No. 92649

In the Missouri Supreme Court

Wells Fargo Bank, N.A.,

Plaintiff/Respondent,

vs.

William and Susan Smith,

Defendants/Appellants.

Appeal from Cause #10JE-AC01817-01,

From the 23rd Judicial Circuit Court - Jefferson County, Missouri
Division No. 12 - The Honorable Stephen Bouchard

Appellants' Brief

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Jurisdictional Statement

This case contests the validity of § 534.210 RSMo, a Missouri statute. In this brief, Appellants argue that § 534.210 is unenforceable pursuant to the Missouri Constitution and the United States Constitution. This Court therefore has jurisdiction of this case pursuant to article V, section 3 of the Missouri Constitution.

Respondent Wells Fargo Bank brought an unlawful detainer action against Appellants Susan and William Smith, asserting that Respondent was the rightful owner of their house and that the Smiths were in possession of it.[1] The Appellant homeowners answered the lawsuit, raising affirmative defenses and counterclaims, asserting that § 534.210 is unconstitutional, for the reasons described throughout this brief.[2] They asserted other defenses as well.

Wells Fargo argued that challenges to the validity of the foreclosure and the title were not allowed in an unlawful detainer. The Smiths fully briefed this issue, asserting that to deny homeowners the right to a full hearing before displacing them from their homes violates both the Missouri and United States Constitutions.[3] Specifically, they argued that creating a special class of defendants who do not have the right to raise

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[1] LF 10.

[2] LF 13.

[3] LF 477-588.

affirmative defenses or counterclaims or even to require that the plaintiff prove the elements of their own claim (such as title) violated the Equal Protection clause and was a denial of due process.[4]

On May 17, 2012, the trial court granted summary judgment for Wells Fargo, holding that the Smiths unlawfully detained their home and that Wells Fargo was the rightful owner.[5]

In this brief, Appellants argue that Missouri's unlawful detainer statutes (in particular, § 534.210) are unconstitutional and thus unenforceable in that they denied Appellants due process and equal protection, that they violated Appellant's right to contest standing and real party in interest, and that they are otherwise inconsistent with the Missouri Rules of Civil Procedure.

[4] *Id.*

[5] LF 659.

Statement of Facts

Respondent Wells Fargo Bank brought an unlawful detainer action against Appellants Susan and William Smith, asserting that Respondent was the rightful owner of their house and that the Smiths were in possession of it "wrongfully" and "unlawfully."[6] Wells Fargo sought "double its lost rents and profits" against the Smiths. The Smiths filed an answer that included affirmative defenses and counterclaims, asserting that

[6] LF 10. This case proceeded twice in Jefferson County originally, and then later as a trial de novo. The trial de novo was based on the original pleadings (LF 10, 13), though motions for summary judgment were fully briefed for the original proceeding and separately for the trial de novo (LF 33, 428). Copies of the Petition and Answer have been provided in this Appendix (A15, A18).

This case was appealed to this Court following the original judgment in favor of Wells Fargo (SC92141). Appellants had filed for a trial de novo a few minutes before filing that Notice of Appeal. Based on the ruling in this Court in *Fannie Mae v My Quyang Truong*, 361 S.W.3d 400 (Mo. 2012), these Appellants dismissed their appeal before this Court (from the original proceedings), proceeded to judgment in the trial de novo, and then re-filed their Notice of Appeal to this Court.

§ 534.210 is unconstitutional for the reasons they have described throughout this brief.[7] The defenses they raised in the trial court included each of the following:

- Plaintiff lacked standing;
- Plaintiff was not the real party in interest;
- Plaintiff lacked the original promissory note;
- Plaintiff could not establish chain of title;
- No proper chain of title existed;
- Plaintiff did not have the power to authorize the trustee's sale of the property;
- The trustee was not empowered to sell the property;
- The foreclosure was illegal;
- Plaintiff cannot show that the Smiths owed their bank money at the time of the foreclosure;
- The foreclosure was void because the note was split from the deed of trust;
- Plaintiff had unclean hands;
- Plaintiff is not a bona fide purchaser, and

[7] LF 13-24

- Defendants were victims of fraud.[8]

As part of their Answer, the Smiths also brought counterclaims for negligence (that the Plaintiff should have known that Defendant's payments were not being properly posted), unjust enrichment, for declaratory judgment, for breach of contract and for full accounting.[9]

Wells Fargo moved to strike Defendants' defenses and counterclaims[10] and moved for summary judgment.[11] In its Motion for Summary Judgment, Wells Fargo argued that challenges to the validity of the foreclosure and the title were not allowed in an unlawful detainer.[12] Wells Fargo then made arguments to the trial court based on § 534.210 RSMo:

> "[t]he merits of the title shall in nowise be inquired into, on any complaint" in unlawful detainer. Mo. Rev. Stat. § 534.210 (2000). Missouri courts have clearly upheld this provision and have stated that "issues relating to title or matters of equity [can] not be interposed as a defense or as a counterclaim" in unlawful detainer

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[8] LF 14, *et seq.*

[9] LF 23.

[10] LF 25.

[11] LF 428.

[12] LF 431 *ff.*

proceedings. . . *[citations]* . . . Additionally, Missouri courts have held that a "claim for wrongful foreclosure" cannot be asserted in an unlawful detainer action.[13]

The Smiths had denied, among other things, that Wells Fargo had legitimate title to the property. The Smiths also provided their own statement of uncontroverted material facts in an attempt to defeat Wells Fargo's suit for unlawful detainer, and the Smith's Statement included each of the following assertions:

1. The "Trustee" listed in the Smith's Deed of Trust is "First American Title."[14]
2. In the Deed of Trust, the "Lender" is designated to be Argent Mortgage Company.[15]
3. The term "Lender" is not further defined in the Deed of Trust.[16]
4. Pursuant to the terms of the Deed of Trust, only the Lender may appoint a successor Trustee[17]:
5. A document called "Appointment of Successor- Trustee" was filed with the Recorder of Deeds on October 20, 2005. It claims that *"Wells Fargo Bank, N.A. ,*

[13] LF 434

[14] LF 484.

[15] *Id.*

[16] *Id.*

[17] LF 485

As Trustee For the Benefit of the Certificate Holders, Park Place Securities, Inc., Asset-Backed Pass-Through Certificates Series 2005-WDCW2, 400 Countrywide Way, Simi Valley, CA 93065" (Hereinafter, "Wells Fargo") was the "legal holder and owner of the said Note secured by said Deed of Trust" and that Wells Fargo was removing Nate Reisetter as Trustee and appointing Millsap and Singer as "Successor Trustee."[18]

6. This "Appointment of Successor – Trustee" does not purport to change the trustee status of "First American Title," indicated to be the trustee in the deed of trust.
7. The "Appointment of Successor – Trustee" was purported executed by "Christine Armendariz," purportedly the "Vice President of Countrywide Home Loans," purportedly serving as an agent of the purported Wells Fargo trust that has purportedly brought this lawsuit.[19]
8. There is no evidence that "First American Title" was ever replaced as Trustee.[20]
9. There is no indication that Argent ever appointed any successor Trustee.[21]

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[18] *Id.*

[19] *Id.*

[20] LF 486.

[21] *Id.*

10. There is no evidence that a representative of Countrywide Home Loans had any power to serve as an agent of a purported trust that purportedly had some sort of ownership interest in the Smith home loan.[22]
11. There is no evidence that Wells Fargo was the "Lender" pursuant to the Deed of Trust.[23]
12. There is no evidence that the actual "Lender" (Argent) ever appointed Millsap & Singer to be a successor Trustee.[24]
13. The Lender was, and will always be Argent.[25]
14. There is no evidence in this case that Wells Fargo ever served as a "Lender."[26]
15. The alleged promissory note is not before the trial Court.[27]
16. There is no evidence of whether the note was assigned at all to any entity.[28]
17. The Deed of Trust provides that, in appropriate circumstances:

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[22] *Id.*

[23] *Id.*

[24] LF 486.

[25] *Id.*

[26] *Id.*

[27] LF 486.

[28] *Id.*

a. "The "Lender" shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument.";

b. "The Lender or Trustee shall mail copies of a notice of sale . . . to Borrower . . . "

c. "Trustee shall give notice of sale by public advertisement . . . "

d. "Trustee, without demand on Borrower, shall sell the Property at public auction to the highest bidder for cash at the time and place and under the terms designated in the notice of sale . . ."

e. Trustee shall deliver to the purchaser Trustee's deed conveying the Property with any covenant or warranty expressed or implied."[29]

18. Pursuant to the Deed of Trust, only the Trustee was empowered to carry out the foreclosure of the property owned by the Susan and Bill Smith.[30]

19. There is no evidence that the Lender gave notice or mailed copies of the notice.[31]

20. Neither "First American Title" nor "Nate Reisetter" carried out the foreclosure of the property owned by the Susan and Bill Smith.[32]

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[29] LF 487.

[30] *Id.*

[31] *Id.*

[32] *Id.*

21. Only a properly appointed trustee may carry out a foreclosure.[33]

22. In this case, the law firm of Millsap & Singer[34]:

    a. Mailed notice of the sale to the Borrower(s);

    b. Gave notice of sale by public advertisement; and

    c. Sold the Property.

23. Throughout the foreclosure and unlawful detainer, the law firm of Millsap & Singer improperly and simultaneously served as trustee for the Smiths and as attorneys for Wells Fargo, and thus has an irreconcilable conflict of interest.[35]

Wells Fargo moved to strike the Smith's submission of uncontroverted facts.[36] The The Smiths asserted that to displace them from their home while denying them the right to a full hearing, including counterclaims and defenses, violated both the Missouri and United States Constitutions.[37] The Smiths also argued to the trial court that § 534.210 created a special class of unlawful detainer defendants who did not have the right to raise affirmative defenses or counterclaims, and it also created a special class of plaintiffs who

[33] *Id.*

[34] *Id.*

[35] LF 487, 500.

[36] LF 589.

[37] LF 488, *et seq.*

had no obligation to prove the elements of their own claim (such as legitimate title). The Smiths argued that § 534.210 thus violated the Equal Protection clause and denied them due process. [38]

The trial court granted summary judgment for Wells Fargo (on May 17, 2012).[39] This Judgment also requires the Smiths to pay damages for remaining in their home during the pendency of the unlawful detainer case.

[38] LF 492.

[39] LF 659.

Points Relied On

Point I

[Constitutional Argument – Due Process]

The trial court erred in granting Respondent's Summary Judgment Motion in reliance on § 534.210 RSMo[40] because this statute violates the Due Process Clause of the United States and Missouri Constitutions in that:

A. The Open Courts Provisions of the Missouri Constitution and of federal law constitute a fundamental right safeguarded by substantive due process, and Section 534.210's irrebuttable presumption that title is proven merely by filing an unlawful detainer invades these rights without being narrowly tailored to serve any compelling state interest; and

B. Appellant has been deprived of property and liberty interests protected under the due process clauses, and the unlawful detainer hearing did not qualify as a "meaningful hearing" as required by procedural due process.

Principle Authority:

- *Kilmer v. Mun*, 17 S.W.3d 545, 548 (Mo. banc 2000).
- *Connecticut v. Doehr*, 501 U.S. 1, 12 (1991).
- *Vlandis v. Kline*, 412 U.S. 441, 452 (1973).
- *Goldberg v. Kelly*, 397 U.S. 254 (1970).

[40] All statutory references are to RSMo 2000 as supplemented unless otherwise referenced.

Point II

[Constitutional Argument – Equal Protection]

The trial court erred in granting Respondent's Summary Judgment Motion in reliance of 534.210 RSMo because 534.210 RSMo violates the Equal Protection Clause of the United States and Missouri Constitutions in that:

A. Section 534.210 RSMo creates two special classes of citizens in violation of the equal protection clauses:

a. A class of Plaintiffs who are able to conclusively establish title by merely filing a petition; and

b. A class of Defendants who, upon being sued, are unable to challenge Plaintiff's case, raise affirmative defenses or allege counterclaims.

B. The creation of these two classes of citizens is not necessary to accomplish a compelling state interest, or in the alternative, the creation of these two classes of citizens is not rationally related to any legitimate government interest.

