion, the litigant seeking to set aside a void judgment has the burden of establishing a factual basis for the claim. Civ.R. 7(B); Civ.R. 11. The Ohio legislature contemplated situations in which foreclosure judgments may be reversed and sales declared invalid, and included provisions in the Revised Code to address these issues. *See, e.g.*, R.C. 2329.45, 2329.46, 2329.47, and 2329.48. With these procedures in place, this Court's affirmative answer to the certified question will confirm the meaning of *Schwartzwald* so that attorneys can rely on it in representing clients and judges can rely on it when issuing decisions. As with every other decision this Court issues, those judges will be in the best position to apply the Court's decision to the facts of individual cases.

III. This Court's case law answers the certified question in the affirmative.

A. The lack of standing is a jurisdictional defect that cannot be waived and can be raised at any time.

Bank of America's argument that the Kuchtas and similarly situated homeowners are barred by res judicata from raising the issue of standing post-judgment is without merit. Bank of America would have this Court hold that a defendant waives any claim that the plaintiff lacks standing by not pleading so in the answer and not responding to a motion for summary judgment.

Article IV, Section 4(B) of the Ohio Constitution confers upon courts of common pleas "original jurisdiction over all justiciable matters" and, as this Court made clear in *Schwartzwald*, there is no justiciable matter when a plaintiff lacks standing to sue. *Schwartzwald* at ¶ 20-21. That holding conformed to the tenet of the United States Supreme Court: "Standing to sue is part of the common understanding of what it takes to make a justiciable case." *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 102, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998). Without standing, a case is not justiciable, and courts of common pleas have no authority to decide a case on its merits if the plaintiff has not presented it with a justiciable matter.

Schwartzwald makes clear that "[s]tanding is required to invoke the jurisdiction of the common pleas court" and "a common pleas court cannot substitute a real party in interest [to cure a lack of standing] for another party if no party with standing has invoked its jurisdiction in the first instance." *Schwartzwald* at ¶ 38. In other words, a case is not justiciable if the plaintiff has no standing at the time of filing. *Id.* at ¶ 41. If a lack of standing at filing cannot be cured by a later act of plaintiff, it follows that no action or inaction by the defendant can change that. Allowing a defendant to waive jurisdictional requirements would, in effect, confer upon that defendant the power to determine the court's jurisdiction, a power that is rightly limited to the Constitution.

"A fundamental element of procedural fairness is that a tribunal presuming to adjudicate a controversy has legal authority to do so. One aspect of the question of authority is whether the tribunal is empowered to adjudicate the type of controversy that is presented. This is conventionally referred to * * * as the question of subject matter jurisdiction." 2 Restatement of the Law, Judgments, Section 1, Comment a (1982). In *Morrison v. Steiner*, this Court held that "Subject-matter jurisdiction defines the competency of a court to render a valid judgment in a particular action." 32 Ohio St.2d 86, 87, 290 N.E.2d 841 (1972).

In deciding *Schwartzwald*, this Court expressly rejected the non-binding plurality decision in *State ex rel. Jones v. Suster* that had limited "subject matter jurisdiction" to the authority of the court to hear a specific class of cases (e.g. foreclosures) and, instead, recognized standing to sue as within the scope of subject matter jurisdiction. *Schwartzwald* at ¶ 29, discussing *State ex rel. Jones v. Suster*, 84 Ohio St.3d 70, 701 N.E.2d 1002 (1998). This Court has long held that subject-matter jurisdiction "can never be waived and may be challenged at any time." *Pratts v. Hurley*, 102 Ohio St.3d 81, 2004-Ohio-1980, 806 N.E.2d 992, ¶ 11; *see also New Boston Coke Corp. v. Tyler*, 32 Ohio St.3d 216, 218, 513 N.E.2d 302 (1987); *Cross v. Gerstenslager Co.*, 63 Ohio App.3d 827, 830, 580 N.E.2d 466 (9th Dist.1989); *Fed. Home Loan Mtge. Corp. v. Rufo*, 11th Dist. No. 2012-A-0011, 2012-Ohio-5930, ¶ 15. This Court has also recognized that res judicata does not apply to judgments by a court that did not have "authority to act." *State v. Simpkins*, 117 Ohio St.3d 420, 426, 2008-Ohio-1197, 884 N.E.2d 568, ¶ 30, 41; *see also United States v. United Technologies Corp.*, 626 F.3d 313, 323 (6th Cir.2010) (stating "prior litigation precludes a claim only if the initial tribunal had jurisdiction over the claim"), citing *Rawe v. Liberty Mut. Fire Ins. Co.*, 462 F.3d 521, 529-30 (6th Cir.2006).

