IN THE SUPREME COURT OF THE STATE OF NEVADA

WELLS FARGO BANK,

Appellant,

vs.

DUKE RENSLOW and TINA RENSLOW,

Respondents.

SUPREME COURT NO. 58283

District Court Case No. CV10-03582

APPEAL
From the Second Judicial District Court
The Honorable Patrick Flanagan, District Judge

APPELLANT'S OPENING BRIEF

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I. JURISDICTIONAL STATEMENT

This is an appeal from the district court's order granting Appellees' Petition for Judicial Review, modifying Appellees' loan, and sanctioning Appellant. The district court's order was entered on March 29, 2011, and the Notice of Entry of Order was filed on March 30, 2011. Appellant timely filed a Notice of Appeal on April 26, 2011, as required by Nevada Rule of Appellate Procedure 4. This Court has jurisdiction over this appeal under Nevada Rule of Appellate Procedure 3A(b)(1).

II. ISSUES PRESENTED FOR REVIEW

1. Whether NRS 107.086(5) violates the Takings Clause of the United States Constitution, amend. V, and the Nevada Constitution, art. I, § 8, because it appropriates private property – including the real property that is collateral for the loan, and also interest and principal to be paid to Wells Fargo – for a public use without any, much less just, compensation?

2. Whether NRS 107.086(5) violates the Contract Clause of the United States Constitution, art. I, § 10 and the Nevada Constitution, art. I, § 15, either on its face, by authorizing the wholesale rewriting of loan agreements, or as applied, by allowing the district court to cut the Renslows' mortgage to 2%, slash their payments by 30%, and award them $30,000 cash – all where they were not even faced with foreclosure.

3. Whether the authority NRS 107.086(5) conferred upon the judiciary to conduct the Foreclosure Mediation Program violates Article III, § 1 of the Nevada Constitution, which mandates separation of the judicial power from the executive and legislative powers as a crucial guarantee of the liberties of Nevadans.

4. Whether the Foreclosure Mediation Program violates the Due Process Clauses of the United States Constitution, amend. XIV, § 1, and the Nevada Constitution, art. I, § 8, by requiring mediation, exposing lenders to substantial liability without the procedural safeguards of litigation.

5. Whether the district court erred by considering and sanctioning Wells Fargo for actions that occurred even before the extrajudicial foreclosure mediation process here.

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II. STATEMENT OF THE CASE

This case casts in stark relief why the Foreclosure Mediation Program established in NRS 107.086(5) violates Nevada's Constitution and the United States Constitution, and basic principles of American law. Amid a wave of home foreclosures during this Great Recession, Nevada's legislature enacted NRS 107.086(5), which forces any bank that would foreclose upon a home mortgage loan in default to submit first to mediation, even where the contractual right to foreclose is clear and undisputed. It mandates mediation where there is no lawsuit to mediate. It mandates mediation where no one has found or alleged bad faith or breach of contract. It then confers a great – and inherently executive – administrative power upon the courts to order interactions among parties to the loan contract, to avoid foreclosures. And then it allows courts, where no case has been filed, no breach of contract adjudicated, and no bad faith found, to rewrite contracts and impose vast fines for failure to do the precise opposite of what the contracts are for.

That is what happened here. Duke and Tina Renslow wanted a loan modification from their original lender, Wells Fargo, which is now the servicer of their loan. They intentionally became delinquent on their loan to make themselves eligible for a loan modification under the Home Affordable Modification Program ("HAMP"). After completing the HAMP trial period, the Renslows were informed that the owner of the loan did not participate in HAMP. The Renslows then defaulted on their mortgage. After Wells Fargo caused a notice of default to be recorded, the Renslows chose mediation. At the mediation, Wells Fargo offered the Renslows choices including a loan modification, reinstatement, and forbearance. Though the Wells Fargo representative had authority to make these offers on behalf of the owner of the note, he did not know who the owner of the note was. The mediator issued a statement that Wells Fargo did not have the authority required to modify the loan, and thus declined to issue the certificate that would permit foreclosure.

The Renslows did not face foreclosure. And though the program is a *Foreclosure* Mediation Program, the Renslows filed a Petition for Judicial Review seeking sanctions

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and to force Wells Fargo to give them the HAMP loan modification they failed to obtain. The district court gave the Renslows almost precisely that, and more. The district court lowered the rate on the Renslows' mortgage to 2%, which is 1.25% below the prime rate in effect since 2009. *See* http://primerate.wsjprimerate.us/2011_04_01_archive.html (last visited Sept. 29, 2011). The district court reduced the Renslows' monthly mortgage payment from $1,708 to $1,135 per month, eight dollars more than the HAMP modification they sought. And the district court assessed $30,000 in sanctions against Wells Fargo, thus handing the Renslows twenty-six months of mortgage payments for free.

Wells Fargo appeals.

III. STATEMENT OF FACTS

A. In 2003, the Renslows Borrow Money From Wells Fargo To Buy a Home.

On May 6, 2003, the Renslows borrowed $184,000 to buy a home at 10200 Shenandoah Drive in Reno, Nevada. (Joint Appendix "JA" at 80.) The Renslows' mortgage was a fifteen year note (the "Note"), due to be repaid in full by June, 2018. (JA at 80.) The Note allowed Wells Fargo to sell its interest in the note at any time without notice. The Note also required the Renslows to provide a period of time for Wells Fargo to cure any perceived failure to comply with any duty under the Note before any judicial action could lie against Wells Fargo. The Renslows' monthly payment on that loan was $1708.83. (JA at 169.) Wells Fargo was the originating lender of the loan. For many years, the Renslows made their payments and were not delinquent. There is also no record of the Renslows having any trouble with Wells Fargo, or giving any notice that Wells Fargo breached any obligation under the Note.