Principle Authority:

- *Jamison v. State, Dept. of Soc. Services, Div. of Family Services*, 218 S.W.3d 399, 405 (Mo. 2007).
- *Doe v. Phillips*, 194 S.W.3d 833, 845 (Mo. 2006).
- *In re: Marriage of Kohring*, 999 S.W.2d 228, 232 (Mo. 1999).
- *Mahoney v. Doerhoff Surgical Services, Inc.*, 807 S.W.2d 503, 513 (Mo. 1991).

Point III

[The "No Counterclaim" Rule]

The trial court erred in granting Respondent's Motion for Summary Judgment, holding as part of that ruling that Appellant's counterclaim was void in reliance of § 534.210 RSMo, because the trial court's interpretation of § 534.210 RSMo stands in direct contravention to Missouri law relating to bringing counterclaims, in that:

A. **A detailed historical analysis of § 534.210 RSMo demonstrates that the "no counterclaim rule" conflicts with Missouri case law and is otherwise inequitable, and**

B. **Missouri's procedural rules, including rules pertaining to one's ability to bring counterclaims, prevail over contradictory statutes, and Missouri Rules 55.32(a) and 55.08 are procedural in nature and therefore trump conflicting aspects of § 534.210 RSMo.**

Principle Authority:

- Robert Sweere, *The No Counterclaim Rule in Unlawful Detainer Proceedings*, 68 J. MO. B. 162 (2012).
- § 517.021 RSMo.
- § 517.031.2 RSMo.
- *Reichert v. Lynch*, 651 S.W.2d 141, 143 (Mo. 1983).

Point IV

[Standing and Real Party in Interest]

The trial court erred in granting Respondent's Summary Judgment Motion, and as part of that ruling preventing Appellants from contesting standing and real party in interest in reliance of § 534.210 RSMo, because § 534.210 RSMo stands in direct contravention to the rules and common law of Missouri, in that standing and real party in interest are fundamental threshold issues in every Missouri case.

Principle Authority:

- *Hill v. Morrison*, 436 S.W.2d 255, 257 (Mo. Ct. App. 1969).
- Robert Sweere, *The No Counterclaim Rule in Unlawful Detainer Proceedings*, 68 J. MO. B. 162 (2012).
- *Mecklenburg Farm v. Anheuser-Busch, Inc.*, 250 F.R.D. 414, 417 (E.D. Mo. 2008).
- *Estate of Lemaster v. Hackley*, 750 S.W.2d 692 (Mo. Ct. App. 1988).

Argument

Argument of Point I: Due Process

The trial court erred in granting Respondent's Summary Judgment Motion in reliance on § 534.210 RSMo because this statute violates the Due Process Clause of the United States and Missouri Constitutions in that:

A. The Open Courts Provisions of the Missouri Constitution and of federal law constitute a fundamental right safeguarded by substantive due process, and Section 534.210's irrebuttable presumption that title is proven merely by filing an unlawful detainer invades these rights without being narrowly tailored to serve any compelling state interest;

B. Appellant has been deprived of property and liberty interests protected under the due process clauses, and the unlawful detainer hearing did not qualify as a "meaningful hearing" as required by procedural due process.

Standard of Review

The standard of review for constitutional challenges to a statute is *de novo.* *Hodges v. City of St. Louis*, 217 S.W.3d 278, 279 (Mo. 2007). When the constitutionality of a statute is attacked, the statute at issue should be presumed to be constitutional unless it is clearly and undoubtedly in contravention of the Missouri constitution. *Blaske v. Smith & Entzeroth, Inc.*, 821 S.W.2d 822, 828-29 (Mo. 1991); *Winston v. Reorganized School District R–2, Lawrence County*, 636 S.W.2d 324, 327 (Mo.1982). In questioning

the constitutionality of a statute, the burden is upon the party claiming the statute is unconstitutional. *Blaske v. Smith & Entzeroth, Inc.*, 821 S.W.2d 822, 828-29 (Mo. 1991); *Schnorbus v. Director of Revenue,* 790 S.W.2d 241, 243 (Mo.1990). "Nonetheless, if a statute conflicts with a constitutional provision or provisions, this Court must hold the statute invalid." *Jamison v. State, Dept. of Soc. Services, Div. of Family Services*, 218 S.W.3d 399, 405 (Mo. 2007). *quoting, Ky. Dep't of Corrections v. Thompson*, 490 U.S. 454, 460 (1989)(internal quotations omitted).

Synopsis of Argument I

Section 534.210 RSMo of Missouri's unlawful detainer statutes severely harms many Missouri citizens, including Appellants. It keeps Missouri homeowners from accessing Missouri courts and from having meaningful court hearings prior to the permanent loss of their property and liberty interests. The statute does this by creating an irrebuttable presumption on behalf of unlawful detainer plaintiffs that stifles Missouri homeowners' ability to present their evidence to a court. It prevents them from having a fair chance to defend themselves.

Section 534.210 violates due process because it prohibits unlawful detainer defendants from:

1) putting the plaintiff to its proof,

2) raising affirmative defenses, and

3) raising counterclaims.

Because § 534.210 muzzles homeowners during unlawful detainer proceedings, they have no alternative against the plaintiff except to file separate actions after they have already lost their homes. This is not a real solution because even if they file separate suits, they must take on the burden of proof and they don't have any chance to stop the unlawful detainer case unless they can somehow find substantial amounts of money to fund a bond. These desperate homeowners suffer irreversible harm because their homes are always purportedly owned by a new buyer during unlawful detainer proceedings, and these homeowners also face garnishments for the double-rent damages awardable pursuant to yet another harsh unlawful detainer statute: § 534.330 RSMo.

Section § 534.210 violates the Due Process Clause of the United States and Missouri Constitutions, because there is no compelling state interest or rational basis for loss of these property and liberty interests, especially since there is no meaningful hearing before the deprivation. Section 534.210 creates an irrebuttable presumption such that the plaintiff has functionally won its case the moment it is filed. Based on these serious deficiencies of § 534.210, this unlawful detainer statute must be struck down as unconstitutional.

A. Overview of Substantive Due Process

Section 534.210 RSMo[41] provides that:

The merits of the title shall in nowise be inquired into, on any complaint which shall be exhibited by virtue of the provisions of this chapter.

Section 534.210 dictates that the parties may not "inquire into" title, but this strange prohibition, which compels relevant evidence, does not further any compelling state interest. §534.210 interferes with the right of homeowners to challenge a basic (and often highly contestable) element of unlawful detainer cases filed against them, often by heavily-lawyered sophisticated banks. Section 534.210 unfairly ties the hands of homeowners in open court, in situations where they are highly vulnerable to fraudulent claims relating to the chain of title. Is the particular unlawful detainer plaintiff who should be before the court *actually* before the court? Because of the strictures of § 534.210, courts refuse to consider this critically compelling issue. Instead of knowing the truth about the status of the title, § 534.210 forces trial courts to make assumptions based on no evidence at all, resulting in gross violations of substantive due process. That is what happened in this case.

"[S]ubstantive due process rights are created only by the Constitution." *Doe v.*

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[41] This appeal is directed specifically at the deficiencies of § 534.210, but also concerns any other section of Chapter 534 consistent with the written (and unconstitutional) directive of § 534.210 prohibiting inquiry into title.

Phillips, 194 S.W.3d 833, 842-43 (Mo. 2006), *quoting Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 229 (1985). In order to be considered a "fundamental" right safeguarded by substantive due process, that right or liberty must be one that is "objectively, deeply rooted in the nation's history and tradition and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Doe v. Phillips*, 194 S.W.3d 833, 842-43 (Mo. 2006), *quoting State ex rel. Nixon v. Powell*, 167 S.W.3d 702, 705 (Mo. 2005).

1. The Open Courts Provision of the Missouri Constitution Is a Fundamental Right Safeguarded by Substantive Due Process.

The open courts provisions of the Missouri Constitution and the 14th Amendment to the U.S. Constitution give rise to a fundamental right invoking the protection of substantive due process.

Missouri's "Open Courts" provision is found in the Bill of Rights of the Missouri Constitution:

> That the courts of justice shall be open to every person, and certain remedy afforded for every injury to person, property, or character, and that right and justice shall be administered without sale, denial, or delay.

MO. CONST. art. I, § 14. This provision is a constitutional right that is "objectively, deeply rooted" in our nation's and Missouri's history. This Court recognized the fundamental protections granted by the Open Courts provision in *Kilmer v. Mun*, 17

S.W.3d 545, 548 (Mo. banc 2000). The Court referred to the Magna Carta, concluding that the mandate of the Open Court's provision is obligatory, writing:

> An "open courts" provision has been in our state constitution since the first Missouri Constitution of 1820. Its origins are in *Magna Carta*, a document that evolved as the basic charter of English liberty after its original version was signed and sealed by King John of England in 1215. The original language of *Magna Carta* – "To none will we sell, to none will we deny, delay, right or justice" – reflected the concern that the courts of the era had fallen into disrepute for selling writs. In Lord Coke's commentary on *Magna Carta,* the text quoted here underwent a "radical change" and was available to American constitutional drafters in a form close to the version now in the Missouri Constitution: "[E]very Subject of this Realm, for injury done to him in [goods, land or person], ... may take his remedy by the course of the Law, and have justice and right for the injury done him, freely without sale, fully without any denial, and speedily without delay." It may be argued that the original *Magna Carta* language was directed only to courts. However, in the 19th century, when our first constitution was adopted, "the evil was renegade legislatures that had, for example, deprived injured creditors of their judicial remedies against debtors by passing legislation impairing existing contractual obligations." In Missouri, barriers to a "certain remedy" for an

"injury" can be erected by the courts themselves, or by the legislature. An examination both of the history and the language of our constitution supports the conclusion that article I, section 14, "applies against all impediments to fair judicial process, be they legislative or judicial in origin." Missouri's version of the "open courts" provision has been strengthened twice since its adoption in our state's first constitution of 1820. Missouri's first constitution put the "open courts" provision in our Bill of Rights, which provided: "That courts of justice *ought to be* open to every person, and certain remedy afforded for every injury to person, property, or character; and that right and justice *ought to be* administered without sale, denial, or delay...." Mo. Const. art. XIII, sec. 7 (1820) (emphasis added.) In the constitution of 1875, the provision reads: "That courts of justice *shall be* open to every person, and certain remedy afforded for every injury to person, property or character; and that right and justice *should be* administered without sale, or delay." Mo. Const. art. II, sec. 10 (1875) (emphasis added). This version was added by amendment in the Constitutional Convention, but without elaboration as to any change in meaning. *See* debates, Missouri Constitutional Convention 1875, vol. II, 226–27. In the constitution of 1945, the word "should" was changed to "shall." *See* o. Const. art. I, sec. 14 (1945) quoted above. One might question whether these changes reflect a change in

> meaning or merely reflect contemporary linguistic conventions. But when the words "ought" and "should" are replaced with the word "shall" it is difficult to escape the conclusion that our drafters changed a passage that could originally have been taken to be mere exhortation to a constitutional provision that is mandatory in tone and substance.

Id. (citations omitted.)[42] This extensive and justifiably reverent review of the history of the open courts provision demonstrates that free and open access to the courts is integral to liberty and justice. And as this Court has previously concluded, it is also a *constitutional* right, and is thus protected by substantive due process.

2. Section 534.010 RSMo is Not Narrowly Tailored to Serve a Compelling State Interest.

Substantive due process principles require abrogation of a substantive rule of law if it intrudes on liberty interests that "are so fundamental that a State may not interfere with it, even with adequate procedural due process, unless the infringement is narrowly tailored to serve a compelling state interest." *Doe v. Phillips*, 194 S.W.3d 833, 842 (Mo. 2006) (internal quotations omitted), *citing Doe v. Miller*, 405 F.3d 700, 709 (8th

[42] Appellant is aware that in *Kilmer v. Mun*, this Court analyzed the open courts provision and established an "arbitrary and unreasonable" test. However, that case was not predicated on a substantial due process claim and therefore the analysis for the provision in this instance is necessarily different.

