

No. 10-55671

---

**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

---

**KAREN LOGAN,**

Appellant,

vs.

**U.S. BANK NATIONAL ASSOCIATION,**

Appellee.

---

Appeal from the United States District Court for the Central District of California,  
Honorable Margaret M. Morrow, District Judge, Case No. CV 09-08950 MMM

**BRIEF OF AMICI CURIAE NATIONAL HOUSING LAW PROJECT,  
SARGENT SHRIVER NATIONAL CENTER ON POVERTY LAW,  
PUBLIC JUSTICE CENTER, NATIONAL LAW CENTER ON  
HOMELESSNESS AND POVERTY, TENANTS TOGETHER, LEGAL  
SERVICES OF NORTHERN CALIFORNIA, HOUSING AND ECONOMIC  
RIGHTS ADVOCATES, HOUSING UMBRELLA GROUP, AND  
COMMUNITY LEGAL SERVICES IN SUPPORT OF REVERSAL**

NATIONAL HOUSING  
LAW PROJECT  
Kent Qian  
James R. Grow  
614 Grand Ave., Suite 320  
Oakland, CA 94610  
(510) 251-9400

SARGENT SHRIVER NATIONAL  
CENTER ON POVERTY LAW  
Samantha Tuttle  
50 E. Washington St. Suite 500  
Chicago, IL 60602  
(312) 368-2677

Attorneys for Amici Curiae

ADDITIONAL COUNSEL:

PUBLIC JUSTICE CENTER

C. Matthew Hill  
Debra Gardner  
One North Charles Street, Suite 200  
Baltimore, MD 21201  
(410) 400-6947  
Attorneys for Amici Curiae

LEGAL SERVICES OF NORTHERN CALIFORNIA

R. Mona Tawatao  
515 12th Street  
Sacramento, CA 95814  
(916) 551-2150  
Attorney for Legal Services of Northern California

COMMUNITY LEGAL SERVICES

George Gould  
1424 Chestnut Street  
Philadelphia, PA 19102  
(215) 981-3717  
Attorney for Community Legal Services

HOUSING UMBRELLA GROUP OF FLORIDA LEGAL SERVICES, INC.

Jeffrey M. Hearne  
Co-Chair, Housing Umbrella Group  
of Florida Legal Services, Inc.  
Legal Services of Greater Miami, Inc.  
3000 Biscayne Blvd, Suite 500  
Miami, FL 33137-4129  
(305) 438-2403  
Attorney for Housing Umbrella Group

## **CORPORATE DISCLOSURE STATEMENT**

National Housing Law Project, Sargent Shriver National Center on Poverty Law, Public Justice Center, National Law Center on Homelessness and Poverty, Tenants Together, Legal Services of Northern California, Housing and Economic Rights Advocates, Housing Umbrella Group of Florida Legal Services, and Community Legal Services are all nonprofit corporations which do not issue stock and which are not subsidiaries or affiliates of any publicly owned corporations.

## TABLE OF CONTENTS

INTERESTS OF AMICI CURIAE.....	1
INTRODUCTION .....	8
ARGUMENT .....	10
I.    THE PTFA GUARANTEES CORE RIGHTS TO TENANTS .....	10
II. <i>YOUNGER</i> ABSTENTION DOES NOT APPLY TO UNLAWFUL DETAINER ACTIONS BETWEEN PRIVATE PARTIES.....	13
III.  CONGRESS ESTABLISHED A PRIVATE RIGHT OF ACTION WHEN IT ENACTED THE PTFA.....	15
A.  Congress Created the PTFA’s Federal Rights to Benefit Tenants Living in Foreclosed Properties.....	17
B.  Congress Intended to Create a Private Remedy to Implement the Rights Created By the PTFA.....	19
1.  The PTFA’s Statutory Text and Legislative History Demonstrates Congressional Intent to Create an Enforceable Right.....	20
2.  The PTFA Provides No Alternative Means of Enforcement.....	22
C.  A Private Right of Action is Consistent with the Underlying Purpose of the Legislative Scheme .....	26
D.  The Cause of Action is Not One Traditionally Relegated to State Law ..	27
CONCLUSION .....	29

## TABLE OF AUTHORITIES

### Cases

<i>Alexander v. Sandoval</i> , 532 U.S. 275 (2001).....	15, 16, 22
<i>AmerisourceBergen Corp. v. Roden</i> , 495 F.3d 1143 (9th Cir. 2007).....	13, 15
<i>Arroyo-Torres v. Ponce Fed. Bank, F.B.S.</i> , 918 F.2d 276 (1st Cir. 1990).....	17
<i>Ayers v. Philadelphia Hous. Auth.</i> , 908 F.2d 1184 (3d Cir. 1990).....	14, 15
<i>Bank of Am., N.A. v. Owens</i> , 28 Misc.3d 328 (N.Y. City Ct. 2010).....	12
<i>Burks v. Lasker</i> , 441 U.S. 471 (1979).....	16
<i>Cannon v. Univ. of Chicago</i> , 441 U.S. 677 (1979).....	17, 26
<i>Cort v. Ash</i> , 422 U.S. 66 (1975).....	passim
<i>Davel Commc’ns, Inc. v. Qwest Corp.</i> , 460 F.3d 1075 (9th Cir. 2006).....	16
<i>First Pacific Bancorp, Inc. v. Helfer</i> , 224 F.3d 1117 (9th Cir. 2000).....	passim
<i>Goldie’s Bookstore, Inc. v. Superior Court</i> , 739 F.2d 466 (9th Cir. 1984).....	14, 15
<i>Gonzaga Univ. v. Doe</i> , 536 U.S. 273 (2002).....	17
<i>In re Digimarc Corp. Derivative Litig.</i> , 549 F.3d 1223 (9th Cir. 2008).....	15, 16
<i>In re: Amendments to the Florida Rules of Civil Procedure-Form 1.996 (Final Judgment of Foreclosure)</i> , 2010 WL 455925, 35 Fla. L. Weekly S97 (Fla. February 11, 2010, as amended on June 3, 2010). .....	24
<i>Knowles v. Robinson</i> , 387 P.2d 833 (Cal. 1963).....	26
<i>Miofsky v. Superior Court</i> , 703 F.2d 332 (9th Cir. 1983).....	14
<i>Nativi v. Deutsche Bank Nat’l Trust Co.</i> , No. 09-06096, 2010 WL 2179885 (N.D. Cal. May 26, 2010).....	19, 25
<i>Opera Plaza Residential Parcel Homeowners Ass’n v. Hoang</i> , 376 F.3d 831 (9th Cir. 2004).....	19