B. If a court lacks jurisdiction, then the judgment is void, and a void judgment is a nullity.

This Court has consistently and repeatedly held that when a court lacks jurisdiction, any judgment issued by that court is void. *Barger's Lessee v. Jackson*, 9 Ohio 163, 164-165 (1839); *Lincoln Tavern, Inc. v. Snader*, 165 Ohio St. 61, 64, 133 N.E.2d 606 (1956); *Westmoreland v. Valley Homes Mut. Hous. Corp.*, 42 Ohio St.2d 291, 294, 328 N.E.2d 406 (1975); *Patton v. Diemer*, 35 Ohio St.3d 68, 71, 518 N.E.2d 941 (1988). "'The effect of determining that a judgment is void is well established. It is as though such proceedings had never occurred; the judgment is a mere nullity and the parties are in the same position as if there had been no judgment.'" *State v. Bloomer*, 122 Ohio St.3d 200, 2009-Ohio-2462, 909 N.E.2d 1254, ¶ 27, quoting *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, 868 N.E.2d 961, ¶ 12, quoting *Romito v. Maxwell*, 10 Ohio St.2d 266, 267-268, 227 N.E.2d 223 (1967). "As one Texas appellate court so aptly stated concerning a void judgment, 'it is good nowhere and bad everywhere.'" *Cincinnati School. Dist. Bd. of Edn. v. Hamilton Cty. Bd. of Revision*, 87 Ohio St.3d 363, 367, 2000-Ohio-452, 721 N.E.2d 40, quoting *Dews v. Floyd*, 413 S.W.2d 800, 804 (Tex.Civ.App.1967).

C. The power to vacate void judgments comes from a court's inherent power, not procedural rules. Therefore, procedural defects are not fatal.

The authority to vacate a void judgment arises from an inherent power of the court, not from Civ.R. 60(B). *Patton* at 70; *Cincinnati Sch. Dist. Bd. of Edn.* at 368; *see also Greenpoint Mtge. Funding, Inc. v. Kutina*, 9th Dist. No. 24275, 2011-Ohio-2241, ¶ 8. Indeed, as the Staff Note to Civ.R. 60(B) states, "It should be noted that Rule 60(B) * * * does not provide for vacation of a void judgment. It is obvious that if a court did not have jurisdiction that a judgment rendered when jurisdiction was not present is void." 1970 Staff Note, Civ.R. 60.

Similarly, it should not matter when or how a defendant raises the issue of the trial court's lack of subject matter jurisdiction. As the Staff Note to 60(B) states, "Any court has inherent power to vacate a void judgment without the vacation being subject to a time limitation. The vacation of a void judgment might be brought in the form of a motion or perhaps in the form of a procedural device such as a declaratory judgment action." *Id.* In fact, Ohio courts have accepted motions filed under Civ.R. 60(B) as motions to vacate. For example, in *CompuServ, Inc. v. Trionfo*, the Tenth District held that a motion to challenge a judgment as void did not need to follow the format or time limitations contained in Civ.R. 60(B). 91 Ohio App.3d 157, 161, 631 N.E.2d 1120 (10th Dist.1993). Appellate courts have also looked to Civ.R. 12(H)(3), which states, "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." In analyzing Civ.R. 12(H)(3), the Eleventh District held that "an objection to a court's subject matter jurisdiction can be made at any time because this issue cannot be waived." *Harrison v. Registrar, Bur. of Motor Vehicles*, 11th Dist. No. 2002-T-0095, 2003-Ohio-2546, ¶ 24.

In summary, the time or precise manner in which a defendant raises the lack of standing – and thus the lack of jurisdiction – is inconsequential. Because a judgment rendered without jurisdiction is void when issued, it can be challenged in any form and at any time. These fundamental, long established principles compel this Court to answer "Yes" to the certified question.

IV. Public policy favors the homeowner's ability to raise the lack of jurisdiction at any time.

While Ohio case law provides ample support for a homeowner's ability to raise the lack of jurisdiction at any time, public policy provides an equally strong foundation. In this case, Bank of America would have the Court overlook the fact that the judgment was void because the court had no jurisdiction to award it. Protecting a void judgment would harm the integrity of the court system and reverse decades of well-established case law.