Cir.2005), *quoting, Reno v. Flores*, 507 U.S. 292, 302 (1993); U.S. CONST. amend. XIV. In such cases, the laws are invalid "regardless of the fairness of the procedures used to implement them." *Daniels v. Williams*, 474 U.S. 327, 331 (1986).

Under this standard, § 534.210 must be narrowly tailored to serve a compelling state interest in order to survive judicial scrutiny. However, there is nothing narrow about the limitations and ramifications of this unlawful detainer statute. Despite the concrete language of the open courts provision, the unlawful detainer statute has effectively

1) closed the courts of justice to unlawful detainer defendants by barring inquiry into title (the only issue that matters in an unlawful detainer case),

2) limited remedies for unlawful detainer defendants by prohibiting affirmative defenses and counterclaims to be filed, and

3) delayed an unlawful detainer defendant's day in court and right to justice by forcing the defendant to file a separate action to address his or her rights and claims.

Such results are not indicative of a narrow rule; in fact, such results are indicative a broad sweeping statute that negatively and seriously affects thousands upon thousands of property owners in Missouri.

There is no compelling interest triggered by this statute. Does the statute generate revenue? No. Does the statute protect the public? No. Does the statute create housing stability? No. In fact, proceeding with eviction after a wrongful foreclosure before there is any determination who actually owns the property hurts everyone. There is no doubt that trespassers should not be allowed to remain. But it is equally clear that rushing to

remove people from homes in a fast and loose foreclosure environment is imprudent, unfair and often dangerous. What is at stake is usually family home ownership. Roughshod and reckless laws should not ever trump the American Dream.

"States and cities suffer on multiple fronts from widespread foreclosures: they experience massive drop-offs in their property tax base; significant increased cost for police, counseling, social services, and emergency services; and increased unemployment rates." Karen Tokarz, et al., *Foreclosure Mediation Programs: A Crucial and Effective Response by States, Cities, and Courts to the Foreclosure Crisis*, THE ST. LOUIS BAR JOURNAL, Vol. 59, No. 1 Summer 2012, at 28, 30. In fact, "a 1% increase in foreclosures…increases burglaries by 10.1%… ." *Id.* Foreclosures cost millions of dollars each year, and by 2012, "foreclosures will cause Missouri property values to decline by approximately $5.9 billion." *Id.* Given the result of foreclosures and the unlawful detainers that follow, and given that anyone except Rip Van Winkle knows that there are horrendous problems with the mortgage industry: with record keeping, with loan serving, with securitization, and with the training and retaining of competent employees, it seems counter intuitive to allow a statute to expedite such devastation across Missouri.

Missouri has no legitimate interest in compounding these problems by prohibiting courts from doing what they do best – getting to the root of issues by examining evidence. Yet this is precisely what the unlawful detainer statute does. It requires courts to assume that title is established even if no proof is introduced at all, and it prohibits courts from considering evidence that would show that title does not exist and the unlawful detainer is unjust and unfounded. Surely, the Show Me State has no interest in

turning courts into rubber stamps, turning homeowners into mutes, and turning big banks into super-plaintiffs who win before they even step foot in court.

B. Overview of Procedural Due Process

The due process clauses of the United States and Missouri Constitutions prohibit the taking of life, liberty or property without due process of law. U.S. CONST. amend. XIV, sec. 1; MO. CONST. art. I, sec. 10.[43] Courts hold these protections sacred because "[t]he foundation on which our economic system is built is the constitutional protection of property rights against government abuse and overreaching. Central to this foundation is procedural due process—the constitutional requirement that an individual has the right to notice and the right to be heard... ." *In re Foreclosures of Liens for Delinquent Land Taxes by Action in rem Collector of Revenue*, 334 S.W.3d 444**,** 451 (Mo. 2011). *See also Conseco Finance Servicing Corp. v. Missouri Department of Revenue*, 195 S.W.3d 410, 415 (Mo. 2006). Procedural due process requires that parties are entitled to be heard "at a meaningful time and in a meaningful manner." *Jamison v. State, Dept. of Soc. Services, Div. of Family Services*, 218 S.W.3d 399, 405 (Mo. 2007), *quoting Mathews v. Eldridge,* 424 U.S. 319, 333 (1976)(internal quotations omitted), with the ability to present "every possible defense." *Lindsey v. Normet,* 405 U.S. 56, 67 (1972).

[43] Courts in Missouri have treated the state and federal due process clauses as equivalent, since Missouri constitutional provisions cannot provide less protection that its federal counterpart. *See, e.g., State v. Rushing*, 935 S.W.2d 30, 34 (Mo. banc 1996); *Belton v. Bd. of Police Comm'rs,* 708 S.W.2d 131, 135 (Mo. banc 1986).

In determining what process is due in a particular case, the Court must conduct a two part inquiry. "The first inquiry in every due process challenge is whether the plaintiff has been deprived of a protected interest in 'property' or 'liberty.' Only after finding the deprivation of a protected interest do we look to see if the State's procedures comport with due process." *America Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 59 (1999).

As is discussed below, appellant has been deprived of property and liberty interests. Therefore, a fair and meaningful hearing is required under the due process clause; the unlawful detainer statute prohibits a fair and meaningful hearing and therefore, fails the protections of procedural due process.

1. Appellant Has Been Deprived of Property and Liberty Interests Recognized Under the Due Process Clause.

"Liberty and property are broad and majestic terms. They are among the (g)reat (constitutional) concepts . . . purposely left to gather meaning from experience. . . . (T)hey relate to the whole domain of social and economic fact, and the statesmen who founded this Nation knew too well that only a stagnant society remains unchanged." *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 571 (1972), (internal quotations omitted). Because of this belief, "the Court has fully and finally rejected the wooden distinction between 'rights' and 'privileges' that once seemed to govern the applicability of procedural due process rights." *Id.* Thus, the determination of what interests qualify under the due process clause is an amorphous concept that changes as society changes, and therefore must be openly evaluated in the context in which it is presented.

a. Appellant Has Been Deprived of a Property Interest.

Property interests are not a creature of the Constitution. Rather, "[i]t is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined." *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972). It is also "clear that the property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money." *Id.* at 571-572. The denial of the basic necessities of life (such as food, housing, employment, and medical care) all requires a substantive hearing prior to deprivation. *See, e.g., Goldberg v. Kelly*, 397 U.S. 254 (1970). The U.S. Supreme Court has held that even "temporary or impartial impairments to property rights…are sufficient to merit due process protections." *Connecticut v. Doehr*, 501 U.S. 1, 12 (1991).

Here, defendants are faced with grave loss. The failure to consider and allow evidence from the defendant homeowners enables the plaintiff to evict people who should not be evicted. For the defendants, the loss is not temporary or partial; the loss of a home is real and definite. Once gone, this basic necessity cannot be returned. It is a complete deprivation, with lasting consequences that cannot be fixed, even if the homeowners prevail in an affirmative claim they might bring later on.

Appellant anticipates that Respondent will claim that these homeowners were not the legal owners. However, this begs the question: Is the Plaintiff the rightful owner? Every rational person would agree that whenever the new owner is the rightful owner, plaintiff bank should get possession of the house. However, it is also true that whenever the original homeowner is the rightful owner (in other words, whenever the plaintiff bank

does not have valid title to the house) the homeowner should not be evicted. To the extent that they prohibit inquiry into title, courts across Missouri are haphazardly expelling homeowners from their homes, including those homeowners who could demonstrate superior title. Just as firing a teacher without any hearing is a violation of due process, so too is throwing a citizen out of his or her home before it is ever determined whether or not any other party can demonstrate proper title to that home.

b. Appellant Has Been Deprived of a Liberty Interest.

"In a Constitution for a free people, there can be no doubt that the meaning of liberty must be broad indeed." *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 571 (1972) (internal citations omitted). Because of this principle, Courts have stated that a liberty interest is implicated "where a person's good name, reputation, honor or integrity is at stake because of governmental action." *State ex rel. Donelon v. Div. of Employment Sec.*, 971 S.W.2d 869, 874 (Mo. Ct. App. 1998). *citing Barnes v. City of Lawson,* 820 S.W.2d 598, 601 (Mo.Ct.App.1991) *citing Board of Regents v. Roth,* 408 U.S. 564, 573 (1972). Accusations of dishonesty or immorality are protectable liberty interests. *Roth*, 408 U.S. at 573. Additionally, courts have held that published information about a person's reputation constitutes a protectable liberty interest. *Jamison v. State, Dept. of Soc. Services, Div. of Family Services*, 218 S.W.3d 399, 409 (Mo. 2007). Therefore, one of the purposes of a hearing "is to provide the person an opportunity to clear his name." *Board of Regents v. Roth,* 408 U.S. 564, 592 n.12 (1972).

In practice, "[f]or state action resulting in stigmatization to rise to the level of a constitutionally protected interest, a person must also show that the state action affects

some other tangible liberty or property interest." *Jamison v. State, Dept. of Soc. Services, Div. of Family Services*, 218 S.W.3d 399, 406 (Mo. 2007). This standard for such state action is the "stigma plus" test. *Id.*

Section 534.210 RSMo impugns the reputation, honor and integrity of every defendant sued under its provisions. The plaintiff's pleadings accuse the defendant of being dishonest and thus immoral. For example, the Petition in this case states that the defendant has "unlawfully and wrongfully" possessed the property, and that the defendant has "willfully" maintained possession of the premises after being served notice to leave. (L.F. 10-12). These pleadings cast the defendant in a negative light as a matter of public record, indicating that the defendant is squatter and a thief who refuses to leave the property.

In addition to this public stigmatization, the defendant homeowners in these cases also have financial and real property interests affected. The unlawful detainer statute prevents defendants from adequately representing their interests in unlawful detainer suits; as a result, defendants are stripped of their property and a monetary judgment is entered against them. These actions create a permanent and public blight on defendants' records. Given that the defendants in unlawful detainer actions suffer both stigmatization and lost property, the stigmatization-plus test is met in this matter.

Since both property and liberty interests have been affected by § 534.210, analysis of the unlawful detainer proceedings must occur to see if it comports with procedural due process.

2. Since Appellant Has Been Deprived of Property and Liberty Interests, Appellant is Entitled to a Meaningful Hearing, which Can Not Occur under Missouri's Unlawful Detainer Statute.

The United States Supreme Court has consistently held "that some form of hearing is required before an individual is finally deprived of a [protectable] interest" because "the right to be heard before being condemned to suffer grievous loss of any kind ... is a principle basic to our society." *Mathews v. Eldridge*, 424 U.S. 319, 33 (1976)(internal quotation omitted). If a hearing is required, there are important procedures that must occur. For example, "[d]ue process requires an impartial decision maker." *Jamison v. State, Dept. of Soc. Services, Div. of Family Services*, 218 S.W.3d 399, 413 (Mo. 2007) *See also Connecticut v. Doehr*, 501 U.S. 1,13 (1991). The timing of the hearing is important as well. "The Court is guided by the well-settled principle that if the State feasibly can provide a hearing before deprivation of a protected interest, it generally must do so in order to minimize 'substantively unfair or mistaken deprivations.'" *Jamison v. State, Dept. of Soc. Services, Div. of Family Services*, 218 S.W.3d 399, 408 (Mo. 2007), *citing Zinermon v. Burch*, 494 U.S. 113, 132 (1990); *Cleveland Bd. of Edu. v. Loudermill*, 470 U.S. 532, 542 (1985)("root requirement" of due process is "that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest") (emphasis in original); *Fuentes v. Shevin*, 407 U.S. 67, 80, 81 (1972) ("If the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented"). *See also Div. of Family Serv. v. Cade*, 939 S.W.2d 546, 554 (Mo.App. W.D.1997) (due process requires pre-

deprivation notice that provides "enough information to be able to defend the allegations and to present conflicting evidence in a timely manner").