B. In 2009, the Renslows Seek and Fail To Obtain a Modification of the Note Through the Federal Home Affordable Modification Program ("HAMP").

According to the Renslows and the district court, in July 2009, the Renslows contacted Wells Fargo seeking a loan modification. (JA at 160-61.) According to the

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Renslows and the district court, a Wells Fargo representative indicated that they could not be eligible for a HAMP modification unless, as a threshold condition, they were first delinquent on their mortgage.[1] (JA at 161.) The Renslows candidly admit that they decided to become delinquent on their mortgage so they might become eligible for loan modification options. (JA at 161-62.) At the Renslows' request, Wells Fargo sent them a Home Affordable Modification Program ("HAMP") application. (JA at 162-63.) The Renslows returned the application and were accepted into a HAMP trial period. (JA at 163-64.) Under the HAMP trial period, the Renslows' payments were $1,127.06. (JA at 164.) The HAMP information stated that upon successful completion of the trial period, the Renslows would receive a modification with a similar payment. (JA at 164.) The Renslows made the trial period payments until approximately April 2010. (JA at 166-67.) On April 5, 2010, Wells Fargo notified the Renslows that they may not be eligible for HAMP because Wells Fargo services their loan for an investor that had not given Wells Fargo the authority to modify the Renslows' loan under HAMP. (JA at 166.) The Renslows were instructed to continue making their trial period payments. Several weeks later, on April 29, 2010, Wells Fargo informed the Renslows that the investor who owned their loan declined to modify it. (JA at 168.) They were also informed that the trial payments would be applied to their loan as it then existed, which, according to the Renslows, left them further delinquent on their loan. (JA at 168-69.) On August 6, 2010, National Default Servicing Corporation recorded a Notice of Default. (JA at 170-71.)

C. After Defaulting, the Renslows Elect To Request a Foreclosure Mediation.

The Renslows elected to mediate, and attended a mediation under the Foreclosure Mediation Program (the "Program") on October 19, 2010. (JA at 12-15.) Stephen Wassner, Esq. participated in the mediation in person on Wells Fargo's behalf and Greg

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[1] The district court relied on the Renslows' self-serving statements about prior matters, and incorporated them at length into its Order. Wells Fargo disputes the statements, and whether the district court could rely upon pre-mediation allegations in awarding sanctions.

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Eastman, a Wells Fargo employee, participated by phone. (JA at 15, 201, 204-05.) The Renslows attended with Benjamin Alasua, a housing counselor with the Washoe County Senior Law Project. (JA at 147, 149.) At the time of the mediation, Federal Home Loan Bank ("FHLB") owned the note, but did not attend the mediation. (JA at 208.) Wells Fargo was the master servicer of the loan, and had been so since FHLB acquired the note. (JA at 208.) At the mediation, everyone was aware that Wells Fargo did not own the note. (JA at 187, 208.)

Wells Fargo presented evidence that Mr. Eastman had full authority to negotiate a loan modification with the Renslows within the parameters of the contract with the investor. (JA at 204-05.) The district court agreed, acknowledging that there was "evidence in the record that Mr. Eastman showed up with authority to modify the loan." (JA at 212.) Indeed, Mr. Eastman offered the Renslows a loan modification which would purportedly have lowered their monthly payment by about $260.00. (JA at 158, 186, 195.) The Renslows declined the offer. Mr. Renslow testified that he "wasn't paying attention that much... I know it wasn't worth – I mean, it wasn't anything substantial..." (JA at 31.) He stated that he knew "it wasn't a significant amount that would reduce my payment down to [] 30 percent [of his income]." (JA at 186-87.) Mr. Renslow "felt" that "it was a minimal amount" compared to the amount of the modification in the HAMP trial period. (JA at 186.) Mr. Renslow admitted that he would have accepted Mr. Eastman's modification offer if it was similar to the HAMP modification. (JA at 190.) Mr. Eastman also offered the Renslows reinstatement or a forbearance. (JA at 156, 175.) The Renslows also declined both of those offers. (JA at 156, 175.)

The Mediator's brief statement indicated that the Wells Fargo representative did not have authority to modify the loan and did not know who owned the note. (JA at 14.) The Mediator did not recommend that the court issue a certificate. (JA at 174.) Wells Fargo, and the ultimate owner of the Note, thus could not exercise the remedy of foreclosure in response to the Renslows' undisputed default.

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D. Though They No Longer Faced Foreclosure For Their Default, the Renslows Petitioned for Judicial Review, Asking the Court To Rewrite the Note Anyway and Sanction Wells Fargo As Well.

Even though the Mediator recommended against issuing a certificate as a result of the October 2010 mediation, the Renslows filed a Petition for Judicial Review, asking the Court to rewrite the Note and sanction Wells Fargo too. (JA at 1-9.) The Renslows do not contend that Wells Fargo failed to fulfill any condition of the Note, or that they gave notice to Wells Fargo giving it an opportunity to cure if it had, as the Note requires. They simply wanted judicial review of a mediation that did not result in a certificate, because they wanted the Court to rewrite their contract.

The Renslows got their contract rewritten. The district court soon issued an order imposing sanctions against Wells Fargo for failing to meet the documentary requirements of NRS 107.086(4) and FMR 5(10)(b), for failing to attend with authority, and for attempting to charge a mediation fee. (JA at 300-26.) The court also awarded the Renslows their fees and costs and ordered that Wells Fargo could not collect late fees accrued since November 2009. (JA at 325-26.) The district court also greatly modified the Renslows' loan, ordering the principal to be re-amortized, the payment to be set at $1,145.00. (JA at 325-26.) The district court also reset the interest rate on the Note to 2%, which is one and one-quarter points below prime, for the life of the note. (JA at 325.) The district court also ordered Wells Fargo to pay $30,000, which is 26 months of mortgage payments, as a sanction. (JA at 325.)