A. A homeowner's ability to raise the lack of jurisdiction at any time preserves public confidence in the integrity of the court system.

This Court has long recognized the need for public confidence in the integrity and fidelity of state courts. *Piqua Bank v. Knoup*, 6 Ohio St. 342, 365 (1856) (Bartley, J., dissenting); *State ex rel. Pratt v. Weygandt*, 164 Ohio St. 463, 471, 132 N.E.2d 191 (1956); *State ex rel. Dayton Newspapers, Inc. v. Phillips*, 46 Ohio St.2d 457, 471, 351 N.E.2d 127 (1976). Maintaining integrity and fidelity means that the same rules and procedures apply to all litigants, regardless of power, status, or money. Holding all litigants to well-established legal precedent preserves that confidence. As this Court affirmed in *Schwartzwald*, "[s]tanding to sue is part of the common understanding of what it takes to make a justiciable case." *Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017, 979 N.E.2d 1214, ¶ 21, quoting *Steel Co.*, 23 U.S. at 102, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998). Standing to prosecute a claim is a threshold question, one that "embodies general concerns about how courts should function in a democratic system of government." *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 469, 715 N.E.2d 1062 (1999).

Common pleas courts have borne the brunt of the flood of foreclosure cases that have overwhelmed Ohio's court system since the collapse of the housing market. In the struggle to

keep dockets under control and cases moving with limited resources, local courts have relied on plaintiffs' statements and affidavits that, on closer inspection, do not always hold up to basic standards of reliable evidence, or meet the requirements of the Civil Rules and the Uniform Commercial Code. Because, more often than not, homeowners failed to answer or otherwise appear, demands to stabilize the marketplace, and demands of the banks to cut losses meant foreclosures went forward on default judgments. Nevertheless,

> A homeowner who defaults on a mortgage doesn't have a right to stay in the home if the proper mortgagee forecloses, but any old stranger cannot take the law into his own hands and kick a family out of its home. That right is reserved solely for the proven mortgagee.
>
> Irrespective of whether a debt is owed, there are rules about who can collect that debt and how. The rules of real estate transfers and foreclosures have some of the oldest pedigrees of any laws. They are the product of centuries of common law wisdom, balancing equities between borrowers and lenders, ensuring procedural fairness and protecting against fraud.
>
> The most basic rule of real estate law is that only the mortgagee may foreclosure. Evidence and process in foreclosures are not mere technicalities nor are they just symbols of rule of law. They are a paid-for part of the bargain between banks and homeowners. Mortgages in states with judicial foreclosures cost more than mortgages in states without judicial oversight of the foreclosure process. This means that homeowners in judicial foreclosure states are buying procedural protection along with their homes, and the banks are being compensated for it with higher interest rates. Banks and homeowners bargained for [this] legal process[.] [The] rule of law, which is the bedrock upon which markets * * * function, demands that the deal be honored.
>
> Ultimately the "No Harm, No Foul," argument is a claim that rule of law should yield to banks' convenience. To argue that problems in the foreclosure process are irrelevant because the homeowner owes someone a debt is to declare that the banks are above the law.

(Citation omitted.) Adam J. Levitin, *Robo-Signing, Chain of Title, Loss Mitigation, and Other Issues in Mortgage Servicing*, Hearing before the Subcommittee on Hous. and Community Opportunity of the House Fin. Serv. Commt., 111th Cong., Nov. 18, 2010,

http://financialservices.house.gov/media/file/hearings/111/levitin111810.pdf at 25 (accessed August 16, 2013).

Other courts in Ohio have followed this line of thinking by stressing the importance of following procedural rules in foreclosure cases to preserve the integrity of the court. *See, e.g., In re Foreclosures*, N.D.Ohio Nos. 1:07CV2282, 07CV2532, 07CV2560, 07CV2602, 07CV2631, 07CV2638, 07CV2681, 07CV2695, 07CV2920, 07CV2930, 07CV2949, 07CV2950, 07CV3000, 07CV3029, 2007 WL 3232430 (Oct. 31, 2007) (stating that "the jurisdictional integrity" of the federal courts is "priceless" and cannot be overcome by the "condescending mindset and quasi-monopolistic system where financial institutions have traditionally controlled, and still control, the foreclosure process"). Of utmost importance in preserving judicial integrity is ensuring that a court hears a case only when the plaintiff has standing and the court has jurisdiction. *See Fortner v. Thomas*, 22 Ohio St.2d 13, 14, 257 N.E.2d 371 (1970).