*Orkin v. Taylor*, 487 F.3d 734 (9th Cir. 2007)..... 16, 27

*Pryor v. U.S. Steel Corp.*, 794 F.2d 52 (2d Cir. 1986) .....28

*San Jose Silicon Valley Chamber of Commerce Political Action Comm. v. City of San Jose*, 546 F.3d 1087 (9th Cir. 2008) .....13

*Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946 (9th Cir. 2009).....20

*Thompson v. Thompson*, 484 U.S. 174 (1988) .....20

*Williams v. United Airlines, Inc.*, 500 F.3d 1019 (9th Cir. 2007) .....22

*Younger v. Harris*, 401 U.S. 37 (1971).....9, 14

*Zeffiro v. First Pa. Banking & Trust Co.*, 473 F. Supp. 201 (E.D. Pa. 1979), *aff'd*, 623 F.2d 290 (3d Cir. 1980).....28

**Statutes**

Ariz. Rev. Stat. § 12-1173.01(2009).....10

Cal. Civ. Proc. Code §§ 1161a-1161b (2009).....10

Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010)..... 9, 12, 28

Fla. Stat. § 83.62 (2010).....24

Protecting Tenants at Foreclosure Act (PTFA), Pub. L. No. 111-22, div. A, tit. VII, §§ 701-704, 123 Stat. 1632, 1660-62 (2009)..... passim

**Other Authorities**

155 Cong. Rec. S5096 (daily ed. May 5, 2009) (statement of Sen. Gillibrand) .....20

155 Cong. Rec. S5109 (daily ed. May 5, 2009) (statement of Sen. Gillibrand) .....8

155 Cong. Rec. S5110 (daily ed. May 5, 2009) (statement of Sen. Kerry).....21

155 Cong. Rec. S5110-5111 (daily ed. May 5, 2009) (statement of Sen. Kerry) ...22

155 Cong. Rec. S5174 (daily ed. May 6, 2009) (statement of Sen. Kerry)..... 10, 21

James Temple, *Foreclosure’s Hidden Victims; After Repossessions, Renters Told to Leave and Utilities Shut Off*, S. F. Chron., Aug. 15, 2008 .....8

Jamie Smith Hopkins, *More Maryland Renters Caught Amid Foreclosure*, Balt. Sun, Dec. 30, 2009 .....25

Kara LaPoint, *Foreclosed Rental Properties Growing, So Are Renters’ Rights*, Reno Gazette-Journal, Aug. 1, 2010.....8

National Law Center on Homelessness and Poverty, *Without Just Cause: A 50-State Review of the (Lack of) Rights of Tenants in Foreclosure* (2009).....10

National Low Income Housing Coalition, *Renters in Foreclosure: Defining the Problem, Identifying Solutions* (2008).....8

Rudy Kleysteuber, *Tenant Screening Thirty Years Later: A Statutory Proposal to Protect Public Records*, 116 Yale L.J. 1344 (2007).....26

Tenants Together, *2010 Report: California Renters in the Foreclosure Crisis* (2010) .....5

## **INTERESTS OF AMICI CURIAE**

### **A. National Housing Law Project**

The National Housing Law Project (NHLP) is a charitable nonprofit corporation established in 1968 whose mission is to use the law to advance housing justice for the poor by increasing and preserving the supply of decent, affordable housing; by improving existing housing conditions, including physical conditions and management practices; by expanding and enforcing tenants' and homeowners' rights; and by increasing housing opportunities for people protected by fair housing laws.

Over the past two years, NHLP has been at the forefront of protecting the rights of renters after foreclosure. Through public policy advocacy, legal assistance, research, training and publications, NHLP has worked to educate advocates, tenants, and others about the Protecting Tenants at Foreclosure Act and other rights renters have after foreclosure. NHLP also provides technical assistance to legal services programs representing tenants and using the PTFA in post-foreclosure advocacy.

### **B. Sargent Shriver National Center on Poverty Law**

The Sargent Shriver National Center on Poverty Law ("Shriver Center") is a not-for-profit public interest law office that represents low-income people without charge in civil matters and uses policy development, advocacy, communications

and litigation to fight poverty and improve opportunity. Established in 1967 under the name National Clearinghouse for Legal Services, the Shriver Center has consistently sought to improve the conditions of people in poverty and formulate and advocate for solutions to the conditions that cause and perpetuate poverty. The Shriver Center considers affordable decent housing as a core component of family economic security. It is an important factor in success in school, employability, productivity, and creation of strong communities of opportunity. As a part of the Shriver Center's housing advocacy, the Shriver Center has represented tenants living in properties in or at-risk of foreclosure and advocates for the rights of tenants throughout the foreclosure process.

### **C. Public Justice Center**

The Public Justice Center (PJC) is a non-profit, civil rights and anti-poverty legal services organization based in Maryland. The PJC has a longstanding commitment to enforcing the rights of tenants and presently spearheads the Tenant in Foreclosure Project in Maryland, seeking to enforce the Protecting Tenants at Foreclosure Act (PTFA) and complementary provisions of Maryland law. The PJC has also submitted or joined in a number of *amicus curiae* briefs in cases involving individuals faced with foreclosure. *See, e.g., Julian v. Buonassissi*, 414 Md. 641, 997 A.2d 104 (2010); *Wells Fargo Home Mortg., Inc. v. Neal*, 398 Md. 705, 922 A.2d 538 (2007). The PJC has a strong interest in the present case

because the failure to recognize a private right of action under the PTFA will leave countless tenants holding a right without a remedy, particularly when tenants are deceived into vacating the property without proper notice or forcibly evicted without court process and have no further recourse except to seek compensatory damages.