IV. SUMMARY OF THE ARGUMENT

The district court's order cannot stand because NRS 107.086 violates bedrock principles of American law found in the United States and Nevada Constitutions. First, it is a taking of real property and other private property for a public use without any compensation, much less just compensation, which violates the Takings Clauses of the United States and Nevada Constitutions. Second, the sweeping authority NRS 107.086 gives courts to modify loans violates the Contract Clauses of the United States and

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Nevada Constitutions because it substantially impairs a contractual obligation in a manner that is neither reasonable nor necessary to achieve Nevada's goal of bringing borrowers and beneficiaries "to the table." Third, the Nevada Constitution and the Nevada Supreme Court have set forth in ringing language a doctrine of separation of powers as a guardian of the people's liberties. Yet the Legislature's delegation of the administration of the Program to the Supreme Court requires the Court to perform inherently executive functions that, however nobly intended the delegation, simply cannot be classed as judicial powers. Fourth, the Program, and its application in this case in particular, violate Wells Fargo's rights to due process, by (a) supplying new terms to contracts in nonjudicial proceedings, (b) providing draconian relief outside the litigation process that is expressly contrary to the parties' contract and (c) thwarting both the remedies clauses of the contract and essential terms and purposes of the contract. Fifth, the district court improperly considered and relied heavily on events that occurred long before and outside the scope of the mediation in fashioning sanctions. This exceeded the scope of the district court's authority in evaluating the Petition for Judicial Review. And while the Renslows brought the Petition to enforce their prior HAMP modification, the Petition was not an appropriate vehicle for that relief. Rather, the Renslows must seek such relief, if at all, by suit. For all of these reasons, this Court should reverse the district court's order.

V. ARGUMENT

A. This Court Reviews the District Court's Legal Rulings *De Novo*.

This Court reviews questions of law *de novo*. *Waldman v. Maini*, 124 Nev. 1121, 195 P.3d 850, 855 (2008). It reviews findings of fact for clear error. *Cortes v. State*, 127 Nev. Adv. Rep. 44, at *6 (July 21, 2011).

B. This Court Should Reverse the District Court's Order, and Strike Down NRS 107.086, Because Both Violate the Takings Clauses of the United States and Nevada Constitutions.

The Foreclosure Mediation Program authorizes the taking of private property – including the real property that is the collateral underlying home mortgage loans – for public use, and thus violates the Takings Clause of both the United States and Nevada

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Constitutions. The Fifth Amendment to the United States Constitution concludes prohibits "private property be[ing] taken for public use, without just compensation." U.S. Const. amend. V; *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226, 228-29 (1897). The Nevada Constitution likewise provides that "Private property shall not be taken for public use without just compensation having been first made." Nev. Const., art. I, Section 8. As this Court has taught, the Takings Clause of the Nevada Constitution is more protective of property rights than is that in the United States Constitution. *McCarran Int'l Airport v. Sisolak*, 122 Nev. 645, 670, 137 P.3d 1110, 1127 (2006).

It could not be clearer the Foreclosure Mediation Program is a *per se* regulatory taking that violates both Constitutions. This Court explained in *Sisolak* that "a *per se* regulatory taking occurs when a public agency seeking to acquire property for a public use enumerated in NRS 37.010 fails to follow the procedures set forth in NRS Chapter 37, Nevada's statutory provision on eminent domain, and appropriates or permanently invades private property for public use without first paying just compensation." 122 Nev. at 670, 137 P.3d at 1127. That is exactly what the Foreclosure Mediation Program does. The Program does not purport to follow NRS Chapter 37 procedures on eminent domain. It lets district courts keep real property from a party otherwise entitled to it – here, through foreclosure to remedy an undisputed default, precisely as the parties' contract contemplates. The taking is for a public use – the government is prosecuting its policy about foreclosures using this program, as evidenced by the program's name and the result here. And there is no compensation. Quite the reverse: the district court has taken Wells Fargo's collateral, and rather than compensating it, fined it a large percentage of the value of the collateral, and reduced its mortgage to one at 5.5% to one at 2% – below prime rate, no less. This is a *per se* regulatory taking, whether under the Nevada Constitution or the United States Constitution. *See Loretto v. Teleprompter Manhattan Catv Corp.*, 458 U.S. 419, 434-35 (1982) (holding that any permanent physical occupation of property is a taking, regardless of the public need or economic impact on the owner).

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But the taking here does not stop with the real property – it extends to and includes Wells Fargo's lost revenue stream from the $30,000 fine, the reduction of the mortgage payments from $1,708.83 to $1,145.00, and the reduction of the mortgage from an already-low contractual 5.125% interest rate to the perverse and below-prime rate of 2%. *See, e.g., Brown v. Legal Foundation of Wash.*, 538 U.S. 216 (2003) (holding that *per se* regulatory takings are not limited to real property); *ASAP Storage, Inc. v. City of Sparks*, 123 Nev. 639, 173 P.3d 734 (2007) (same). In *Brown*, the Supreme Court held that when a state keeps the interest derived from client trust accounts and sends it to poverty law programs, that constituted a *per se* taking. 538 U.S. at 220. Here, interest, and monthly revenue, and the $30,000 fine that is a large share of the entire loan balance, are all takings, likewise for a redistributive public purpose and an intended social benefit. Yet no matter now small or glancing, the appropriation and transfer of income for a public use constitutes a physical occupation of property and a *per se* taking. *See id.*