Likewise, public policy favors, and the law prefers, that cases be decided on their merits. *Peterson v. Teodosio*, 34 Ohio St.2d 161, 175, 297 N.E.2d 113 (1973). "The Civil Rules are designed and should be construed as an aid and not an impediment in the search for truth." *Normali v. Cleveland Ass'n of Life Underwriters,* 39 Ohio App.2d 25, 30, 315 N.E.2d 482 (8th Dist.1974), citing Civ.R. 1(B). "[P]leading is not 'a game of skill in which one misstep by counsel may be decisive to the outcome[;] rather the purpose of pleading is to facilitate a proper decision on the merits.'" *Hardesty v. Cabotage,* 1 Ohio St.3d 114, 117, 438 N.E.2d 431 (1982), quoting *Foman v. Davis*, 371 U.S. 178, 181-182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962). A defendant's ability to raise the lack of jurisdiction at any time is especially important in foreclosure cases because homeowners – like Mr. and Mrs. Kuchta – are often without legal representation, leaving them to attempt to raise these issues pro se. As the Northern District of

Ohio said, "Typically, the homeowner who finds himself/herself in financial straits, fails to make the required mortgage payments and faces a foreclosure suit, is not interested in testing state or federal jurisdictional requirements, either pro se or through counsel. * * * [U]nchallenged by underfinanced opponents, the [financial] institutions worry less about jurisdictional requirements and more about maximizing returns." *In re Foreclosures* at *3, fn.3.

Bank of America has carefully constructed an argument that, at first blush, seems appealing. However, applying the principles of res judicata and finality of judgments to void judgments as Bank of America suggests would effectively close the courthouse doors to any homeowners who did not have the skill or knowledge to play the pleading game. *See, e.g., Hardesty* at 117 (rejecting the notion that pleading is a game of skill). If this Court adopts these flawed notions, the fundamental rights of homeowners who did not get the legal process they bargained for will be seriously undermined. As this Court reported, nearly forty percent of all foreclosure cases in 2012 ended with a default judgment. Supreme Court of Ohio, *2012 Ohio Courts Statistical Summary*, 45 (2013). The number of default judgments was more than double the number of dismissals. *Id.* Amici's anecdotal experience suggests that the vast majority of the remaining cases are only nominally contested by homeowners who file pro se answers but, due to lack of ability and resources, make no meaningful response to the plaintiff's motion for summary judgment. It may not be until after default judgment that the jurisdictional defects have become apparent and a homeowner is able to retain an attorney and produce a meaningful challenge to a foreclosing plaintiff's lack of jurisdiction.

The policy implications of a ruling in favor of Bank of America are troublesome. Such a ruling would signal to foreclosing plaintiffs – and all other plaintiffs in civil cases – that a trial court's lack of jurisdiction is irrelevant if a defendant cannot afford an attorney or is unable to

formulate a correct pro se response that challenges the plaintiff's standing. Such a ruling would mean that as long as a plaintiff obtained a default judgment and the thirty-day window for appeal passed, it is scot-free. Such a ruling would reward lenders for playing the "pleading game," rewarding form over substance, obstructing, rather than facilitating, a decision on the merits. Such a ruling would render meaningless Article IV, Section 4(B) of the Ohio Constitution, the Ohio Rules of Civil Procedure, and this Court's jurisprudence in nearly forty percent of the 70,000 foreclosures filed each year in Ohio.

By definition, our justice system is only fair and impartial when the same rules and standards are applied in the same manner to all litigants in all cases. Especially in the foreclosure context, where an obvious imbalance of power and resources exists between financial institutions and homeowners, a court's equal application of the rules to all parties is essential to ensure that the process is just. There is nothing unique about foreclosure cases that warrants creating an exception to the well-established fundamental rule that judgments entered by a court lacking jurisdiction are void ab initio. Otherwise, an unfair double standard may be created in which borrowers are held to strict accountability to follow the Civil Rules but banks are allowed a relaxed pleading and jurisdictional standard.