**D. National Law Center on Homelessness and Poverty**

The National Law Center on Homelessness & Poverty (the “Law Center”) was founded in 1989. The mission of the Law Center is to prevent and end homelessness by serving as the legal arm of the nationwide movement to end homelessness. To achieve its mission, the organization pursues three main strategies: impact litigation, policy advocacy, and public education.

Over the past two years, the Law Center has devoted significant attention to protecting the rights of tenants in foreclosed properties. In February of 2009, we published a report entitled *Without Just Cause: A 50-State Review of the (Lack of) Rights of Tenants in Foreclosure*. This report guided our advocacy on behalf of the Protecting Tenants at Foreclosure Act (PTFA), passed in May of that year. Since the PTFA became law, the Law Center has provided training and technical assistance to ensure that the PTFA is enforced across the country. In the instant case, we have a strong interest in vindicating the right of tenants to enforce the PTFA in order to avoid eviction, which often leads to homelessness.

### **E. Tenants Together**

Tenants Together is a nonprofit organization that promotes fairness and justice for California's 14 million renters through education, organizing, and advocacy. Tenants Together is California's only statewide renters' rights organization. Our members include tenants across the state whose rights have been violated by banks and other post-foreclosure owners.

Over the last two years, our largest program area has been our work to protect the rights of tenants living in foreclosed properties. Tenants Together operates a hotline dedicated exclusively to assisting California tenants in foreclosure situations. Through the hotline, our organization has provided free counseling to over 4,000 California tenants since March 2009. Tenants Together also publishes an annual report on the plight of California tenants in foreclosed properties.

### **F. Legal Services of Northern California**

Founded in 1956, Legal Services of Northern California (LSNC) is a non-profit organization that provides no-cost civil legal services and representation to low-income persons in 23 northern California counties. Helping lower-income renters enforce their rights is a critical part of LSNC's daily work.

The housing and foreclosure crisis has deeply affected renters and homeowners in LSNC's service area, particularly in the Sacramento region, which

has been consistently in the top ten areas in the country most affected by foreclosure over the last three years. In 2009, it is estimated that in Sacramento, Placer, Solano and Butte counties nearly 21,000 renters were in foreclosed rental units, nearly 14,000 in Sacramento County alone. Tenants Together, *2010 Report: California Renters in the Foreclosure Crisis* 13-14 (2010).<sup>1</sup> In counseling and representing hundreds of renters in foreclosure, LSNC has observed that many new owners (successors in interest) of foreclosed properties either do not know about, disregard or act in defiance of laws enacted to protect tenants in foreclosed properties, including the Protecting Tenants at Foreclosure Act (PTFA).

Thus, LSNC has a strong interest in ensuring that tenants in foreclosed properties are armed with the power to enforce the rights that the PTFA confers on them.

### **G. Housing and Economic Rights Advocates**

Housing and Economic Rights Advocates (HERA) is a California statewide, not-for-profit legal service and advocacy organization, located in Oakland, California. HERA's mission is to ensure that all people are protected from discrimination and economic abuses, especially in the realm of housing. We focus

---

<sup>1</sup> Available at <http://www.tenants-together.org/downloads/2010%20Report-%20California%20Renters%20in%20the%20Foreclosure%20Crisis-%20final.pdf>.

particularly on the needs of those who are most vulnerable, which includes lower-income people, the elderly, immigrants, people of color and people with disabilities. HERA's core practice areas are predatory or unfair mortgage lending, foreclosure prevention and fair housing. Our work includes the provision of free legal advice to tenants across the state on their rights in foreclosed on properties, under local, state and federal law, including the Protecting Tenants at Foreclosure Act.

#### **H. Housing Umbrella Group of Florida Legal Services**

The Housing Umbrella Group of Florida Legal Services (Housing Umbrella Group) is a Florida statewide association of approximately 175 public interest law attorneys, from eighteen independent, county, and regional low-income, legal aid service organizations, and law professors from three Florida law schools. Founded in the 1980s, the attorney members of the Housing Umbrella Group provide civil legal services to the indigent citizens and working poor residing throughout the State of Florida. With Florida having one of the highest foreclosure rates in the country, the Housing Umbrella Group is particularly concerned with protecting the rights of low-income tenants who are living in foreclosed properties.

#### **I. Community Legal Services**

The Community Legal Services (“CLS”) is a nonprofit public interest law office in Philadelphia, PA that represents low income persons without any fee in

civil matters. Established in 1966, the organization represents low income clients in a broad range of issues that fundamentally affect their lives. Decent and affordable housing is an issue of great importance to our clients. As part of our daily work CLS represents tenants living in or at risk of being foreclosed and advocates for tenant rights in the foreclosure proceedings. The organization also works to educate advocates, tenants and others about the Protecting Tenants at Foreclosure Act.

## INTRODUCTION

As our nation has grappled with the devastation that foreclosure has caused to our communities, tenants have remained foreclosure's innocent casualties. Indeed, an estimated forty percent of families displaced from their homes due to foreclosure have been renters. National Low Income Housing Coalition, *Renters in Foreclosure: Defining the Problem, Identifying Solutions* 7 (2008).<sup>2</sup> In the confusing wake of foreclosure, renters have found themselves facing a myriad of harms through no fault of their own, ranging from rapid evictions with little or no notice to utility shut-offs. *See, e.g.*, James Temple, *Foreclosure's Hidden Victims; After Repossessions, Renters Told to Leave and Utilities Shut Off*, S.F. Chron., Aug. 15, 2008, at A1. Many tenants are financially incapable of immediate relocation, especially those with school-age children. *Id.*; Kara LaPoint, *Foreclosed Rental Properties Growing, So Are Renters' Rights*, Reno Gazette-Journal, Aug. 1, 2010, at BIZ.<sup>3</sup> Consequently, families have been "kicked out on the street" not because they failed to pay their rent but because their landlords failed to pay the mortgage. 155 Cong. Rec. S5109 (daily ed. May 5, 2009) (statement of Sen. Gillibrand).