During an even greater prior economic crisis, the Supreme Court struck down as a prohibited regulatory taking another law that, like NRS 107.086, took banks' security interest in their collateral by preventing them from obtaining full repayment. *See Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935). That law, the Frazier-Lemke Act, let farmers buy their property at its current appraised value on a deferred payment plan. If the mortgagee did not consent to that purchase, the court would stay the proceedings for five years while the farmer paid reasonable rent, at which point the farmer would have another opportunity to purchase the property at its then-appraised value. The Court explained:

> This right of the mortgagee to insist upon full payment before giving up his security has been deemed of the essence of a mortgage . . . To protect his right to full payment or the mortgaged property, the mortgagee was allowed to bid at the judicial sale on foreclosure. In many states other statutory changes were made in the form and detail of foreclosure and redemption. But practically always the measures adopted for the mortgagor's relief, including moratorium legislation enacted by the several states during the present depression, resulted primarily in a stay; and the relief afforded rested, as theretofore, upon the assumption that no substantive right of the

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> mortgagee was being impaired, since payment in full of the debt with interest would fully compensate him.

295 U.S. at 580-81.

The Court in *Radford* rejected the Framers' position that the Act did not impair substantive property rights, and held that the Fifth Amendment required eminent domain proceedings absent there (and here), and compensation absent there (and here) where the farmers were let to make payments until the bank agreed to let them buy the land at a market price determined by a third party's appraisal. The Court concluded:

> For the Fifth Amendment commands that, however great the nation's need, private property shall not be thus taken even for a wholly public use without just compensation. If the public interest requires, and permits, the taking of property of individual mortgagees in order to relieve the necessities of individual mortgagors, resort must be had to proceedings by eminent domain; so that, through taxation, the burden of the relief afforded in the public interest may be borne by the public.

295 U.S. at 601-02.

This holding was right during the Great Depression. It remains the law. *United States v. Security Indus. Bank*, 459 U.S. 70, 78 (1982) (citing *Radford* with approval); *Dewsnup v. Timm*, 502 U.S. 410, 419 (1992) (same). It is still right today, during this difficult Great Recession that has challenged homeowners and banks alike. The Foreclosure Mediation Program authorizes takings. Here, through NRS 107.086, Nevada took most of Wells Fargo's interest payments, and by a huge fine, took much of its principal payments too. Nevada took this without just compensation or any eminent domain proceeding. Nevada intends no compensation. Taking this property is Nevada's goal here. Whether or not this is thought to be good social policy, as takings were sometimes thought to be during the Great Depression, it is not constitutional. Two years into the Foreclosure Mediation Program, this Court needs to say no. This Court needs to stop the takings.

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C. The Foreclosure Mediation Legislation and Its Application Here Violate the Contract Clauses in the Nevada and U.S. Constitutions.

The Contract Clause is a vital bulwark against overbearing state legislation. It was "perhaps the strongest single constitutional check on state legislation during our early years as a Nation." *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 241 (1978). Nevada's Constitution has a Contract Clause, just like that in the United States Constitution; both prohibit any "law impairing the obligation of contracts." U.S. Const., article I, § 10; Nev. Const., article I, § 15. The two provisions are "substantially the same," and are construed the same way. *See Holloway v. Honorable John W. Barrett*, 87 Nev. 385, 391-92, 487 P.2d 501, 505-06 (1971). While there is little authority construing Nevada's Contract Clause, federal authority construing the Contract Clause in the United States Constitution makes clear that NRS 107.086 violates both Constitutions.

To determine whether an impairment of contract violates the Contract Clauses, one must first evaluate whether the law substantially impairs a contractual relationship. *Allied Steel Co.*, 438 U.S. at 244. If the law impairs the contract severely, the Court must then examine carefully the nature and purpose of the state legislation, and scrutinize the law more closely. *Energy Reserves Group, Inc.*, 459 U.S. at 411. Yet even where there is a significant and legitimate public purpose behind the law, the Court must determine whether the impairment is "of a character appropriate to the public purpose," that is, whether the law –here NRS 107.086 – is necessary and reasonable. *Id.* at 412-13. Thus considered, NRS 107.086 is a severe impairment of rights that is neither necessary or reasonable. It is thus unconstitutional.

1. NRS 107.086, As Applied Here, Impairs a Contractual Relationship, Not Only Substantially, But Severely.

There is no doubt that NRS 107.086 impairs the Renslows' mortgage contract not only substantially, but severely. In *Allied Steel*, the Supreme Court held that a Minnesota law that retroactively accelerated the vesting of pension benefits and caused a present unanticipated expenditures violated the Contract Clause. By changing the originally

contemplated vesting arrangements for pension benefits, and causing a payment, the law's effect "was severe." 438 U.S. at 245. The same things happened here. The district court's rewrite of an eight-year old mortgage is just as retroactive as the Minnesota law's rewriting of ten-year old terms of pension plans. The Minnesota law caused an unanticipated $185,000 charge to the owner of the pension plan. *See id.* The district court here modified the contract while effecting unanticipated charges: the whopping $30,000 sanction and rewriting the mortgage contract to reduce monthly payments on the mortgage by $6,600 more per year. Accordingly, this is "severe" impairment of a contractual right, which in turn triggers close scrutiny of NRS 107.086. *See Energy Reserves Group, Inc.*, 459 U.S. at 411; *Allied Structural Steel Co.*, 438 U.S. at 245 ("[t]he severity of the impairment measures the height of the hurdle the state legislation must clear."). Lenders and beneficiaries like Wells Fargo, can no longer rely on their loan agreements because any court reviewing a mediation proceeding has the authority to rewrite the contract on a whim. This is a severe alteration to the fabric of contract in American law.