B. Homeowners and courts are harmed by foreclosing plaintiffs' disregard of the law.

The actions of lenders and servicers do not exist in a vacuum. Homeowners lose when servicers rush to foreclosure instead of first acquiring the interest necessary to have standing. Thompson, *Foreclosing Modifications: How Servicer Incentives Discourage Modifications*, 86 Wash.L.Rev. 755, 814 (2011). For low-income individuals, homes represent the most significant – and possibly only – major investment. Lost in this rush to foreclosure is the consideration that foreclosure is not the only possible consequence of a homeowner defaulting on a loan.

When foreclosing plaintiffs – in this case, Bank of America or, in *Schwartzwald*, Freddie Mac – file a foreclosure before acquiring the necessary interest to obtain standing, they are forgoing opportunities to work with homeowners to prevent the foreclosure. *See* 24 C.F.R. 203.501 and 203.606(a) (stating that, for mortgage loans insured by HUD, servicers must evaluate the homeowner for specific loss mitigation options before filing a foreclosure action); Fannie Mae Announcement 09-05, 16 (April 21, 2009) (stating that servicers must not refer a loan to foreclosure "until the borrower has been evaluated for [HAMP] and, if eligible, an offer to participate * * * has been made"); Freddie Mac, *Bulletin 2009-10*, Chapter C65: Home Affordable Modification Program, C65-20 (Apr. 21, 2009) (stating, "Servicers * * * must not refer a mortgage to foreclosure while Freddie Mac is evaluating a borrower [for loss mitigation]."); Making Home Affordable Program, *Handbook for Servicers of Non-GSE Mortgages v. 4.2*, § 3.1.1 (stating that a servicer cannot refer a loan not owned by Fannie Mae or Freddie Mac to foreclosure until it determines that the homeowner is not eligible for assistance under the Home Affordable Modification Program).[2]

The manner in which foreclosures – especially foreclosures that are filed too early – are prosecuted also harms homeowners. The lending industry business model incentivizes the rush to foreclosure. Servicers are not compensated in most situations in which a default is resolved before a foreclosure lawsuit is filed. Levitin & Twomey, *Mortgage Servicing*, 28 Yale J. on Reg. 1, 46 (2011). However, once the foreclosure has been filed, the servicer can then assess its fees and other costs against the homeowner (if there is a loan modification) or the investor (if the foreclosure sale occurs). *Id.* at 46-47. Thus, servicers have an incentive to increase costs "as the inflated costs are profit margin for them." *Id.* at 70-71. One way to do so is by filing a

[2] Together, the loans covered by these four provisions amount to more than ninety percent of the market share of outstanding single-family residential mortgage loans.

foreclosure lawsuit as soon as possible or, as with Bank of America in this case and Freddie Mac in *Schwartzwald*, too soon.

As a result, both the judicial system, which must handle cases filed when foreclosing plaintiffs do not have standing, and homeowners, who ultimately must foot the bill for the plaintiffs' transgressions, are harmed by the plaintiffs' rush to file foreclosure lawsuits. "Faced with the cost of properly litigating a foreclosure, some banks might well have opted instead to negotiate with homeowners to modify the underlying loans." Eduardo Moisés Peñalver, *Lawyer Up the Prey,* Commonweal, http://www.commonwealmagazine.org/lawyer-prey (accessed July 16, 2013); *see also* Thompson, 86 Wash.L.Rev. at 777-778. Accepting Bank of America's position would keep the costs of improper foreclosures unfairly and squarely on the courts and homeowners, instead of requiring the banks to accept the true systemic and societal costs of the epidemic of sloppy record keeping and disregard for the rule of law.

C. The court system should not relieve foreclosing plaintiffs of the obligation to follow fundamental rules that go to the heart of the courts' exercise of power.

Bank of America asks this Court to ignore longstanding case law and, instead, permit it to escape from a situation it created for itself. That would be imprudent. As the Second District noted when evaluating whether a foreclosing plaintiff was entitled to enforce a promissory note:

> Financial institutions, noted for insisting on their customers' compliance with numerous ritualistic formalities, are not sympathetic petitioners in urging relaxation of an elementary business practice. It is a tenet of commercial law that "[h]oldership and the potential for becoming holders in due course should only be accorded to transferees that observe the historic protocol."