---

<sup>2</sup> Available at <https://www2398.sslldomain.com/nlihc/doc/renters-in-foreclosure.pdf>.

<sup>3</sup> Available at <http://www.rgj.com/article/20100731/BIZ/100731020/-1/CARSON/Growing-number-of-renters-displaced>.

In response to the devastating effects of foreclosure on renting families, Congress passed the Protecting Tenants at Foreclosure Act (PTFA), part of the Helping Families Save Their Homes Act. Pub. L. No. 111-22, div. A, tit. VII, §§ 701-704, 123 Stat. 1632, 1660-62 (2009), *amended by* Pub. L. No. 111-203, tit. XIV, § 1484, 124 Stat. 1376, 2204 (2010). Under the PTFA, a bona fide tenant's tenancy survives the foreclosure and any bona fide tenant, regardless of the length of the lease term, is entitled to at least a 90-day notice to vacate.

On December 7, 2009, plaintiff-appellant Karen Logan, a tenant living in a property that had been foreclosed, filed the instant action against defendant-appellee U.S. Bank National Association (U.S. Bank) seeking monetary damages and to enjoin her eviction. On April 12, 2010, the United States District Court for the Central District of California dismissed Ms. Logan's lawsuit because it concluded that (a) it must abstain from hearing Ms. Logan's claim for injunctive relief under *Younger v. Harris*, 401 U.S. 37 (1971), and (b) it lacked subject matter jurisdiction because the PTFA does not give rise to an implied private right of action. A thorough analysis of the PTFA, however, reveals that the *Younger* abstention does not apply to Ms. Logan's claim for injunctive relief and that the PTFA implies a private right of action.

## ARGUMENT

### I. THE PTFA GUARANTEES CORE RIGHTS TO TENANTS

Prior to the PTFA, tenants in properties at foreclosure frequently found themselves at risk of homelessness or struggling with poor living conditions, often with few state or local laws to protect them. *See* National Law Center on Homelessness and Poverty, *Without Just Cause: A 50-State Review of the (Lack of) Rights of Tenants in Foreclosure* (2009);<sup>4</sup> *see, e.g.*, Ariz. Rev. Stat. § 12-1173.01(2009) (providing that a purchaser at foreclosure sale has a right to immediate possession). Indeed, prior to the PTFA, California tenants at foreclosure could be evicted with as little as 30 days' notice, even if they had entered into a long-term lease agreement with the prior owner. Cal. Civ. Proc. Code §§ 1161a-1161b (2009).

In 2009, Congress passed the Protecting Tenants at Foreclosure Act in order to stop this “rampage of sudden evictions of renters” caused by foreclosure and to “help unsuspecting renters from falling victims to foreclosure in which they played absolutely no part.” 155 Cong. Rec. S5174 (daily ed. May 6, 2009) (statement of Sen. Kerry).

---

<sup>4</sup> Available at [http://www.nlchp.org/content/pubs/Without\\_Just\\_Cause1.pdf](http://www.nlchp.org/content/pubs/Without_Just_Cause1.pdf).

Section 702(a) of the PTFA, the section at issue in this case,<sup>5</sup> provides core protections for tenants living in foreclosed properties. It reads:

In the case of any foreclosure on a federally-related mortgage loan or on any dwelling or residential real property after the date of enactment of this title, any immediate successor in interest in such property pursuant to the foreclosure shall assume such interest subject to—

(1) the provision, by such successor in interest of a notice to vacate to any bona fide tenant at least 90 days before the effective date of such notice; and

(2) the rights of any bona fide tenant—

(A) under any bona fide lease entered into before the notice of foreclosure to occupy the premises until the end of the remaining term of the lease, except that a successor in interest may terminate a lease effective on the date of sale of the unit to a purchaser who will occupy the unit as a primary residence, subject to the receipt by the tenant of the 90 day notice under paragraph (1); or

(B) without a lease or with a lease terminable at will under State law, subject to the receipt by the tenant of the 90 day notice under subsection (1),

except that nothing under this section shall affect the requirements for termination of any Federal- or State-subsidized tenancy or of any State or local law that provides longer time periods or other additional protections for tenants.

PTFA § 702(a). Section 702, therefore, establishes two federally guaranteed protections for tenants: (1) the tenant retains all of the housing rights to which he or she was entitled prior to the foreclosure, including the benefits under any lease

---

<sup>5</sup> Section 703 of the PTFA, the other substantive section of the Act, provides additional protections for tenants participating in the Section 8 Housing Choice Voucher Program under the United States Housing Act of 1937, 42 U.S.C. § 1437(o).

agreement, for the entire lease term;<sup>6</sup> and (2) all tenants, regardless of the existence of a lease agreement with the prior owner, must be given at least 90 days' notice to vacate before an eviction action is filed. *Id.* These federal rights preempt any *inferior* rights otherwise established by state landlord-tenant or real property principles. *Id.*

Establishing a federal right to continued occupancy, Section 702 provides that bona fide tenants<sup>7</sup> who live in the property become the tenants of the successor-in-interest taking title as a result of a foreclosure, and the successor becomes their landlord.<sup>8</sup> PTFA § 702(a)(2). Indeed, Section 702 does not merely provide that a tenant who has a longer lease term may stay in her home at least until the end of her term, it also mandates that the tenant's rights under the tenancy or lease agreement – e.g., rental amount, the provision of certain utilities, property

---

<sup>6</sup> A lease may be prematurely terminated under the PTFA only if a purchaser intends to use the property as a primary residence. PTFA § 702(a).