NRS 107.086 authorizes the court to require a loan modification in any manner it determines is proper. It is beyond question that NRS 107.086 substantially impairs contractual relations on its face – it conditions the right to foreclosure on willingness to do something that is the opposite of foreclosure – specifically, ameliorating the terms of the loan to avoid being made whole for a default. It also radically impairs mortgages by allowing courts to rewrite mortgages and fine mortgage holders a substantial percentage of the owed balance of the mortgage, if they are not willing to do the opposite of what the mortgage contract then entitles them to do on its face. NRS 107.086 also violates the Contract Clauses as applied here, because the district court did precisely these things in this case, and they are profound impairments of Wells Fargo's contractual rights.

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2. The District Court's Use of NRS 107.086 To Take Money and Rights From Mortgagees and To Provide Them To Mortgagors Is the Modification of Contract To Benefit One Type of Interest and Group Over Another That the Contract Clause Forbids.

NRS 107.086 is unconstitutional because it plays favorites in a way the Contract Clauses do not allow. *See Treigle v. Acme Homestead Ass'n*, 297 U.S. 189 (1936). If a state law substantially impairs a contract, the State must have a significant and legitimate public purpose behind the regulation, such as the remedying of a broad and general social or economic problem to justify the impairment. *Energy Reserves Group, Inc.*, 459 U.S. at 411-12. This requirement is meant to guarantee that State is exercising its police power rather than providing benefit to particular groups. *Id.* However well-intentioned NRS 107.086 is, it works in precisely the way the Contract Clauses say a law cannot, for it is aimed at the very purpose of providing benefit to one particular group – homeowners – by taking it from another – lenders.

The Depression-era case *Treigle* shows that laws like NRS 107.086 play favorites among rival economic groups by impairing their contracts do not have the required legitimate public purpose. 297 U.S. at 198. In 1932, Louisiana passed a law that materially changed the vested rights of a shareholder seeking to withdraw from a building and loan association. *Id.* at 194. It cut the payments they would receive if they withdrew. *Id.* The Supreme Court held that the fact that stock companies are regulated is no excuse to change the rights to monies among members who would withdraw from them versus those who would remain in them. *Id.* at 197-98. The Court struck down the Louisiana law as it "deal[t] only with private rights," and "deprive[d] withdrawing members of a solvent association of existing contract rights, for the benefit of those who remain." *Id.* This is on all fours. NRS 107.086, as the district court applied it, abrogated the contractual arrangement of the parties, moved money from a mortgagee to a mortgagor, and did so for the obvious purpose of benefiting mortgagee at mortgagor's expense. As *Treigle* shows, the Constitution doesn't let states play favorites among mortgagees and

mortgagors in that way. This Court should reverse the district court, and strike down NRS 107.086.

3. NRS 107.086 Violates the Contract Clause Because Rewriting Mortgage Contracts Is Neither Reasonable or Necessary To Further What Should Be the Real Goal: Nonbinding Mediation.

Yet even if this Court were to hold that NRS 107.086, though a severe impairment of contract, fulfills a legitimate public purpose, it still does so in a manner that is not reasonable or necessary to effectuate the public purpose of reducing foreclosure by promoting mediation. *See Energy Reserves Group, Inc.*, 459 U.S. at 412-13 ("Once a legitimate public purpose has been identified, the next inquiry is whether the adjustment of the 'rights and responsibilities of contracting parties is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the legislation's adoption.'") The law must be ***reasonable and necessary*** to serve an important public purpose. *United States Trust Co. v. New Jersey*, 431 U.S. 1, 29 (1977). NRS 107.086 fails this test badly. To determine whether a law is reasonable in a Contract Clause analysis, courts ask whether the law: is limited to the duration of the emergency, is one to protect a basic societal interest, rather than particular individuals, is tailored appropriately to its purpose, imposes reasonable conditions. *Energy Reserves Group, Inc.*, 459 U.S. at 412-13. NRS 107.086 fails these tests across the board.

First, NRS 107.086 is not an emergency measure in any sense that makes it constitutional. The law upheld in *Home Building & Loan Association v. Blaisdell*, 290 U.S. 398 (1934) was deemed to be an appropriate emergency measure because it was temporary, and limited to the duration of the putative emergency. *See Allied Structural Steel Co.*, 438 U.S. at 242 (citing *Blaisdell*, 290 U.S. at 445-47). There is no sunset provision in NRS 107.086. There is no constitutional authority for finding that permanent emergencies can trump contract rights.

Second, NRS 107.086, however well-intended, does privilege one interest group over another. As discussed above, *Treigle* teaches that the Contract Clause does not allow

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a legislature to rewrite private contracts to play favorites. It is no matter whether those the state would favor are people who want to stay in building and loan associations in the Depression, or, as here, borrowers in the current recession. Both are examples of picking sides. *Treigle* says the Contract Clause guards against that.

Third, NRS 107.086 is not narrowly tailored and reasonably limited to a legitimate public end. Bald taking, by rewriting mortgages, is not a legitimate public end. Mediation is a good thing, and can be a legitimate public end. In *Blaisdell*, the Supreme Court upheld Minnesota's Depression-era foreclosure moratorium law in the face of a Contract Clause challenge. It did so because the law forestalling foreclosures was sufficiently narrowly tailored to stand, largely because it possessed limitations that NRS 107.086 lacks. In *Blaisdell*, the law did not impair the integrity of the mortgage indebtedness, interest kept accruing, and the mortgagee could recover a deficiency if the mortgagor failed to redeem. Here, in stark contrast, the mortgage is slashed by a $30,000 transfer payment, $6,600 per year of mortgage reductions, and dropping the interest rate to 2% – and there is no foreclosure allowed for an admitted default in the instant case. The *Blaisdell* Court found it important that a mortgagor, while not ousted from his home, was required to pay *the fair rental value* of the premises. *Id.* at 422. Here, the district court's NRS 107.086-authorized rewrite of the mortgage is a naked redistributive grab for the homeowner. The point is to take. There is no compensation. Lacking the attributes that made the Minnesota law reasonably tailored, NRS 107.086 violates the Contract Clause.