A. The Unlawful Detainer Statute Prevents a Meaningful Opportunity to Be Heard.

Here, the unlawful detainer statute does not provide for an "opportunity to be heard at a meaningful time and in a meaningful manner." In fact, the unlawful detainer statute prevents unlawful detainer defendants from being heard. While the risk of deprivation is grave (as set forth in the previous section), there are no procedures in an unlawful detainer suit that afford a defendant a fair hearing. The defendant is prohibited from presenting evidence to clear his or her name. Defendants are prohibited from presenting evidence to rebut the allegations that they are "unlawfully and wrongfully" in possession of the premises. Defendants are prohibited from presenting evidence that the underlying foreclosure sale was wrongful, thus rendering the sale void. No evidence is allowed that would counter plaintiff's assertion that it allegedly has a legal right to the property. Not only is evidence barred, but the defendant is not allowed to assert any counter claims or affirmative defenses relating to the circumstances leading up to the unlawful detainer action, even where the action wouldn't have happened in the absence of prior wrongful or illegal conduct by the mortgage company or loan servicer. In the unlawful detainer setting, defendants must remain silent while watching a bank kick them out of their houses. Clearly, such silence not only demonstrates that the defendant is not "heard" but it also shows that there is nothing "meaningful" occurring in the unlawful detainer case. This statutory gag order turns what should be trials into rituals where

judges are forced to rubber-stamp the paperwork regardless of the facts instead of resolving legal issues.

Because § 534.210 effectively nullifies the judge's role, there is no impartial decision maker presiding over these proceedings. Plaintiffs' evidence cannot be meaningfully weighed or evaluated because it cannot be contested. Essentially, the judge must rule for plaintiff despite any misgiving the judge may have in doing so.

The facts in this case highlight these problems. For example, in Plaintiff's motion for summary judgment,[44] Plaintiff provided a copy of the successor trustee's deed (L.F. 442) and the original deed of trust signed by defendants (L.F. 457). The trustee deed indicates that Millsap & Singer acted as the trustee at the sale. However, the original deed of trust states that "First American Title" was named the trustee (L.F. 459). The deed further states that only the lender is allowed to appoint successor trustees (L.F. 459, 470).

As part of its consolidated response to Plaintiff's motion for summary judgment, Defendant provided the trial court with the full title history (beginning at L.F. 519) indicating that in 2005, Wells Fargo named Millsap & Singer the successor trustee (L.F. 477, *et seq.*, L.F., 563). However, Wells Fargo was not the "Lender," nor is there any indication in the title history that the actual "Lender" ever appointed a successor trustee. Nonetheless, section 534.210 prohibited the trial judge from inquiring into this matter. Even more striking, there is a huge gap in this title history (again, the full title history

[44] This case was tried twice. These events each happened twice, both in the original trial and in the trial de novo. These citations are to the filings in the trial de novo.

begins at L.F. 519). First American Title was the original Lender (L.F., 545). There was no public assignment of either the mortgage or the note to Wells Fargo (See L.F., 545 – 563), yet Wells Fargo appears out of thin air to appoint Millsap and Singer as successor trustee.[45] There are other critical issues that relate to real party in interest and to standing. Defendants preserved each of these issues in their Answer (L.F. 13)[46] and throughout this suit, including in its consolidated response to Plaintiff's Motion for Summary Judgment. (L.F. 477).

The essential job a judge is supposed to undertake –judging – is prohibited under § 534.210. Serious title issues like these are therefore never considered. Aware of his limited ability and role in these cases because of the statute, Judge Dickhaner stated as

[45] Section 442.380 (Instruments to be recorded) provides as follows:

> Every instrument in writing that conveys any real estate, or whereby any real estate may be affected, in law or equity, proved or acknowledged and certified in the manner herein prescribed, shall be recorded in the office of the recorder of the county in which such real estate is situated.

[46] Again, this case was tried twice, and it was tried both times on the original Petition (LF 10; Appendix A15) and original Answer (LF 13; Appendix A18).

following during the argument of cross-motions for summary judgment in the original trial of this case[47]:

> I'm definitely going to take the case under advisement and I'll review those. And I presume, if you've got it all pled and briefed, that it has been adequately preserved for whatever--whatever round it goes to, if I choose to not declare the statutes of Missouri, that have been in effect a long time,

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[47] Judge Dickhaner expressed similar concerns in another unlawful detainer case recently before this Court :

> I certainly emphasize and understand the dilemma that somebody has that says what do you do in an unlawful detainer where you're not entitled to try title to land if you're the record owner of the title and some usurper is out there who's trying to evict you from property you really own. I . . . that's a real dilemma under the statute.
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> . . .
>
> I'm still struggling with the fact that I don't like the statute very much either. It doesn't seem fair to me fair that somebody can't come into court and say, especially in the economic climate that we have with loan proceedings – not suggesting Fannie Mae did anything wrong, but Lord knows there's been a slug of them
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> . . .

See the trial transcript of an appeal before this Court in *Fannie Mae v My Quyang Truong*, No. SC 91880.

> unconstitutional. But I understand and I did indicate to client--to counsel in chambers on other occasions when this case has come up, that I understand the problems inherent in the statute that says you can't defend the case on the basis that the party that's suing you-Mickey Mouse who claims he's got a deed on your house and he wants to evict you. But I'll take that issue--the constitutional issue as briefed then, Mr. Vieth . . . .[48]

Especially in substantial cases like this, due process also requires a pre-deprivation hearing. While the unlawful detainer action occurs before a family is evicted from their home, there is no way for these defendants to actually be heard. It would not matter when or where the unlawful detainer is filed because the defendant has no rights and abilities to challenge the plaintiff in any way.

Connecticut v. Doehr is analogous to the facts herein. In that case, the petitioner submitted an application for attachment of $75,000 on respondent's home, in addition to filing a civil action for assault and battery for which he was seeking damages. As proof, petitioner filed a five line affidavit indicating that respondent had attacked him and that there was probable cause that a judgment would be rendered in his favor. Connecticut law allowed this procedure.

Respondent had the ability to contest the very elements of the attachment;

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[48] Transcript from original trial of this case (before Judge Dickhaner). Tr. 10. This case was then re-tried on the original pleadings (trial de novo) before Judge Steven Bouchard (see LF, starting at page 427).

however, respondent filed suit in federal court alleging that the statute violated due process. The case proceeded to the U.S. Supreme Court, where the Court analyzed the state statute; specifically, "what process must be afforded by a state statute enabling an individual to enlist the aid of the State to deprive another of his or her property by means of the prejudgment attachment or similar procedure." *Connecticut v. Doehr*, 501 U.S. 1,9 (1991).

After recognizing the property interest, the U.S. Supreme Court proceeded to invalidate the statute finding that it violated due process. In doing so the Court noted that "[p]ermitting a court to authorize attachment merely because the plaintiff believes the defendant is liable, or because the plaintiff can make out a facially valid complaint, would permit the deprivation of the defendant's property when the claim would fail to convince a jury, when it rested on factual allegations…" *Id.* at 13. Additionally, the Court advised that "fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights.... [And n]o better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it." *Id*. at 14 *quoting Joint Anti–Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 170–172, (1951)(internal quotations omitted).

Here, the unlawful detainer action has similar procedures and characteristics as outlined in *Connecticut*. First, the plaintiff is enlisting the aid of the state in forcefully removing people from their homes. In doing so, plaintiff provides the court with skeletal proof that it has any right to the property, and as in *Connecticut*, since the plaintiff believes it is entitled to the property, it argues that such belief is enough proof to eject a

person from their home.

In contrast, *Connecticut* allowed defendants to rebut the evidence proffered by the plaintiff. Defendants were able to attack the attachment and the underlying claim that any money damages were owed. This is starkly different from what occurs in an unlawful detainer action. As explained above, defendants are only able to stand mute in Court. They cannot attack or disprove the allegations of the plaintiff. Despite the ability to rebut the plaintiff, the U.S. Supreme Court struck down the attachment statute as violative of due process. It seems logical based on the above analysis, that Section 534.210 violates due process as well.

B. The Unlawful Detainer Statute Creates an Irrebuttable Presumption that Runs Afoul of All Existing Supreme Court Precedent and Therefore Violates Due Process.

In addition to the general contours of procedural due process discussed above, a line of United States Supreme Court cases specifically addresses statues, regulations and other state actions that produce irrebuttable presumptions. By prohibiting any inquiry into title and thereby foreclosing the need for even the simplest proof, § 534.210 creates just such an irrebuttable presumption. Namely, it establishes an irrebuttable presumption that anyone who files an unlawful detainer and alleges ownership is conclusively deemed to have proven legal title. In trial courts across the state of Missouri, this presumption is deemed to arise pursuant to §534.210 in the absence of any evidence at all since any inquiry of any kind into title is prohibited.

Rebuttable presumptions that serve as a basis for depriving a party of property or liberty were extensively examined by the United States Supreme Court in the context of due process. In a series of cases sometimes referred to as the "irrebuttable presumption" cases, the Court struck down a string of irrebuttable presumptions because the Court concluded they deprived parties of due process – namely the right to challenge the presumption that operated to deprive them of their rights.

In each of these cases, an irrebuttable presumption operated so that that if one fact was proven, another more significant legal conclusion was conclusively established. For example, one state held that if it was proven that a father was not married to a mother when the child was born, the father was an unfit parent whose parental rights could be terminated. *Stanley v. Illinois*, 405 U.S. 645 (1972). In another case, if a female school teacher was proven to be five months pregnant, she was forced to take leave because it was conclusively proven that she was unable to teach effectively. *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 644 (1974). In still another case, all uninsured drivers were presumed liable for any accident in which they were involved. In short, irrebuttable presumptions operated as follows: If fact A is proven, then legal conclusion B is conclusively and irrebuttably established.

The Supreme Court established a vigorous, almost impossible to satisfy test for these presumptions, asserting that they will fail unless the presumptions are "necessarily or universally true." *Vlandis v. Kline*, 412 U.S. 441, 452 (1973). The Court soundly rejected the idea that efficiency justified such presumptions, holding that "the

Constitution recognizes higher values than speed and efficiency." *Stanley v. Illinois*, 405 U.S. 645, 656 (1972).

This line of cases began with *Bell v. Burson*, which although it did not enunciate the irrebuttable presumption test explicitly, in retrospect was clearly the first to identify it. *Bell v. Burson*, 402 U.S. 535, 539 (1971). The Georgia statute challenged in that case provided that should an uninsured motorist be involved in an accident causing damage, his license would be suspended pending final determination of liability. *Id.* at 536. The driver had no opportunity to prevent the suspension of his license by presenting evidence of his nonliability to a judicial or administrative tribunal. *Id.* The Court unanimously decided that the failure to grant a hearing deprived the uninsured motorist of due process of law since the legislature could not presume that all uninsured motorists were at fault. *Id* at 542-43.

The Court articulated its irrebuttable presumption analysis even more clearly in *Stanley v. Illinois.* Stanley was the father of several illegitimate children whose mother had died. 405 U.S. at 646. Under an Illinois statute a child could be declared a ward of the state if it had no fit parent. *Id.* at 650. An illegitimate father was irrebuttably presumed to be unfit, and therefore not a parent. *Id.* The state instituted proceedings seeking custody of Stanley's children without a determination of his unfitness. Stanley alleged that this application of the statute unconstitutionally discriminated against him. The Supreme Court noted that the Illinois statute violated the fourteenth amendment's due process clause. The Court reasoned that the statute established an irrebuttable presumption that illegitimate fathers are unfit. Noting that such fathers have parental

rights cognizable under the due process clause, the Court rejected the state's argument that illegitimate fathers are so frequently uninterested in the welfare of their children that the statutory provisions were reasonable. *Id.* at 657. Declaring that "**the Constitution recognizes higher values than speed and efficiency**," the Court held that regardless of the general accuracy of the presumption that illegitimate fathers are not suitable parents, Stanley was entitled to a hearing to determine his fitness. *Id.* at 656(emphasis added).