<sup>7</sup> Under Section 702, a lease or tenancy is bona fide only if: “(1) the mortgagor or the child, spouse, or parent of the mortgagor under the contract is not the tenant; (2) the lease or tenancy was the result of an arms-length transaction; and (3) the lease or tenancy requires the receipt of rent that is not substantially less than fair market rent for the property or the unit's rent is reduced or subsidized due to a Federal, State, or local subsidy.” PTFA § 702(b). Tenants in foreclosed properties are presumed to be bona fide tenants under the PTFA. *Bank of Am., N.A. v. Owens*, 28 Misc.3d 328, 334 (N.Y. City Ct. 2010).

<sup>8</sup> A 2010 amendment to the PTFA clarified that all leases entered into prior to the completion of the transfer of title are covered by Section 702(a)(2)(A). Pub. L. No. 111-203, tit. XIV, § 1484, 124 Stat. 1376, 2204 (2010).

maintenance, etc. – become binding on the successor-in-interest. PTFA § 702(a)(2)(A). In this way, the PTFA clearly and directly protects all aspects of tenants’ housing from the jarring, and often devastating, effects of a foreclosure.

## **II. YOUNGER ABSTENTION DOES NOT APPLY TO UNLAWFUL DETAINER ACTIONS BETWEEN PRIVATE PARTIES**

In certain circumstances, as a matter of comity, federal courts should refrain from enjoining or otherwise interfering with state judicial proceedings. *Younger*, 401 U.S. at 45-46. *Younger* abstention is appropriate where four requirements are met:

(1) a state-initiated proceeding is ongoing; (2) the proceeding implicates important state interests; (3) the federal plaintiff is not barred from litigating federal [] issues in the state proceeding; and (4) the federal court action would enjoin the proceeding or have the practical effect of doing so . . . .

*San Jose Silicon Valley Chamber of Commerce Political Action Comm. v. City of San Jose*, 546 F.3d 1087, 1092 (9th Cir. 2008). All four elements must be satisfied to justify abstention. *AmerisourceBergen Corp. v. Roden*, 495 F.3d 1143, 1148 (9th Cir. 2007).

Two *Younger* factors are absent in this case. First, no state-initiated proceeding is present. This Court has distinguished between cases where the state was a party to the proceeding and state-court litigation that involved only private litigants. *See Goldie’s Bookstore, Inc. v. Superior Court*, 739 F.2d 466, 469 (9th

Cir. 1984) (holding that underlying unlawful detainer action between private parties does not justify abstention); *Miofsky v. Superior Court*, 703 F.2d 332, 337 (9th Cir. 1983) (finding *Younger* abstention unwarranted for underlying tort litigation between private parties). A state-initiated proceeding is similarly absent here, as the underlying unlawful detainer action in this case is between Ms. Logan and U.S. Bank, two private litigants.

The second *Younger* factor absent from this case is whether the proceeding implicates an important state interest sufficient to warrant abstention. It does not. Absent a state-initiated proceeding, this Court has never found a sufficiently important state interest to justify abstention. Further, this Court has recognized that an unlawful detainer action does not trigger *Younger* abstention. *Goldie's*, 739 F.2d at 469. *Goldie's* presented a similar question of whether *Younger* abstention is warranted when the underlying state proceeding was, as here, an unlawful detainer action. *Id.* In that case, this Court held that the unlawful detainer proceeding “do[es] not implicate important state interests” to warrant abstention under *Younger*. *Id.* at 470. Similarly, in *Ayers v. Philadelphia Hous. Auth.*, the Third Circuit found that the state’s interest in foreclosure-related eviction proceedings was insufficient to trigger *Younger* abstention. 908 F.2d 1184, 1195 n.21 (3d Cir. 1990) (noting that underlying eviction “does not implicate an

important state interest”). As in *Goldie’s* and *Ayers*, this case does not implicate a strong state interest.

Because neither the state-initiated proceeding nor the “state interest” element of *Younger* is satisfied, *Younger* abstention is unwarranted.<sup>9</sup> See *AmerisourceBergen Corp.*, 495 F.3d at 1148 (holding that all four elements must be met to justify abstention).

### **III. CONGRESS ESTABLISHED A PRIVATE RIGHT OF ACTION WHEN IT ENACTED THE PTFA**

To protect tenants from abrupt displacement, Congress unambiguously created federal rights in the PTFA to benefit tenants in foreclosed properties. Because these PTFA rights are consistent with the underlying statutory purpose and are not traditionally relegated to state law, they are enforceable through a private right of action.

“Private rights of action to enforce federal law must be created by Congress.” *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001). Private rights of action may be express or implied. *In re Digimarc Corp. Derivative Litig.*, 549 F.3d 1223, 1231 (9th Cir. 2008). When, as here, a federal statute does not

---

<sup>9</sup> Ms. Logan’s injunctive relief claim is not mooted by the dismissal of the unlawful detainer action: as the dismissal was without prejudice, the action may be re-filed at any time.

expressly provide a private right of action, courts turn to the four-part test set forth in *Cort v. Ash*, 422 U.S. 66 (1975), to determine whether a statute implies a right of action:

(1) whether the plaintiff is “one of the class for whose especial benefit the statute was enacted—that is, [whether] the statute create[s] a federal right in favor of the plaintiff”; (2) whether “there [is] any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one”; (3) whether the cause of action is “consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff”; and (4) whether “the cause of action [is] one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law.”