NRS 107.086 is also not reasonable or narrow enough to survive a Contract Clause challenge in light of the Supreme Court's holding in *W.B. Worthen Co. v. Kavanaugh*, 295 U.S. 56, 62 (1935). In *Kavanaugh*, the Court held that an Arkansas law that diluted the rights and remedies of mortgage bondholders was invalid under the Contract Clause. *Id.* The Arkansas law extended the time required to enforce payment, greatly increased the time between default and sale, reduced penalties for late payments, and withdrew possession from the foreclosure sale purchaser during the redemption period. *Id.* at 57-59. Where the interval between default and sale had been sixty-five days, under the new

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legislation it was two and a half years. *Id.* at 61-62. Here, the district court applied NRS 107.086 just so – to delay and reduce payments to Wells Fargo, and to prevent the mortgagee from obtaining the collateral. The Court distinguished *Kavanaugh* from *Blaisdell*, and held the law invalid because of its lack of protections for lenders. *Id.* at 63. As Justice Cardozo wrote, "Even when the public welfare is invoked as an excuse," the security of a mortgage cannot be cut down "without moderation or reason or in a spirit of oppression." *Id.* at 60.

Here, NRS 107.086 imposes a lengthy, mandatory mediation process, followed by a petition for judicial review and possible appeal. Any shortcoming by the beneficiary will result in sanctions, including, as here, the possibility of a compelled loan modification on extreme and unfavorable terms, such as those imposed here. During this mediation and petition period, borrowers may remain in their homes without compensating the mortgagee. Moreover, at the end of the process, the court has statutory authority to modify the loan contract in any "manner determined proper by the court." Now that mediation is the mandatory prerequisite to non-judicial foreclosure, a beneficiary risks having its contract re-written by the court, as occurred here. Unlike *Blaisdell*, the Nevada law not only fails to maintain the integrity of the indebtedness under the contract, but does the opposite and explicitly permits alteration of the indebtedness and a statutorily-sanctioned re-writing of the contract. Letting any court impose any terms it pleases, including those extreme ones imposed here, far exceeds the purpose of having beneficiaries and borrowers "come to the table" to engage in meaningful negotiations. It flouts notions of fundamental fairness and basic concepts of property rights. It violates the Contract Clause. This Court should strike it down.

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D. The Foreclosure Mediation Program Violates Article III of the Nevada Constitution, Which Mandates a Separation of the Executive, Legislative, and Judicial Powers.

1. The Separation of Powers Doctrine Is Clear on the Face of Nevada's Constitution, and Is of Vital Importance to Liberty, Drawing Bright Lines Clearly Separating the Three Departments of Government.

The text of Nevada's Constitution could not be clearer that the separation of powers among the three branches of Nevada's government is both total and important. The Constitution states: "[t]he powers of the Government of the State of Nevada shall be divided into three separate departments,—the Legislative,—the Executive and the Judicial; and no persons charged with the exercise of powers properly belonging to one of these departments shall exercise any functions, appertaining to either of the others, except in the cases expressly directed or permitted in this constitution." Nev. Const. art. III.

This Court has announced in ringing language that the separation of the judicial, executive, and legislative powers is a bedrock guarantee of liberties, seemingly the most important such principle in Nevada's government: "The division of power is probably the most important single principle of government declaring and guaranteeing the liberties of the people." *Galloway v. Truesdale*, 83 Nev. 13, 118, 422 P.2d 237, 241 (1967). *See also Heller v. Legis. of Nev.*, 120 Nev. 456, 93 P.3d 746 (2004). The Legislature's delegation of management of the Foreclosure Mediation Program, however well-intended, directed the judiciary to perform executive functions. However well-intended the judiciary's receipt of those powers was is also of no moment. The fundamental guarantee of justice and liberty that is the separation of powers doctrine is nonetheless violated by this delegation. This Court cannot let it stand, or it will make precedent that blurs lines marking the vital separation among these powers, and undermine the protection of liberties this Court articulated so clearly in *Galloway*.

As this Court has explained, the separation of powers is complete, and it is crucial. It does not admit of minor exceptions in which the judiciary exercises a bit of executive power, any more than one can be a little pregnant. As this Court has made clear, the

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judiciary may not exercise "any functions" which are executive in nature. *See Halverson v. Hardcastle*, 123 Nev. 245, 261, 163 P.3d 428, 439 (2007) ("These governmental powers are coequal, and no person charged with the exercise of one department's powers may exercise 'any functions' of the other departments, except when expressly directed or permitted under the Constitution.") The separation is complete, and the line must be bright and clear, for the mutually exclusive nature of each department's powers is "fundamental in [Nevada's] system of government." *Galloway*, 83 Nev. at 19, 422 P.2d at 241-42 ("the requirement that one department cannot exercise the powers of the other two is *fundamental in our system of government.*") (emphasis added).

2. A Correct Understanding of the Judicial Power Is That It Is To Hear Cases and Controversies, and Does Not Extend To Administering the Foreclosure Mediation Program, Which Is Inherently Administrative.