In *Vlandis v. Kline*, the Court declared unconstitutional a Connecticut statute which classified individuals as permanent nonresidents, for the purpose of determining tuition at a state university, on the basis of their past or present place of residence. *Vlandis v. Kline*, 412 U.S. 441, 452 (1973) Married students whose legal address was outside the state at the time of their application to a state university, and unmarried students whose legal address was outside the state at any time in the twelve months prior to application, were deemed nonresidents, and thus were ineligible for reduced tuition for the entire time the attended the school. *Id.* at 443. The Court found this permanent classification to be an irrebuttable presumption. *Id.* at 452. In response to Connecticut's argument that in the absence of the provision the state's school system would be subjected to onslaughts of education prospectors, the Court responded as it had in *Stanley*: **efficiency cannot outweigh individual rights to a judicial determination** of entitlement. *Id.* The standard adopted by the Court was enormously exacting:

> [I]t is forbidden by the Due Process Clause to deny an individual the resident rates on the basis of a permanent and irrebuttable presumption of nonresidence, when that presumption is not necessarily or universally true

in fact, and when the State has reasonable alternative means of making the crucial determination.

Id.

Finally, in yet another irrebuttable presumption cases, *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 644 (1974), the Court dealt with administrative regulations which required that teachers take leaves of absence in the fifth or sixth month of pregnancy. The Court found that the regulations created irrebuttable presumptions of disability which were clearly not universally true. *Id.* Reiterating the *Vlandis* standard, the Court found that absent a hearing, the regulations violated the due process clause of the fourteenth amendment. *Id.*

Turning to the present matter, the parallels are clear and demonstrate that the presumption created by § 534.210—namely that the plaintiff has good title in every unlawful detainer lawsuit filed—cannot stand constitutional scrutiny. Unlike *Bell, Stanley, Vlandis*, and *LaFleur,* § 534.210 does not require even the most basic facts be proven. In the cases above, before a deprivation of rights could occur, there had at least to be proof of the initial fact which triggered the presumption, and in some cases there was some evidence the presumptions were sometime true. Nonetheless, because they were not universally true, and because they served to deprive people of rights, the each and every irrebuttable presumption was struck down by the United States Supreme Court.

The present matter is far more offensive. Under § 534.210 there is quite literally no initial fact needing to be proven. Simply filing a petition that alleges title is all that is

required to conclusively prove title in favor of the plaintiff. No other document is required by the statute, no affidavit, nothing at all.

What is at stake in the present matter is at least as serious, if not more serious, than any of the cases listed above. In those cases the Court protected the right to work, the right to in-state tuition, the right to parent and the right to keep a driver's license. In this case, the interests at stake are a person's home (the most fundamental and protected piece of property in American law) and the right not to be publicly defamed as a trespasser and deadbeat (an obvious liberty interest). In short, the rights at issue in this case are more serious than in the cases above (weighing in favor of more complete due process), and yet the irrebuttable presumption is triggered more easily and with less support than in the cases above. The result is obvious. § 534.210 must be invalidated. This outcome is required by language of the test articulated by the United States Supreme Court. Accordingly, this Court must ask:

Is it "necessarily or universally true" that every time a person alleges in a petition that they have title to property, they actually do?

The answer is an obvious "no," and yet the "title" presumption is used dozens or hundreds of times daily to put people out of their homes without proof.[49] This is

[49] There are many cases in which a party alleging title might not actually have it. These would include cases like this one, in which the alleged successor trustee was never appointed, default never occurred under the deed of trust, and there were a panoply of other fatal flaws with the alleged foreclosure. It would also be true of cases like those

unconscionable and disgrace to Missouri. Because the irrebuttable presumption of § 534.210 serves to deprive individuals of their rights without requiring any evidence at all, this Court should hold that §534.210, as it applies to any foreclosure setting, is unconstitutional and invalid.[50]

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reported in the media, such as the case in which Bank of America foreclosed on a home that was bought in cash, with no note at all. It would also be true in a case like *Truong*, previously before this Court, in which the lender itself admitted that there was no default, but then foreclosed nonetheless.

[50] It should be noted that Missouri too has addressed the question of irrebuttable presumptions too. In considering a rebuttable presumption in a criminal case, this Court made it clear that while rebuttable presumptions may pass muster, it is doubtful an irrebuttable one could ever survive. In *State v. Shelby*, 64 S.W.2d 269, 273-74 (Mo. 1933), this Court held that "[w]hile the Legislature . . . may provide that a certain proved fact shall be sufficient to constitute prima facie evidence of another fact necessary to be established, it is still for the jury to determine whether or not the fact to be inferred is sufficiently proved . . . The very essence of trial by jury is the right of each juror to weigh the evidence for himself, and in the exercise of his own reasoning faculties, determine whether or not the facts involved in the issue are proved. And if this right is taken from the juror . . . then, very clearly, the substance, the very essence of 'trial by jury' will be taken away . . . ."

In sum, the procedures of Missouri unlawful detainer action are shockingly deficient. The statute requires that the defendant suffer silently and that the judge enter an order based on one-sided allegations, without any basic showing of evidence. The result is that the "hearing" is no hearing at all, because the defendants are told to be quiet and assume that title is good, while the plaintiffs are not required to make any proof on the most important issue of the case.

Argument of Point II: Equal Protection

The trial court erred in granting Respondent's Summary Judgment Motion in reliance of 534.210 RSMo because 534.210 RSMo violates the Equal Protection Clause of the United States and Missouri Constitutions in that:

C. Section 534.210 RSMo creates two special classes of citizens in violation of the equal protection clauses:

a. A class of Plaintiffs who are able to conclusively establish title by merely filing a petition; and

b. A class of Defendants who, upon being sued, are unable to challenge Plaintiff's case, raise affirmative defenses or allege counterclaims.

D. The creation of these two classes of citizens is not necessary to accomplish a compelling state interest, or in the alternative, the creation of these two classes of citizens is not rationally related to any legitimate government interest.

Synopsis of the Argument of Point II

In Missouri courts, a contested action for unlawful detainer often proceeds as follows:

1) A bank or corporation files an unlawful detainer action against a property owner.
2) The property owner is prohibited from challenging title based on §534.210. As a result, the filing of a petition conclusively proves title for the plaintiff.

3) The property owner may answer the allegations relating to damages, but is barred from raising counterclaims and affirmative defenses.
4) The property owner insists that he is the lawful owner of the property, often offering evidence that default did not occur (rendering the foreclosure void), the party who initiated foreclosure was not recorded at all (rendering the foreclosure sale void under Missouri law), the trustee who sold the property was not properly appointed (rendering the foreclosure sale void under Missouri law) or other infirmities existed that render the foreclosure void.
5) The bank or corporation argues that title cannot be inquired into, meaning that any proof the entity decided to put forward is sufficient.
6) Because Section 534.210 explicitly prohibits inquiry into title, the Missouri court then sides with the bank or corporation, orders the property owner(s) out their home and enters a monetary judgment the defendant(s).
7) All of this occurs before any court has ever considered the question of who rightfully owns the property at issue.
8) The homeowner loses his or her home, is subjected to humiliation, and is forced to pay double rent on a property that the homeowner contends (and has offered evidence to establish) is rightfully and legally still the homeowner's.

The above scenario demonstrates the flaws of Missouri's unlawful detainer statue, § 534.210 RSMo. This statute has created a special class of plaintiffs (namely banks and corporations), who are able to quickly kick Missouri homeowners out their houses with little or no proof. Simultaneously, the statute has created a special class of defendants

who are being deprived of their property rights without a fair hearing. Specifically, the statute does not allow unlawful detainer defendants to 1) put the plaintiff to his proof, 2) raise affirmative defenses, and 3) raise counterclaims. In fact, defendants are gagged during this proceeding and have no recourse against the plaintiff except to file a separate action, after he or she has already lost her home, in which he or she will take on the burden of proof. The homeowner suffers irreparable harm, as the house is almost invariably sold, and the homeowner can face garnishments for double damages due to the unlawful detainer judgment.

The unlawful detainer plaintiff and defendant stand in stark contrast to all other plaintiffs and defendants. When most plaintiffs file their case, they are charged with proving their case. When most defendants are sued, they are able to defend themselves with the full power of procedure and law to help them. It is only in the unlawful detainer context that plaintiffs are given all presumptions and defendants are stripped of all ability to defend themselves.

Appellant argues that this creation and classification of plaintiffs and defendants under 534.010 RSMo. violates the Equal Protection Clause of the United States and Missouri Constitutions, that there is no compelling state interest or rational basis for disparate treatment between regular plaintiffs and unlawful detainer plaintiffs or regular defendants and unlawful detainer defendants, and that the statute must be struck down as unconstitutional.

Standard of Review

The standard of review for constitutional challenges to a statute is *de novo.* *Hodges v. City of St. Louis*, 217 S.W.3d 278, 279 (Mo. 2007). When the constitutionality of a statute is attacked, the statute at issue should be presumed to be constitutional unless it is clearly and undoubtedly in contravention of the Missouri constitution. *Blaske v. Smith & Entzeroth, Inc.*, 821 S.W.2d 822, 828-29 (Mo. 1991); *Winston v. Reorganized School District R–2, Lawrence County*, 636 S.W.2d 324, 327 (Mo. 1982). In questioning the constitutionality of a statute, the burden is upon the party claiming the statute is unconstitutional. *Blaske v. Smith & Entzeroth, Inc.*, 821 S.W.2d 822, 828-29 (Mo. 1991); *Schnorbus v. Director of Revenue*, 790 S.W.2d 241, 243 (Mo. 1990). "Nonetheless, if a statute conflicts with a constitutional provision or provisions, this Court must hold the statute invalid." *Jamison v. State, Dept. of Soc. Services, Div. of Family Services*, 218 S.W.3d 399, 405 (Mo. 2007), *citing Ky. Dep't of Corrections v. Thompson*, 490 U.S. 454, 460 (1989).

A. Section 534.210 RSMo Inappropriately Creates and Classifies Two Groups of Plaintiffs and Defendants in Missouri Courts.

The Equal Protection Clauses of the United States and Missouri Constitutions provide that all persons are created equal and are entitled to equal rights and opportunities under the law. Thus, equal protection scrutiny focuses on the classifications of persons or groups. *Doe v. Phillips*, 194 S.W.3d 833, 845 (Mo. 2006), *citing Romer v. Evans*, 517 U.S. 620, 631 (1996). Not all differences in treatment of individuals or groups are invalid; a law may properly treat groups differently. However, "a law may not treat

similarly situated persons differently unless such differentiation is adequately justified." *Doe v. Phillips*, 194 S.W.3d 833, 845 (Mo. 2006), *citing Creason v. City of Washington*, 435 F.3d 820, 823 (8th Cir. 2006).

In this case, two groups of similarly situated individuals are being treated radically differently. Section 534.210 impermissibly creates a special class of plaintiffs and defendants, in direct contravention of the Equal Protection Clause.

1. The unlawful detainer plaintiff versus the "regular" plaintiff

A plaintiff in an unlawful detainer action enjoys:

- A forum where their bare allegations (and any skeletal proof they might voluntarily proffer) cannot be contested or refuted,
- A mandatory award of double damages, and
- An expedited proceeding.

Such practice is different from cases involving "regular" plaintiffs. Even if a regular plaintiff is gravely physically harmed, has lost his job due to discrimination, or has suffered severe economic harm due to a breach of a contract, he or she must still prove his case, is not entitled to double damages, and must endure a full court proceeding, not an expedited one. This is true despite the fact that the delay implicit in requiring a plaintiff to prove her case could mean that an injured party goes without care, a worker goes without wages she will eventually prove, or a company suffers tremendous losses (even losses that might bankrupt the company) due to a breach of contract.

One could articulate some rational reasons why certain plaintiffs might receive a presumption in their favor, an expedited hearing, or double damages. For example, a

single mother who is wrongfully terminated from her job in violation of the Americans with Disabilities Act might file suit against her former employer. While the case is proceeding, she would almost certainly struggle to find new work, and while searching for that new position, she may struggle to make ends meet. One could argue that a presumption in her favor, or an expedited hearing, might be rational. And yet, like every other plaintiff, Missouri law puts her to her proof. Missouri law values getting it right over getting it done quickly. It values making the plaintiff prove her case before requiring a defendant to part with money.