*In re Digimarc*, 549 F.3d at 1231 (quoting *Cort*, 422 U.S. at 78). An analysis under *Cort* is “focused entirely on intent.” *Orkin v. Taylor*, 487 F.3d 734, 739 (9th Cir. 2007). “Indeed, the three *Cort* factors not explicitly focused on legislative intent are actually indicia of legislative intent.” *Id.*

Each statutory provision must be analyzed separately for a private right of action. *Sandoval*, 532 U.S. at 286 (finding a right of action in Section 601 of Title VI but not in Section 602). Application of the *Cort* factors to Section 702 of the PTFA demonstrates an implied right of action.<sup>10</sup>

---

<sup>10</sup> In this case, the District Court dismissed for lack of subject matter jurisdiction. However, “the existence of a private right of action is not a jurisdictional question.” *Davel Commc’ns, Inc. v. Qwest Corp.*, 460 F.3d 1075, 1085 (9th Cir. 2006) (citing *Burks v. Lasker*, 441 U.S. 471, 476 n.5 (1979)). Since jurisdiction

**A. Congress Created the PTFA’s Federal Rights to Benefit Tenants Living in Foreclosed Properties**

The first *Cort* factor asks whether the plaintiff is “one of the class for whose especial benefit the statute was enacted—that is, [whether] the statute create[s] a federal right in favor of the plaintiff.” *In re Digimarc*, 549 F.3d at 1231. This inquiry “simply require[s] a determination as to whether or not Congress intended to confer individual rights upon a class of beneficiaries,” *Gonzaga Univ. v. Doe*, 536 U.S. 273, 285 (2002). Accordingly, this factor “is satisfied when there is an explicit reference to the individuals for whose benefit the statute was enacted.” *First Pacific Bancorp, Inc. v. Helfer*, 224 F.3d 1117, 1123 (9th Cir. 2000); *see also Cannon v. Univ. of Chicago*, 441 U.S. 677, 690-91 (1979) (when the statutory language expressly identifies the class of people Congress intended to benefit, it tends to favor a private right of action).

The PTFA is clearly aimed at protecting tenants, as demonstrated both by its title and the substantive rights it establishes. Indeed, the plain language of the title of the Act makes clear that tenants affected by foreclosure are the intended beneficiaries of the statute – the Act is called the “Protecting Tenants at Foreclosure Act of 2009.” PTFA § 701. To that end, the PTFA grants bona fide

---

clearly exists to determine the existence of a possible federal claim, the right of action issue is appropriately analyzed as such under Rule 12(b)(6). *Arroyo-Torres v. Ponce Fed. Bank, F.B.S.*, 918 F.2d 276, 280 (1st Cir. 1990).

tenants two explicit rights. The first is the right to a 90-day notice to vacate before they may be subject to an eviction. PTFA § 702(a) (“any immediate successor in interest . . . pursuant to [a] foreclosure shall assume such interest subject to . . . the provision . . . of a notice to vacate to any bona fide tenant at least 90 days before the effective date of such notice”).

In addition, the PTFA creates continued occupancy rights for bona fide tenants. PTFA § 702(a)(2). Indeed, the PTFA provides that “any immediate successor in interest . . . pursuant to [a] foreclosure shall assume such interest subject to . . . the rights of any bona fide tenant to occupy the premises until the end of the remaining term of the lease,” thus giving tenants additional rights, including the right to remain until the end of a fixed term lease, as well as rights granted under a lease or by landlord-tenant law, which otherwise would generally have been terminated by foreclosure of any superior mortgage or deed of trust. PTFA § 702(a)(2)(A). Absent local law, these rights did not exist prior to PTFA. *See* pp. 8-13, *supra*. These PTFA rights were explicitly enacted for the benefit of bona fide tenants whose homes are the subject of foreclosure, thus fully satisfying the first *Cort* factor. *See Nativi v. Deutsche Bank Nat’l Trust Co.*, No. 09-06096,

2010 WL 2179885, at \*3 (N.D. Cal. May 26, 2010) (finding that the PTFA intended to especially benefit tenants who fell victims to the foreclosure crisis).<sup>11</sup>

**B. Congress Intended to Create a Private Remedy to Implement the Rights Created By the PTFA**

The second *Cort* factor focuses on whether there is “any indication of legislative intent, explicit or implicit, [ ] to create such a remedy or deny one.” *Cort*, 422 U.S. at 78. Of the four *Cort* factors, this factor is the most important. *Opera Plaza Residential Parcel Homeowners Ass’n v. Hoang*, 376 F.3d 831, 835 (9th Cir. 2004). To determine the legislative intent to create a private right of action, courts examine the rights-creating language of the statute, the context in which it was passed, and the statute’s legislative history. *Id.* at 836.

Of course, the absence of express legislative intent to create a private remedy does not mean that Congress did not intend such a right. *Opera Plaza*, 376 F.3d at 836 (“Legislative silence does not necessarily equate to the absence of intent to create a private right of action.”). “Indeed, if that were the case, the Supreme Court would not have developed a test for an implied private right of action.” *Helper*, 224 F.3d at 1124. Instead, the Supreme Court has instructed that:

---

<sup>11</sup> While the *Nativi* court did not eventually find an implied private right of action, our argument *infra* will demonstrate that its holding was incorrect.

Our focus on congressional intent does not mean that we require evidence that Members of Congress, in enacting the statute, actually had in mind the creation of a private cause of action. The implied cause of action doctrine would be a virtual dead letter were it limited to correcting drafting errors when Congress simply forgot to codify its evident intention to provide a cause of action.

*Thompson v. Thompson*, 484 U.S. 174, 179 (1988).

**1. The PTFA’s Statutory Text and Legislative History Demonstrates Congressional Intent to Create an Enforceable Right**

Every question of statutory interpretation “begins with the statutory text.” *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 951 (9th Cir. 2009). As set forth fully above, the PTFA starts with an unmistakable focus on tenants’ rights, as it is titled “*Protecting Tenants at Foreclosure Act*,” and then proceeds to establish critical housing rights for tenants at foreclosure. PTFA §§ 701, 702(a) (emphasis added).