The executive power is a power to administer. In defining executive power, United States Supreme Court held that "[i]nterpreting a law enacted by Congress to implement the legislative mandate is the very essence of 'execution' of the law." *Bowsher v. Synar*, 478 U.S. 714, 733 (1986). "The executive power extends to the carrying out and enforcing the laws enacted by the Legislature." *Galloway*, 83 Nev. at 20, 422 P.2d at 243; *see also Halverson*, 123 Nev. at 260, 163 P.3d at 439 (holding that the executive power is vested in the Governor, and encompasses the responsibility to carry out and enforce the laws).

Carrying out NRS 107.086 pursuant to the Legislature's mandate in NRS 107, is squarely within the wheelhouse of administrative, and thus executive, authority. NRS 107.086 authorizes the Supreme Court to "adopt rules necessary to carry out the provisions of this section." This provision alone evidences a delegation of executive authority to the judicial branch because it instructs and authorizes the judiciary to interpret the law and implement its legislative mandate. The statutory language leaves the Supreme Court no choice. It not only invites – but in fact requires – the exercise of executive power. It causes the Court to promulgate rules that are not incident to a judicial

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proceeding. It causes the Court to hire a Foreclosure Mediation Program Administrator. It causes the Court to hire and train mediators.

The program is so clearly administrative in nature that the very district court from which this appeal was taken wrote in an order on May 6, 2011, "the Foreclosure Mediation Program is certainly an Adminstrative Agency". *See* Ex. A to Request For Judicial Notice, Order in *Kuhl v. Carrington Mortgage Services, LLC, et al.*, CA11-00325 (Washoe County District Court) (Flanagan, J.), at 10:4-10:5. The district court was right.

It is as if the Legislature had resolved one day to commit the administrative hearings governing unemployment insurance to the judiciary, even though presently they reside within the Employment Security Division, and are unquestionably executive in function. The Employment Security Division runs that program, and hears and determine for the unemployed appeals from denials of their unemployment benefits, just as the Supreme Court runs the Foreclosure Mediation Program, in which its chosen Foreclosure Mediators hear and determine whether a holder of a perfected security interest shall be issued a certificate permitting them to foreclose. There is no difference, except the fiat of labeling the former "executive" and the latter "judicial."

Moreover, administration of the Program is not a judicial function because mediation unattached to a pending judicial proceeding is inherently nonjudicial. In the Foreclosure Mediation Program, there is no underlying justiciable controversy to be adjudicated. Thus, administration of the Foreclosure Mediation Program cannot properly be characterized as one of the Court's ministerial powers, ancillary to the judiciary's basic functions. While courts mediate and promote alternative dispute resolution to manage their ever-increasing case loads and heavy dockets, that is a proposition wholly unrelated to the business at hand here – taking sets of parties who are not in litigation, and may never be in litigation, and compelling them to participate in an administrative process. The use of the word "mediation" is euphemistic – there is no case or controversy to "mediate." Rather, there is a legislative imperative to force a whole category of private ordering into a process to reduce how much it occurs, and to slow it down. Because the

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Supreme Court's administration and management of the Foreclosure Mediation Program, as mandated by the Legislature, is administrative and executive, it violates the Separation of Powers doctrine.

The executive and administrative nature of the Foreclosure Mediation Program is even clearer when one considers this Court's teaching that the judicial power is, by stark contrast, "the authority to hear and determine justiciable controversies." *Galloway*, 83 Nev. at 20, 422 P.2d at 243; *see also Halverson*, 123 Nev. 245, 163 P.3d 428. This judicial power is mutually exclusive of the legislative and executive powers, and cannot even "include a power or function that must be derived from the basic Legislative or Executive powers." *Galloway*, 83 Nev. at 21, 422 P.2d at 243. The legislature may not confer or impose powers non-judicial in character upon the judiciary. *Id.*

The guidestar of the judicial power is whether the exercise of power is necessary to carrying out the judicial function. *See Halverson*, 123 Nev. at 263, 163 P.3d at 441 (A court's inherent authority is limited to "acts that are reasonably necessary for the judiciary's proper operation."). Again, the basic judicial power and the basic judicial function, is to adjudicate cases and controversies. *Galloway*, 83 Nev. at 20, 422 P.2d at 243. Thus, the judiciary may "make rules and carry out other incidental powers when 'reasonable and necessary' for the administration of justice.'" *Halverson*, 123 Nev. at 261, 163 P.3d at 440. For example, the judiciary may protect the dignity and decency of proceedings, and enforce its decrees by issuing contempt orders or sanctions without violating the separation of powers doctrine. *Id.*

Yet these are powers exercised, obviously enough, within cases that are adjudicated. *Compare Galloway, supra*. The establishment of the Foreclosure Mediation Program, and the issuance of a certificate, no more occurs within the confines of a judicial proceeding than does the denial of unemployment benefits or the denial of an appeal therefrom. Thus, the rules for the Foreclosure Mediation Program established by the Supreme Court are not "reasonable and necessary for the administration of justice," for those rules govern pre-judicial, or extrajudicial proceedings. *See Halverson, supra*. To

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understand that this is so, please consider whether the Legislature could mandate that the Supreme Court write rules for the granting or denial of unemployment benefits within the Employment Security Division. It cannot, for that would not be incidental to a case or controversy, even though ultimately, those matters too can end up being reviewed by the district court in later-filed proceedings, as can Foreclosure Mediations. *See Halverson, supra.* It would not be "reasonably incidental to the fulfillment of judicial duties." *See Galloway, supra.* It would be executive.