In the context of unlawful detainer, however, the plaintiff is not only presumed to be right, but that presumption is irrebuttable the moment the lawsuit is filed. Although the plaintiff only has a right to evict someone from property if it is in fact the rightful owner, unlawful detainer plaintiffs are not required to offer any proof at all. Similarly, the unlawful detainer plaintiff is afforded an expedited proceeding and then awarded double damages. What possible justification could there be for fast-tracking the removal of homeowners from their homes? How can the law presume that the very entities that have collapsed the world economy through exotic loans and sloppy record-keeping are always right, and then award double damages?

2. The unlawful detainer defendant vs. the "regular" defendant

The defendants in unlawful detainer actions are treated substantially differently from other defendants. Specifically, an unlawful detainer defendant:

- Cannot refute or contest the assertion of title made by Defendant;
- Cannot raise affirmative defenses; and
- Cannot raise counter claims.

As a result, the unlawful detainer defendant is exposed to irreparable harm and double damages before there is any proof that the unlawful detainer defendant has done anything wrong. By contrast, the "regular" defendant in Missouri does in fact, have the right to defend their actions and position, as well as counter-sue the plaintiff. The defendant can, and routinely does, challenge each and every element the plaintiff must prove.

This stands in stark contrast to the unlawful detainer scenario, in which the defendant is only able to stand in court gagged by a lopsided statute that keeps a defendant from defending himself.

Because of these rules, unlawful detainer defendants lose before they ever appear. In a shocking demonstration of this fact, Appellants William and Susan Smith, and most of those people who are sued for unlawful detainer, face summary judgments filed by the banks. The first asserted statement of fact in these summary judgment motions is that the bank has title. However, even though the Plaintiff should have to prove this fact, the defendant is affirmatively and completely prohibited from denying the statement or submitting evidence to contest this fact. The result: each and every unlawful detainer plaintiff has its case made by §534.210 before it enters the courtroom.

The Courts did not create this system, and given Missouri's history of impartial courts, it should not tolerate it. The current statute converts the courts into rubber stamp assembly lines rather than places where facts are weighed and justice is dispensed. This substitution of legislative fiat for evidence is ironic and sad in a state known as the Show-Me state. As a result, in one quick proceeding that was over before it began, an unlawful detainer defendant goes from living in their home to being homeless, indebted, and humiliated. All of this occurs because § 534.210 operates to do what no other statue in Missouri does – it eliminates the role of the court and establishes proof of conclusive legal facts by legislation.

B. There is no compelling state interest for the separate classification of unlawful detainer plaintiffs and "real" plaintiffs and unlawful detainer defendants and "real" defendants under 534.010 RSMo.

"When considering a claim that a statute violates the Equal Protection Clause, the first step is to determine whether the challenged statutory classification operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution . . . ." *In re: Marriage of Kohring*, 999 S.W.2d 228, 232 (Mo. 1999), *quoting Missourians for Tax Justice Educ. Project v. Holden*, 959 S.W.2d 100, 103 (Mo. 1997), *quoting San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973). If a fundamental right is encroached, then "the classification is subject to strict judicial scrutiny to determine whether it is necessary to accomplish a compelling state interest." *In re: Marriage of Kohring*, 999 S.W.2d 228, 232 (Mo. 1999), *citing Missourians for Tax Justice Educ. Project v. Holden*, 959 S.W.2d 100, 103 (Mo. 1997).

As discussed in section 1 of this brief, Missouri's unlawful detainer statute forecloses Missouri citizens from the fundamental right of access to the courthouse. The unlawful detainer defendant is barred from the procedures and protections that regular defendants enjoy. The unlawful detainer defendant cannot assert counterclaims and defenses, and is forbidden from challenging the plaintiff's case. This is very different from the experience of the regular defendant who is able to fully litigate his claim. Ultimately, the unlawful detainer defendant is excluded from having access to the fairness that courts provide to all other defendants. As such, the differences between the unlawful detainer defendant and the regular defendant are glaring, and the result is that two similarly situated groups enjoy very different realities in court. Equally clear is that deprivation of the right to defend one's own home in court is deprivation of a substantial right protected by the Missouri Constitution.

The state has no compelling interest in promulgating this statute. Throughout our judicial history, Courts have found the existence of compelling interests in very limited instances. *See, e.g.*, *Miller v. Johnson*, 515 U.S. 900, (1995) (state has a compelling interest in eradicating the effects of past discrimination); *Grutter v. Bollinger*, 539 U.S. 306 (2003) (state has compelling interest in attempting to obtain a diverse student body at state universities). But generally speaking, most statutes fail because the compelling state interest standard is a difficult one to meet.

In this case, even for the most creative legal thinker, it would difficult to articulate any interest the state has in promoting and allowing the unlawful detainer statute. Evicting people from their homes with no meaningful adjudication of the claim harms

neighborhoods, cities, and counties all throughout Missouri. Given that Missouri has the fifth highest foreclosure rate in the nation, the state has absolutely no interest in making helping a plaintiff throw a Missouri citizen out of their home before title is even established. In light of rampant problems in the mortgage industry as evidenced by tens of thousands of lawsuits, multi-billion dollar settlements with the government, ongoing investigations in almost every state regarding recording practices, securitization and record-keeping, what possible interest could Missouri have in concluding in every single case that the parties filing unlawful detainers have clear title? To presume that the very banks that collapsed the world economy through their greed, recklessness, short-sightedness and disrespect for centuries of established law and practice regarding home lending and the recording of those transactions, is insanity. It is a bit like presuming that all criminals do charity work, or that all people who challenge the non-partisan court plan do so because they want fairer judges. There is no good reason to give effect to § 534.210 and its reckless presumption.

In fact, it is enlightening to consider what sort of law a rational legislature would write today regarding unlawful detainers. In light of all the problems with home lending, home servicing and the foreclosure mills, a reasonable legislature would likely create presumptions in favor of the homeowner. A reasonable law would seek to make sure that no homeowner is removed from his or her home until it is conclusively proven that default occurred, the home was sold legally, and the party seeking to evict has clean title. The legislature might well want to create a higher burden of proof for the new buyer who seeks to evict the homeowner. It might want to prescribe what sorts of proof are required,

or it might want to limit damages to homeowners who contest the unlawful detainer in good faith. What it certainly would never do immediately after the worst mortgage crisis in United States history, is create presumptions against homeowners.

C. Even if this Court were to conclude there is no fundamental right infringed by § 534.210, the statute still fails a rational basis test because there is no rational basis for the presumption against homeowners provided by § 534.210.

A party who challenges a statute under the equal protection clause may present facts or arguments to show that the classification as applied is not rationally related to a legitimate interest. *Mahoney v. Doerhoff Surgical Services, Inc.*, 807 S.W.2d 503, 513 (Mo. 1991), *citing United States v. Carolene Products Co.*, 304 U.S. 144, 153 (1938). In the equal protection analysis, once it is determined that classifications have been created under a statutory scheme, the next issue to consider is whether there possible rational reasons for those classifications. *Blaske v. Smith & Entzeroth, Inc.*, 821 S.W.2d 822, 829 (Mo. 1991).

As discussed above, there are no rational reasons for the classifications of plaintiffs and defendants that exist under § 534.210. In fact, the statute and its application against Missouri homeowners are irrational, especially in this mortgage climate where one in eight homes are falling victim to foreclosure, and where banks have demonstrated a total

lack of accountability.[51] Appellant asks this Court to consider the following questions relating to the rational basis test:

- In a proceeding to take a defendant's home is it rational to limit homeowners' rights to defend themselves by asserting and proving prohibiting counterclaims, affirmative defenses, or otherwise challenging plaintiff's evidence?
- Is it rational to force defendants to file a separate action, taking on the burden of proof, after irreparable harm has already occurred and the unlawful detainer judgment is entered?

[51] *See, e.g.*, *Mortgage Fraud Reports Spike as Lawsuits Pile Up*, ASSOCIATED PRESS, Sept. 28, 2011; Derek Kravitz, *Fannie Mae Cited for Failing to Stop Robo-Signing,* ASSOCIATED PRESS, Sept. 22, 2011; Pallavi Gogoi, *Robo-Signed Mortgage Docs Date Back to Late 1990s*, THE NEWS JOURNAL, Sept. 7, 2011; *Time for Deal on Banks' Misconduct*, WASHINGTON POST, Sept. 5, 2011; Lee Provost, *Major Banks Targeted for Mortgage Document Fraud*, THE DAILY JOURNAL, Sept. 17, 2011; Doug McMurdo & Chris Sieroty, *Wells Fargo Accused of Forging Loan Documents*, LAS VEGAS REVIEW-JOURNAL, Sept. 22, 2011; Jessica Silver-Greenberg, *Mired in Foreclosures*, WALL STREET JOURNAL, Sept. 18, 2011;John Schoen, *Inside the Foreclosure Factory, They're Working Overtime*, NBC NEWS, April 12, 2012; Hari Sreenivasan, *Wells Fargo Settles On Minority Lending Scam*, PBS NEWS, July 3, 2012; Nelson D. Schwartz & J.B. Silver-Greenberg, *Bank Officials Cited in Churn of Foreclosures*, THE NEW YORK TIMES, March 12, 2012.

- Is it rational to value expediency over accuracy when what is at stake is a person's home?
- Is it rational to provide an unlawful detainer plaintiff, who is often a commercial entity, more advantages than a "regular" plaintiff?
- Is it rational to provide a "regular" defendant more protections, even if his claim is small or involves only pecuniary damages, than an unlawful detainer defendant, who is at risk of losing his home?
- Is it rational to require the splitting of a cause of action relating to title, resulting in uncertainty regarding legal title to property and fractured, multiplicative litigation?
- Is it rational to provide additional protection for unlawful detainer plaintiffs, who are often large commercial banks, when those entities are implicated in perhaps the most pervasive fraud seen in American history?

The answer to each of these questions is a resounding "No." For each of these reasons, § 534.210 RSMo, as it applies to any foreclosure setting, should be held invalid because it violates the Equal Protection Clauses of the United States and Missouri Constitutions.

Argument of Point III: The "No Counterclaim" Rule

The trial court erred in granting Respondent's Motion for Summary Judgment, holding as part of that ruling that Appellant's counterclaim was void in reliance of § 534.210 RSMo, because the trial court's interpretation of § 534.210 RSMo stands in direct contravention to Missouri law relating to bringing counterclaims, in that:

A. A detailed historical analysis of § 534.210 RSMo demonstrates that the "no counterclaim rule" conflicts with Missouri case law and is otherwise inequitable, and

B. Missouri's procedural rules, including rules pertaining to one's ability to bring counterclaims, prevail over contradictory statutes, and Missouri Rules 55.32(a) and 55.08 are procedural in nature and therefore trump conflicting aspects of § 534.210 RSMo.

Standard of Review

This Court's review of the trial court's grant of summary judgment "is essentially *de novo*." *Arbor Inv. Co., LLC v. City of Hermann*, 341 S.W.3d 673, 678 (Mo. 2011), *reh'g denied* (July 19, 2011). Summary judgment is proper only if the moving party establishes that there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Rule 74.04(c)(6). Thus, this Court should review the record

in the light most favorable to the party against whom judgment was entered, and afford the non-movant the benefit of all reasonable inferences. *Id.* at 678.

Synopsis: Missouri rules of civil procedure and Missouri statutes both invite or require defendants in unlawful detainer cases to file counterclaims and affirmative defenses. Therefore, this Point goes above and beyond the fundamental fairness issues raised in the first two points of this brief. Further, because counterclaims and affirmative defenses are invited by the Missouri rules of civil procedure, these procedural rules prevail over any conflicting statute, including § 534.210.

A. A detailed historical analysis of § 534.210 RSMo demonstrates that the "no counterclaim rule" conflicts with Missouri case law and is otherwise inequitable.

The evolution of the unlawful detainer action provides an interesting backdrop to the many rules and statutes associated with such actions. In this case, when Defendants attempted to file their counterclaims and affirmative defenses, they were confronted with motions indicating that they had no right to do so. A review of the history of unlawful detainer actions in Missouri demonstrates that the trial court erred in striking Defendants' counterclaims, affirmative defenses and evidence relating to these counterclaims and defenses.