Congress’s exclusive focus on tenants’ rights in the plain language of the PTFA is also amply supported by the legislative history. The Congressional Record is replete with forceful statements about the dire necessity to create a law that would protect innocent tenants affected by foreclosure. *See* 155 Cong. Rec. S5096 (daily ed. May 5, 2009) (statement of Sen. Gillibrand) (“[T]enants have almost no rights when a bank seizes their home . . . [and] as the housing crisis becomes more and more widespread, we need to make sure we are not just helping homeowners stay in their homes but also helping the thousands of tenants who are

hit just as hard or even worse as a result of this crisis.”); *id.* at S5110 (statement of Sen. Kerry) (“Congress has done very little to help renters who have been paying their rent regularly on time but, unfortunately, they have landlords who are losing their property to foreclosure. So these renters are absolutely blameless victims in the foreclosure catastrophe that has hit the country.”); *id.* at S5174 (daily ed. May 6, 2009) (statement of Sen. Kerry) (“What we want to do is provide them with a provision where they will have [at least] 90 days... We are protecting legitimate, low- to moderate-income folks in America who do not get protections otherwise from being just booted out on the street, which is literally what has happened in the absence of this protection.”).

Moreover, Congress intended tenants to have an enforceable right to remedy the “disgraceful” incidents that are happening around the country. As Senator Kerry described,

A landlord should not be allowed to come in, change the locks, and force out tenants who were there completely legitimately, with an expectation that they were coming home to their same old home. . . .

A Dorchester, MA, man returned to the home he had been renting for the past 4 years. He found that the locks had been changed and a foreclosure notice had been placed on the door. . . . When the police arrived, he had to beg them not to be arrested.

In early January, a 45-year-old former factory worker from China came home to her third-floor walkup in east Boston to find a crew of moving men removing all of her furniture. She thought she was being

robbed. She didn't speak English. . . . She ended up on the street with all of her possessions . . . .

155 Cong. Rec. S5110-5111 (daily ed. May 5, 2009) (statement of Sen. Kerry). Indeed, Senator Kerry describes situations in which tenants living in foreclosed properties were not even being brought into eviction court where they could present a defense or ask the court for more time. *Id.* Based on the PTFA's sole focus on tenants – both in its explicit text creating federal tenants' rights and its legislative history, the second *Cort* factor also demonstrates that Congress intended to create a private judicial remedy to enforce the PTFA.

## **2. The PTFA Provides No Alternative Means of Enforcement**

The PTFA's lack of any comprehensive agency enforcement scheme provides yet another sign that Congress intended tenants to have a private right of action under the statute. Although “[t]he express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others,” *Sandoval*, 532 U.S. at 290, the lack of an express enforcement mechanism suggests that Congress intended the statute to be privately enforceable. *Compare Helfer*, 224 F.3d at 1125-26 (concluding that “where no enforcement mechanism is explicitly provided by Congress or an administrative agency, it is appropriate to infer that Congress did not intend to enact unenforceable requirements”), *with Williams v. United Airlines, Inc.*, 500 F.3d 1019, 1024 (9th Cir. 2007) (finding that

the fact that Congress established a carefully tailored administrative scheme of enforcement suggests that Congress did not intend to create a private right of action).

Where Congress has specified a comprehensive governmental enforcement scheme, plaintiffs can obtain redress for violations of their federal rights. But when Congress creates a federal right without any alternative enforcement authority, a private right of action should be implied. *See Helfer*, 224 F.3d at 1125-26 (explaining that Congress would not have created a statutory right without an expectation that the right would be enforceable). Here, while Congress saw the need to enact this landmark legislation establishing new tenants' rights, it did not task any federal agency with enforcing the individual rights of tenants under the PTFA. Nor did Congress establish a federal enforcement scheme or delegate enforcement to the states.

Not only is there no comprehensive federal enforcement scheme, but no existing state mechanism would protect all the tenant rights created by the PTFA. Indeed, defending state eviction actions alone would not be adequate to enforce the PTFA, especially in states with judicial foreclosure proceedings which allow the purchaser at the foreclosure sale to remove the tenant without having to file an eviction action. For example, in Florida, the foreclosure final judgment form approved by the Florida Supreme Court entitles the purchaser at a foreclosure sale

to immediately obtain a Writ of Possession. *See In re: Amendments to the Florida Rules of Civil Procedure-Form 1.996 (Final Judgment of Foreclosure)*, 2010 WL 455925, 35 Fla. L. Weekly S97 (Fla. February 11, 2010, as amended on June 3, 2010). The tenant first learns of the eviction when the Sheriff posts the Writ of Possession on the front door. The Writ of Possession gives the tenant 24 hours' notice before the Sheriff returns to remove the tenant from the property. Fla. Stat. § 83.62(1) (2010). Under the current version of the form Final Judgment, the new owner is not required to file a separate eviction action against the tenant where the tenant could raise legal defenses. Because of this, the only way a tenant can raise the defense that the purchaser failed to comply with PTFA is by filing an emergency motion with the foreclosure judge. It is simply unrealistic to expect tenants facing eviction within 24 hours to spend those limited final hours navigating the judicial system rather than finding someplace safe for their families to stay. In states with procedures similar to Florida, traditional state remedies are wholly inadequate, and it is critical that tenants have a private right of action to enforce PTFA.

Even in states such as Maryland, where procedures under Md. Rule 14-102 should afford tenants the opportunity to raise a PTFA defense to foreclosure eviction, a private right of action remains critical. Foreclosure sale purchasers in some Maryland cases have successfully circumvented the notice and hearing

provisions in Rule 14-102 while seeking possession, either by deceiving tenants about the application of PTFA rights and intimidating them to quickly vacate or by failing to investigate whether a bona fide tenant lives on the property and consequently failing to serve the tenant with the action for possession according to Rule 14-102. *See, e.g.,* Jamie Smith Hopkins, *More Maryland Renters Caught Amid Foreclosure*, Balt. Sun, Dec. 30, 2009, at A1. In such cases where the eviction is already accomplished or the judgment for possession is already enrolled, tenants have little to no recourse without a private right of action seeking compensatory damages for such unscrupulous conduct that violates PTFA's express provisions.