HSBC Bank USA v. Thompson, 2d Dist. No. 23761, 2010-Ohio-4158, ¶ 74, quoting *Adams v. Madison Realty & Development, Inc.*, 853 F.2d 163, 169 (3d Cir.1988); *see also Bank of Am., N.A. v. Miller*, 194 Ohio App.3d 307, 2011-Ohio-1403, 956 N.E.2d 319, ¶ 32 (2d Dist.) (quoting same passage from *Adams* in context of faulty documents submitted by Bank of America in

support of a motion for summary judgment); *Wachovia Bank of Delaware, N.A. v. Jackson*, 5th Dist. No. 2010-CA-00291, 2011-Ohio-3202, at ¶ 58 (stating, "This court is aware of the realities of the secondary mortgage market but we must apply the Rules of Civil Procedure and Evidence set forth by the Ohio Supreme Court."); *U.S. Bank Nat. Assn. v. Ibanez*, 458 Mass. 637, 655, 941 N.E.2d 40 (2011) (stating, in issuing a ruling similar to *Schwartzwald*, "The legal principles and requirements we set forth are well established in our case law and our statutes. All that has changed is the plaintiffs' apparent failure to abide by those principles and requirements in the rush to sell mortgage-backed securities.").

The reasoning used by those courts applies here. Bank of America has asked this Court and the courts below to excuse the fact that it filed and prosecuted a foreclosure action when, pursuant to this Court's longstanding case law, it had not first invoked the jurisdiction of the court. Bank of America has not provided any reasoning for it to be excused from the jurisdictional requirements all other litigants in this state must follow other than claiming it would be inconvenient for it to follow this Court's jurisprudence. Inconvenience of a party that rushed to foreclosure instead of following longstanding Ohio case law is not a reason to discard the integrity created by courts' adherence to the jurisdictional limits of judicial power.

Bank of America's argument is the equivalent of saying that adherence to established process is irrelevant because the homeowner owes someone a debt – even if that "someone" is not the foreclosing plaintiff. If this Court were to adopt this argument, it would declare that banks are above the law. Levitin, *Robo-Signing, Chain of Title, Loss Mitigation, and Other Issues in Mortgage Servicing* at 25. More insidiously, Bank of America's arguments play into the myth that all homeowners challenging foreclosure judgments are deadbeats seeking to cash in on legal technicalities and will bring a new flood of litigation into the courts.

As a practical matter, former homeowners are unlikely to challenge defects in the foreclosure sales in great numbers because they simply do not have the resources to do so. Necessary resources include the money to hire attorneys, the money to become current on the mortgage loan if they are in default, a sufficiently large pool of knowledgeable attorneys to bring the cases, and the desire and energy to fight for a home in which the former homeowner no longer lives. Renuart, *Property Title Trouble in Non-Judicial Foreclosure States: The Ibanez Time Bomb?*, 4 Wm. & Mary Bus. L. Rev. 111, 174 (2013). Halting a foreclosure or reversing a defective sale does not equate to a free house for the homeowner because there is still, presumably, a valid note and mortgage encumbering the property. *Id.* at 177-178.

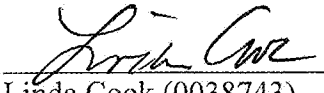
Finally, as mentioned above, any challenge to a judgment will be limited by the Ohio Rules of Civil Procedure. Civ.R. 7(B) requires that any movant "state with particularity the grounds" for the motion, and Civ.R. 11 requires the attorney or pro se party to certify that, to the best of his or her knowledge, there is good ground to support the motion. For decades, these longstanding parameters on potentially frivolous motions have provided appropriate limitations for litigants and courts, and there is no reason they will not continue to do so.

The case law shows that Bank of America's judgment is void, and Bank of America's attempts to wiggle out of the legal situation it created are misguided. This Court should follow the lead of the courts in *Thompson*, *Adams*, *Miller*, *Jackson*, *Ibanez*, and dozens of other courts by holding Bank of America to the same standard it holds its customers and to the same standard courts hold all other litigants in this state.

V. Conclusion

For the reasons set forth above, Amici urge this Court to answer "Yes" to the question before the Court. Permitting homeowners to raise lack of standing as part of a motion for relief from judgment, if they have failed to appeal from a trial court's foreclosure judgment, confirms well-established legal precedent, applies the same rules of procedure and fundamental fairness to all parties, and preserves the integrity of the courts.

Respectfully submitted,



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CERTIFICATE OF SERVICE

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