Many of the legal analysis and citations to authority in this section have been presented in a recent excellent article. Robert Sweere, *The No Counterclaim Rule in Unlawful Detainer Proceedings*, 68 J. MO. B. 162 (2012).[52]

The first forcible entry and detainer statute was enacted in 1813. *Id.* at 163. At that time, the merits of title were not to be considered by the tribunal because a justice of the peace was in charge of the proceedings; there was no requirement for the justice to even be a lawyer. *Id.* The primary function of the statute and the justice was to simply "discourage breach of the peace." *Id.* Additionally, because a justice of the peace had virtually no training, statutes mandated that they had no jurisdiction over any action where title to land was at issue. *Id.*

From 1835 to 1909, justices of the peace were in charge of the unlawful detainer suits unless there was a dispute regarding title. *Id.* Once title was at issue, the matter was then certified to Circuit Court, as mandated by the Missouri Constitution of 1820. *Id.* That version of the Constitution stated that all matters not cognizable in front of justices were within the jurisdiction of the Circuit Courts. *Id.*

In 1945, justice of the peace courts were abolished and replaced by magistrates. *Id.* By 1979, magistrates were no longer used and there was a consolidation of the associate circuit courts and circuit courts. *Id.* While this consolidation did not take real effect until 1989, unlawful detainer actions were then (and are now) able to be heard by both associate circuit and circuit judges. *Id.* "Thus, since 1989, associate circuit judges have

[52] Mr. Sweere's article is also reprinted in this Appendix, beginning at page A-30.

had the authority to decide both real estate title questions and equity claims – just like circuit judges." *Id.*

Throughout this course of changing court models, the law regarding unlawful detainers transformed as well. This change is most evident in Chapter 517 RSMo. Historically, this chapter applied to the procedure of associate circuit judges and magistrates. *Id.* But in 1987, the statutory scheme of RSMo 517 was completely changed, and explicitly incorporated Chapter 534 RSMo. *Id.* Most importantly, Chapter 517 specifically authorized counterclaims; RSMo 534 did not and does not affirmatively prohibit counterclaims. *Id.* at 164. Therefore,

> "as of 1987, counterclaims became explicitly permitted in unlawful detainer proceedings. These changes in the interaction between Chapters 517 and 534, however, have not been explicitly discussed in any appellate decision cited for the no counterclaim rule."

Id. Despite this lack of discussion, the conventional wisdom offered by Missouri appellate courts is that counterclaims are not allowed in unlawful detainer actions. This conventional wisdom is incorrect, as it is contradicted by the relevant statutes and rules.

The pivotal "no counterclaim" case in Missouri, *Lake in the Woods Apartment v. Carson*, 651 S.W.2d 556 (Mo. Ct. App. 1983), (*See* Robert Sweere's article at p. 165), is heavily cited for this proposition by many plaintiffs attempting to strike defendant counterclaims. 68 J. MO. B. at 165. As indicated by Sweere's detailed analysis, the fact that *Carson* was decided before the 1987 changes to Chapter 517 could indicate that *Carson* was simply stating the law at that time. *Id*. However, *Carson* and all cases relying

on *Carson* and espousing the "no counterclaim rule" have been bad law since the 1987 change to RSMo 517.

Interestingly, § 517.021 RSMo provides that "the rules of civil procedure shall apply to cases or classes of cases to which this Chapter is applicable, except as otherwise provided by law." The civil rules clearly allow counterclaims and affirmative defenses. Section 517.031.2 RSMo also specifically allows counterclaims and affirmative defenses:

> Affirmative defenses, counterclaims and cross claims shall be filed in writing not later than the return date and time of the summons unless leave to file the same at a later date is granted by the court. No other responsive pleading need be filed . . . .

Because § 517.021 applies to Chapter 534 and because Missouri's unlawful detainer statutes are subject to the rules of civil procedure, they should be deemed to allow both counterclaims and affirmative defenses. Therefore, the trial court erred when it struck Defendants' counterclaims, affirmative defenses and evidence relating to Defendants' counterclaims and affirmative defenses.

B. Missouri's procedural rules, including rules pertaining to one's ability to bring counterclaims, prevail over contradictory statutes, and Missouri Rules 55.32(a) and 55.08 are procedural in nature and therefore trump conflicting aspects of § 534.210 RSMo;

The Missouri Constitution authorizes the Supreme Court to set out rules of practice and procedure for all courts and. those rules have the full force and effect of law.

MO. CONST. art. V, § 5. As a result, rules promulgated pursuant to article V, section 5, supplant all statutes and existing court rules that are inconsistent. *See* Rule 41.02.[53] "[I]f there is a conflict between this Court's rules and a statute, the rule always prevails if it addresses practice, procedure or pleadings." *Reichert v. Lynch,* 651 S.W.2d 141, 143 (Mo. banc 1983). In fact, the Court's rules can only be invalidated or changed in whole or in part by a law that was enacted solely for that purpose. MO. CONST. art. V, § 5. Procedural laws set up a system for enforcing rights or procuring redress. *State ex rel. Union Elec. Co. v. Barnes*, 893 S.W.2d 804, 805 (Mo. 1995) (*citing Wilkes v. Missouri Highway and Transportation Commission,* 762 S.W.2d 27, 28 (Mo. banc 1985)). "Substantive laws, on the other hand, define and regulate those rights. In a sense, substantive laws create rights; procedural laws provide remedies." *State ex rel. Union Elec. Co. v. Barnes*, 893 S.W.2d 804, 805 (Mo. 1995) (*citing Shepherd v. Consumers Cooperative Assoc.*, 384 S.W.2d 635, 640 (Mo. banc 1964)). Put simply, "substantive law relates to the rights and duties giving rise to the cause of action, while the procedural law is the machinery used for carrying on the suit." *State v. Reese,* 920 S.W.2d 94, 95 (Mo. banc. 1996).

Missouri Rule 55.32 indicates that a counterclaim must be filed in an action or it is waived. Specifically, 55.32(a) states:

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[53] Rule 41.02 states specifically: "Rules 41 to 101, inclusive, are promulgated pursuant to authority granted this Court by Section 5 of article V of the Constitution of Missouri and supersede all statutes and existing court rules inconsistent therewith."

> **(a) Compulsory Counterclaims.** A pleading shall state as a counterclaim any claim that at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction.

Id. Similarly, Rule 55.08 outlines when affirmative defenses must be filed: "[i]n pleading to a preceding pleading, a party shall set forth all applicable affirmative defenses and avoidances…" Rule 58.08. Clearly, Rules 55.32(a) and 55.08 describe the procedure used to answer a suit and compels a defendant to raise all potential counterclaims at the first instance so that the litigation can proceed with all issues out in the open.

However, by Respondent's analysis, under the unlawful detainer statute, such counterclaims and affirmative defenses cannot be filed.[54] This directly contradicts Rules 55.32(a) and 55.08, and prevents the efficient resolution of claims. It forces Defendant to file his claims separately, thereby splitting the causes of action, which is disfavored under Missouri law. Given that Rules 55.32(a) and 55.08 govern the "machinery" of litigation, compulsory counterclaims should be allowed in unlawful detainer actions.

[54] Respondent relies on *Central Bank of Kansas City v. Mika*, 36 S.W.3d 772 (Mo. Ct. App. 2001), for this proposition.

Argument of Point IV: Standing and Real Party in Interest

The trial court erred in granting Respondent's Summary Judgment Motion, and as part of that ruling preventing Appellants from contesting standing and real party in interest in reliance of § 534.210 RSMo, because § 534.210 RSMo stands in direct contravention to the rules and common law of Missouri, in that standing and real party in interest are fundamental threshold issues in every Missouri case.

Standard of Review

This Court's review of the trial court's grant of summary judgment "is essentially *de novo.*" *Arbor Inv. Co., LLC v. City of Hermann*, 341 S.W.3d 673, 678 (Mo. 2011), *reh'g denied* (July 19, 2011). Summary judgment is proper only if the moving party establishes that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. Rule 74.04(c)(6). Thus, this Court should review the record in the light most favorable to the party against whom judgment was entered, and afford the non-movant the benefit of all reasonable inferences. *Id.* at 678.

Synopsis: Authority is ubiquitous that the issues of standing and real party in interest are gateway issues to every case. Therefore, the trial court erred in failing to allow the Smiths to contest these critical gateway issues.

Unlawful detainer actions are not exempt from basic justifiability doctrines, including standing. *See Hill v. Morrison,* 436 S.W.2d 255, 257 (Mo. Ct. App.

1969)(holding that plaintiff in an unlawful detainer action brought under Chapter 534 of the Missouri Revised Statutes "had no standing to maintain this possessory action"). "[S]tanding is a threshold issue" that must be determined as a matter of law. *Executive Bd. of Mo. Baptist Convention v. Carnahan*, 170 S.W.3d 437, 445 (Mo. Ct. App. 2005); s*ee also In re Estate of Scott*, 913 S.W.2d 104, 105 (Mo. Ct. App. 1995) ("Without [standing], a court has no power to grant the relief requested"). Lack of standing cannot be waived. *Kinder v. Holden*, 92 S.W.3d 793, 803 (Mo. Ct. App. 2002). "Where, as here, a question is raised about a party's standing, courts have a duty to determine the question of their jurisdiction before reaching substantive issues, for if a party lacks standing, the court must dismiss the case because it does not have jurisdiction of the substantive issues presented." *Farmer v. Kinder*, 89 S.W.3d 447, 451 (Mo. 2002). "[T]o have standing a plaintiff must show she has some actual and justiciable interest susceptible of protection by her suit." *Dodson v. City of Wentzville*, 133 S.W.3d 528, 533 (Mo. Ct. App. 2004)(emphasis added); *See also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 565–66 (1992).

Further, Section 507.010 RSMo and Rule 52.01 require that every action be prosecuted in the name of the real party at interest. While the "real party in interest" rule is a "prudential limitation" and standing is a "jurisdictional limit," the two doctrines are related. *Mecklenburg Farm v. Anheuser-Busch, Inc.*, 250 F.R.D. 414, 417 (E.D. Mo. 2008). The requirements that a plaintiff have standing to maintain an action and be the real party at interest apply to every action, including unlawful detainer actions pursuant to the plain terms of Rule 52.01 and RSMo 507.010. For instance, in *Mecklenburg Farm*,

the district court denied, without prejudice, defendants' motion to dismiss for lack of standing, but ordered the plaintiff to produce evidence that it had standing to maintain an action and that it was the real party at interest. The court stated:

> The defendants correctly observe that the complaint does not contain any reference to the [plaintiff] as an assignee of the [third party's] rights in the [contracts at issue] or in this cause of action. The [plaintiff] responds that it is the assignee of the [third party's] interest in the contracts . . . . This assertion, however, is not supported by affidavits or other evidentiary proof.
>
> The identity of the real party may not always be apparent from the face of pleadings; it may be necessary to look beyond the pleadings to the facts of the dispute. The Court finds it appropriate under the circumstances of this case to order the Farm to submit evidence to establish (1) what was assigned to it, so it can be determined whether the Farm is the real party in interest with regard to the claims raised in this action, and (2) that a valid assignment was made.

Id. at 418 (quotations and citations omitted)(emphasis added).

In this case, Wells Fargo would not have standing (and would not be the real party in interest) unless it has good title to the house in which the Smith family was living. In

Plaintiff's motion for summary judgment,[55] Plaintiff provided a copy of the successor trustee's deed (L.F. 442) and the original deed of trust signed by defendants (L.F. 457). The trustee deed indicates that Millsap & Singer acted as the trustee at the sale. However, the original deed of trust states that "First American Title" was named the trustee (L.F. 459). The deed further states that only the lender is allowed to appoint successor trustees (L.F. 459, 470).

As part of its consolidated response to Plaintiff's Motion for Summary Judgment, Defendant provided the trial court with the full title history (beginning at L.F. 519), indicating that in 2005 Wells Fargo named Millsap & Singer the successor trustee (L.F. 477, *et seq.*, L.F., 563). However, Wells Fargo was not the "Lender," nor is there any indication in the title history that the actual "Lender" ever appointed a successor trustee. There is a huge gap in this title history (again, the full title history begins at L.F. 519). First American Title was the original Lender (L.F., 545). There was no public assignment of either the mortgage or the note to Wells Fargo (See L.F., 545 – 563), yet Wells Fargo appears out of thin air to appoint Millsap and Singer as successor trustee.[56] There are

[55] As a reminder, this case was tried twice. These events each happened twice, both in the original trial and in the trial de novo. These citations are to the filings in the trial de novo.