In fact, as Senator Kerry's May 5, 2009 statements indicate, many of the worst situations facing tenants at foreclosure involve skirting a state court eviction process altogether – and practices such as lockouts after foreclosure have not subsided since PTFA's enactment. *See Nativi*, 2010 WL 2179885, at \*1 (describing tenants who were locked out of their homes without an eviction or court order). Further, the rights created by the PTFA go beyond mere eviction defenses – they provide bona fide tenants with any rights that had been theirs under their leases with the prior owner, as well as continued occupancy rights for at least 90 days following a PTFA-required notice. Many of these rights cannot be raised as a counterclaim in an unlawful detainer case. *See Knowles v. Robinson*, 387 P.2d

833, 836 (Cal. 1963) (“[N]either a cross-complaint nor a counterclaim may be properly filed in a suit for unlawful detention of property . . . .”). What’s more, waiting to raise the PTFA in eviction court – even if the tenant prevails – may put tenants’ future housing opportunities in jeopardy. *See* Rudy Kleysteuber, *Tenant Screening Thirty Years Later: A Statutory Proposal to Protect Public Records*, 116 *Yale L.J.* 1344, 1346 (2007) (explaining that when evaluating prospective tenants, landlords routinely purchase “tenant screening reports” that “chronicle landlord-tenant disputes and court filings, often regardless of their outcomes,” making it difficult for even prevailing tenants to secure housing). Only the availability of a private right of action ensures that tenants can fully enforce the individual rights provided by the PTFA. *See Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 18-19 (1979) (finding that Congress intended to create a private right of action, in part, because seeking relief under the statute in the context of state court litigation or as a defense was inadequate to effectuate Congressional purpose).

**C. A Private Right of Action is Consistent with the Underlying Purpose of the Legislative Scheme**

The purpose of the PTFA is evident from the legislative history: to protect tenants from the devastating effects of foreclosure. A private right of action is consistent with that goal. *See, e.g., Cannon*, 441 U.S. at 693 (holding that a private

right of action for damages under Title IX would not frustrate the statutory purpose to ensure federal funds are not used to support discrimination).

Moreover, because the PTFA does not identify any enforcement entity to sue violators on behalf of tenants, allowing tenants “a private right of action is consistent with the goals of the Act,” because “it is appropriate to infer that Congress did not intend to enact unenforceable requirements.” *Helper*, 224 F.3d at 1127 (holding that shareholders had a private right of action against defendant bank to demand a satisfactory accounting). A private right of action is critical to advance Congress’s goals under the PTFA because there is no other way the rights created can be secured.

**D. The Cause of Action is Not One Traditionally Relegated to State Law**

The fourth *Cort* factor, whether the cause of action is one traditionally relegated to state law, is the least important of the four factors. *See Helper*, 224 F.3d at 1127 (“[T]he utility of the fourth *Cort* factor is in doubt . . .”). As with all the factors, this factor is a means to examine Congressional intent. *Orkin*, 487 F.3d at 739. Both the literal text and the legislative history of the PTFA demonstrate that Congress has established a federal policy to address a nationwide crisis – notwithstanding that it treads in areas of traditional state law. Certainly, since the almost unprecedented financial and housing crises began, Congress has

determined it necessary to adopt a wide range of remedial policies in areas that have traditionally been left to the states. *See, e.g.*, Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (creating an array of new protections in the area of consumer protection, mortgage lending, and banking, including establishing a new federal consumer protection agency).

Foreclosure is no exception. While post-foreclosure possessory rights may have traditionally been an area regulated by the states, the federal government has been squarely at the center of attempts to address the foreclosure crisis. Indeed, in similar situations, courts have found a private right of action even when an area traditionally regulated by the states has been involved. *See, e.g., Pryor v. U.S. Steel Corp.*, 794 F.2d 52, 58 (2d Cir. 1986) ("Here . . . U.S. Steel is alleged to have violated a specific substantive provision of the Williams Act by failing to purchase shares on a pro rata basis. Under these circumstances, we are not intruding unnecessarily into the province of state contract law by recognizing a federal private remedy to enforce a requirement of a federal statute."); *Zeffiro v. First Pa. Banking & Trust Co.*, 473 F. Supp. 201, 210 (E.D. Pa. 1979) (determining that that the fourth *Cort* factor was satisfied because, while issue before the court (trust indentures) may have traditionally been the primary concern of states, increased federal legislation and regulation in the area changed that), *aff'd*, 623 F.2d 290 (3d Cir. 1980). The federal government has a strong interest in protecting the innocent

casualties of the foreclosure crisis and stabilizing communities affected by foreclosure. This interest only buttresses the conclusion of the language, structure, and legislative history of the PTFA – Congress intended to create a private right of action.

### **CONCLUSION**

For the reasons stated above, amici curiae respectfully urge this Court to reverse the decision of the District Court.

Dated: August 25, 2010

NATIONAL HOUSING LAW PROJECT

By: s/ Kent Qian  
KENT QIAN  
Attorney for Amici Curiae

## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with type-volume limitation set forth in FRAP 32(a)(7)(B) and FRAP 29(d). This brief is proportionately spaced, contains 6,541 words, and has a typeface of 14 points or more.

Dated: August 25, 2010

NATIONAL HOUSING LAW PROJECT

By: s/ Kent Qian  
KENT QIAN  
Attorney for Amici Curiae

### **CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on August 25, 2010. Participants in this case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing documents by First-Class Mail, postage prepaid to the following non-CM/ECF participants:

John M. Sorich  
ALVARADO & ASSOCIATES LLP  
Suite 210  
1 Mac Arthur Place  
Santa Ana, CA 92707

Karen Logan  
1437 Caitlyn Circle  
Westlake Village, CA 91361

By: s/ Kent Qian