[56] Section 442.380 (Instruments to be recorded) provides as follows:

> Every instrument in writing that conveys any real estate, or whereby any real estate may be affected, in law or equity, proved or acknowledged and

other critical issues that relate to real party in interest and standing. Defendants preserved each of these issues in their Answer (L.F. 13)[57] and throughout this suit, including in its consolidated response to Plaintiff's Motion for Summary Judgment. (L.F. 477). Based on these facts, Plaintiff has no standing in this unlawful detainer action as the underlying foreclosure sale is void.

In *Estate of Lemaster v. Hackley*, 750 S.W.2d 692 (Mo. Ct. App. 1988), the appellate court reversed the circuit court's grant of summary judgment to the plaintiff. In that case, the purported "personal representative" of an estate attempted to bring a suit to collect on a note, but proffered no proof that he was the personal representative and the defendant disputed this fact. The *Lemaster* court stated:

> The right to maintain this suit in the first instance depended on proof that [plaintiff] was the personal representative of the payee of the note who was deceased. . . . Such proof was essential to the entry of summary judgment in view of appellant's denial of the fact in his answer. The deficiency in proof of the capacity of the plaintiff to maintain the action is all the more apparent from the documents respondent offered to support the summary judgment motion.

> certified in the manner herein prescribed, shall be recorded in the office of the recorder of the county in which such real estate is situated.

[57] Both trials were based on the original Petition and original Answer.

Id. at 694. Likewise, deficiency in proof of Plaintiff's capacity to maintain this unlawful detainer action is "all the more apparent" because of the documents Plaintiff offers in support.

Plaintiff will likely point to the "Successor Trustee's Deed" in an attempt to prove that it has a right of possession, but this document amounts to nothing other than a bare recitation. Any stranger to this case could have filed a "Successor Trustee's Deed" in the recorder's office, and that stranger might then assert that it was the note holder for the property at issue. The lack of proof that the plaintiff actually is the note holder makes it all the more apparent that (1) Plaintiff has no standing to maintain this action and (2) Plaintiff has no right to possess this property.

As indicated above, the title history filed by the Defendant demonstrates that Wells Fargo has intervened in this matter in an unsupportable way. It is not clear, even from the records, how Wells Fargo came to be the note holder of the property, nor whether it had any authority to appoint the successor trustee. Rather than producing evidence that demonstrates this right, Wells Fargo simply filed a motion to strike this evidence proffered by Defendant, which was granted, which thus allowed Defendant to benefit from this state-sanctioned cover up.

It is expected that Plaintiff will repeatedly point to Section 534.210 RSMo to argue that "[t]he merits of the title shall in nowise be inquired into" on a complaint of unlawful detainer, as evidence that it need not present any evidence that it has standing to bring a claim. Courts have long distinguished, however, between questioning title and using the title as evidence to show the nature of possession. In *Lehnen v. Dickson*, 148

U.S. 71, 75 (1893), the Supreme Court, applying Missouri law, held that proof of the transfer of title was proper in an unlawful detainer action. The Court wrote, "[I]t has been held in Missouri that the tenant may defeat an action for unlawful detainer, brought by the landlord after the expiration of the lease, by proof that the title, since the execution of the lease, has passed away from the landlord to some other party . . . ." *Id.* at 75. The Court goes on to point out that derivative titles may be admitted into evidence in an unlawful detainer, whether offered by the plaintiff, the defendant, or the party now with title. *Id.* at 76. "None of this testimony impeaches the lease, or challenges any rights created by or under it. It is simply evidence for proof of rights under a derivative title, evidence which, in terms, is authorized by [statute]." *Id.* at 76-77.

The statute to which the Supreme Court refers is now denominated as Section 534.220, RSMo, and is currently part of the chapter on Forcible Entry and Unlawful Detainer, as it was at the time the *Lehnen* Court handed down its decision. The statute states, in its entirety:

> Evidence for proof of rights under derivative titles, provided for by this chapter, shall be admissible in actions instituted under this chapter.

Section 534.220, RSMo. "Derivative title" is a general term not employed by a Missouri court since 1918. Black's Law Dictionary defines "derivative" as:

> Coming from another; taken from something preceding; secondary. That which has not its origin in itself, but owes its existence to something foregoing. Anything obtained or deduced from another.

DERIVATIVE, BLACK'S LAW DICTIONARY (9th ed. 2009).

The term "derivative title" would appear to apply to a title that is assigned, a situation that describes this case. Like in *Lehnen*, where the Supreme Court held that evidence of the invalidity of the lease at issue did not involve an inquiry into the merits of the title but was, rather, properly admitted as proof of right under a derivative title, evidence of the invalidity of the foreclosure sale and the lack of the proper assignment of the deed of trust should be admitted under Section 534.220. The facts of this case trigger the *Lehnen* holding in that evidence of the invalidity of the lease at issue did not involve an inquiry into the merits of the title but was, rather, properly admitted as proof of right under a derivative title, evidence of the invalidity of the foreclosure sale. In sum, the lack of assignment of the deed of trust should be admitted under Section 534.220.

Hafner Mfg. Co. v. City of St. Louis, 172 S.W. 28 (Mo. 1914) (still good law and cited by *Davis*, 726 S.W.2d at 849) is also instructive on the construction of Sections 534.210 and 534.220. In *Hafner*, the plaintiff brought an action in unlawful detainer, asserting "color of title" and right of possession to a strip of land on a wharf on which he stacked lumber. The defendant, the city of St. Louis, argued that it owned the land at issue. The city provided evidence that it had established the public wharf and continued to control it, by ordinance, and the court found for the city. *Id.* at 30. The plaintiff appealed, claiming that the evidence provided by the city was inadmissible under the same statute that Plaintiff relies on in this case, that the merits of his title cannot be inquired into. *Id.* at 33; section 534.210 (as now denominated). The court dismissed the plaintiff's argument out of hand, holding:

> It is argued for appellant that the case was tried throughout on an erroneous theory, to wit, on the theory of trying title as if it were a case in ejectment; this in the teeth of the statute forbidding an inquiry into the merits of the title. But [the statutes] permit[] evidence for proof of rights under derivative titles, provided for by this article, the forcible entry and unlawful detainer statute.

Id. at 33.

Courts continue to distinguish between inquiring into the merits of the title and using the title as proof of right of possession. In *Davis v. Stewart Title Guar. Co.*, 726 S.W.2d 839 (Mo. Ct. App. 1987), also an unlawful detainer action, the court held the prohibition on inquiry into the merits of the title "is only to say, however, that the title may not be tried out as a determinative factor. Inquiry into title is relevant to show the nature of the possession, therefore, but not to fix title." *Id.* at 849. The *Davis* court found that the trial court had properly admitted into evidence eight deeds describing the chain of conveyances affecting the easement under which the defendant claimed possession and properly relied on that evidence to find for defendant. *Id.*

Appellant anticipates that Respondent will also cite to a recent unlawful detainer case decided by the Western District Court of Appeals, *State ex rel. Deutsche Bank Nat. Trust Co. v. Chamberlain*, 372 S.W.3d 24 (Mo. Ct. App. 2012), *transfer denied* (Aug. 14, 2012), *reh'g and/or transfer denied* (May 29, 2012). The *Chamberlain* court improperly relied on a long string of cases holding that unlawful detainer courts cannot consider "issues relating to title or matters of equity. . . ." *Id* at 28. For instance, *Chamberlain*

relies extensively on *Lake in the Woods Apartment v. Carson,* 651 S.W.2d 556 (Mo. Ct. App. 1983), a case that Robert Sweere completely dismantled in his detailed historical analysis of how a string of Missouri appellate cases repeatedly misconstrued the "summary" nature of unlawful detainer cases.[58]

The *Chamberlain* court failed to consider the authority that is now being raised in this brief with regard to standing and real party in interest. Nor did the *Chamberlain* court consider any of the serious constitutional issues raised in this brief. Instead of engaging on the critical issue of standing, the *Chamberlain* court dismissed these issues (essentially the same standing and real party in interest issues raised here) as "creatively framed" "wordsmithing." 372 S.W.3d at 29.

What should homeowners do when they are facing an unjustified unlawful detainer action do, according to *Chamberlain*, given *Chamberlain's* conclusion that they may not raise counterclaims or affirmative defenses and they may not attack deficient title? The *Chamberlain* court proclaimed that these homeowners should seek "injunctive relief." The appellant in *Chamberlain* protested that seeking injunctive relief would require "the posting of a bond," which is not within the means of most people facing foreclosure. The *Chamberlain* court characterized this predicament as one of those "practical difficulties" that it was powerless to remedy in the face of its traditional (and according to the above authorities, incorrect) interpretation of Chapter 534.

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[58] Robert Sweere, *The No Counterclaim Rule in Unlawful Detainer Proceedings,* 68 J. MO. B. 162 (2012). Mr. Sweere's article is reprinted at p. A30 of this Appendix.

Missouri courts can address these unfair and oppressive situations in which a bank that does not really own a house attempts to make use of Missouri Courts to evict the true owner. At a minimum, Missouri courts can allow the homeowner to raise and contest all applicable counter-claims and defenses in the unlawful detainer case without pretending that cash-strapped homeowners doing their best to resist unlawful detainer cases are in a position to post hefty bonds. Missouri courts can allow unlawful detainer defendants to challenge standing and real party in interest.

Robert Sweere concludes his long analysis as follows:

> When first enacted, the forcible entry and unlawful detainer statute was a tool in the toolbox of the justice of the peace to keep the peace. In the almost 10 score years since then, however, the detainer statute has morphed into a weapon for the one percent to oppress the 99 percent. Early on, it was determined that we didn't want the Roy Beans of Missouri to decide matters of title or equity. Now Judge Bean is in history's dust bin and unlawful detainers are decided by trained lawyers who, by statute, may explicitly hear and determine all cases and matters within the jurisdiction of their circuit courts." *Lake in the Woods Apartment v. Carson*, the seminal case for the no counterclaim rule, incorrectly stated the law when decided and is unsupported by precedent. Both *Carson* and the rule that no equitable defenses are allowed in unlawful detainer proceedings were legislatively reversed by the 1987 revisions to Chapters 478 and 517, RSMo. The judicially-adopted no counterclaim and no equitable defenses

in unlawful detainer proceedings rules are anachronisms and should be abandoned.[59]

Based on the legal authority cited throughout this brief, Appellants strongly agree with the analysis of Robert Sweere and strongly disagree with the holding of *Chamberlain*. The opinion on *Chamberlain* conflicts with bedrock law of Missouri that unlawful detainer defendants, like all other defendants, should be able to fully contest both standing and real party in interest. Homeowners should be allowed to do this by vigorously challenging the chain of title that allegedly gives the unlawful detainer plaintiffs their right to bring their suits in the first place.

CONCLUSION

For each of these reasons set forth in this brief, Missouri unlawful detainer statute § 534.210 is unconstitutional and unenforceable in that it prohibits parties who have undergone a foreclosure from raising affirmative defenses and counterclaims. Further, any and all prior cases must be overturned to the extent that they hold that an unlawful detainer defendant cannot challenge the validity of the underlying foreclosure or challenge whether the plaintiff has standing and/or is the real party in interest.

[59] 68 J. MO. B. at 168.

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Certificates of Service, Brief Form and Virus Scanning

1. This brief complies with Rule 55.03, the limitations contained in Rule 84.06(b), limiting Appellant's brief to 31,000 words. This brief contains 19,529 words, as determined by the word count feature of MS Word.

2. This brief has been filed electronically, as required by this Court, after scanning for viruses.

3. An electronic copy of the foregoing was delivered this 5th day of October, 2012, to attorneys for the Respondent *via* the Court's electronic filing system:

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