The Foreclosure Mediation Program looks like an exercise of executive authority because it is. It cannot be classed as an exercise of the judicial power, because it simply is not. This Court should determine that the Foreclosure Mediation Program, as mandated in NRS 107.086, violates Article III of the Nevada Constitution, as this Court has interpreted it so clearly and correctly in *Galloway* and *Halverson*. The Nevada Constitution, and this Court's clear precedents, compel this result.

E. The Program, and its Application in this Case, Violates Due Process.

Following a mediation and hearing on the Petition for Judicial Review, the district court imposed $30,000.00 in sanctions, fees and costs, and a forced loan modification against Wells Fargo. This case raises several due process issues.

First, the Program violates due process by creating a positive duty in the law that lenders subjectively intend to modify their mortgages. By mandating mediation, and denying a certificate that permits foreclosure where a lender did not in good faith consider modifying its mortgage, NRS 107.086 creates a duty of good faith to do the opposite of what the mortgage contract itself provides – a duty to not want to be made whole through reaching collateral when a borrower defaults. Yet one cannot have a duty of good faith and fair dealing that reaches beyond the scope of the express terms of the contract. *See Nelson v. Heer*, 123 Nev. 217, 226-27, 163 P.3d 420, 427 (2007) (the implied covenant of good faith and fair dealing does not create new duties not included in the contract and cannot be based on a failure to perform such absent duties). *A fortiori*, there cannot be a duty of good faith that contradicts the language of a contract. *See id.* By creating a

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vehicle to penalize borrowers where it is determined they did not in good faith behave as if they would choose the opposite (modification and nonforeclosure) of what their contract provides (payment at the contractually agreed amount or foreclosure), the Legislature has written into every contract a duty of good faith that contradicts the contracts express terms. This abrogation of the law of contracts violates due process.

Second, NRS 107.086 violates due process here is because there is no private right of action against banks under HAMP to begin with. *See Manabat v. Sierra Pac. Mortg. Co.*, 2010 U.S. Dist. LEXIS 70377, at **30-32 (E.D. Cal. June 25, 2010) (dismissing plaintiff's wrongful foreclosure claim because there is no private right of action for HAMP violations against lenders that receive HAMP funds); *Simon v. Bank of Am., N.A.*, 2010 U.S. Dist. LEXIS 63480, at **26-27 (D. Nev. June 23, 2010) ("[C]ourts have consistently held that the Home Affordable Modification Program does not provide borrowers with a private cause of action against lenders for failing to consider their application for loan modification, or even to modify an eligible loan.") (collecting cases). Nor may borrowers seek judicial enforcement of HAMP agreements between loan servicers and the federal government. *Benito v. Indymac Mortgage Servs.*, 2010 U.S. Dist. LEXIS 51259, at *21 (D. Nev. May 21, 2010) ("the HAMP contract does not express any intent to grant borrowers a right to enforce the HAMP contract between the government and the loan servicer"); *Sena v. Bank of America Home Loans*, 2011 U.S. Dist. LEXIS 33959 (D. Nev. Mar. 29, 2011) (collecting cases). Given that law, to subject Wells Fargo to what amounts to a $30,000 fine for bad faith in not being able to provide a permanent version of a trial modification under HAMP subverts both the law of HAMP, and, incidentally, federalism itself by doing so through a state law. To do those things as a result of compelled participation in an extrajudicial administrative proceeding violates due process. It should not stand. This Court should reverse.

Third, the substantial liability ensuing from mediation without filed litigation and the procedural protections it affords also violates due process. The Foreclosure Mediation Program borrower can force a beneficiary to participate in mediation, and subject itself to

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severe liability. Any failure to comply with the statute or Rules – however minor – can, and often does, result in sanctions. Here, Wells Fargo was sanctioned $30,000, even after offering a modification. This rests on assessments of Wells Fargo's premediation conduct, none of which is properly before the Court, and none of which was subjected to the crucible of cross-examination. Instead, courts rely, as here, on the hastily prepared mediator's statement, without any personal testimony by a mediator. None of what led to Wells Fargo's liability here was judicial, but it created significant burdens ($30,000) and disabilities (a modified mortgage and the lack of any opportunity to foreclose) upon the party not permitted to foreclose. Please recall that when Wells Fargo entered into the mortgage, Nevada was a nonjudicial foreclosure state without NRS 107.086. The Renslows, it is undisputed, ***put themselves into default*** to get a HAMP modification to which they have no legal right. They have no right to sue for that HAMP modification either. See *supra*. And yet ***Wells Fargo*** is fined much of the mortgage balance, where it had an undisputed right to foreclose the Renslows, under every pre-NRS 107.086 and non-NRS 107.086 provision of Nevada law, because it failed adequately to represent that it would do something that, under its contract, it is not supposed to do. The extreme and perverse "down is up" nature of this result violates the Due Process Clause of the Nevada and United States Constitutions.

F. The District Court Exceeded the Scope of Permitted Judicial Review by Considering Events and Issues that Were Not Part of the Mediation.

As contemplated by NRS 107.086 and the Foreclosure Mediation Rules, judicial review of a mediation is limited to just that – review of the mediation. Yet, in this case the district court broadly considered the parties' entire history and found the lion's share of what it believed to be Wells Fargo's objectionable conduct to have occurred before the mediation process. This exceeds the scope of this Petition for Judicial Review, and is thus not properly before the court. In addition to focusing on events predating the mediation process, the district court's ruling ultimately enforced a previous loan modification the Renslows claim they were offered long before the mediation process commenced.

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Respectfully, the status of the prior negotiations was not before the district court. Nor was this Petition for Judicial Review the appropriate vehicle for such a suit. Rather, if the Renslows wanted to enforce a previous loan modification, they should have brought a suit to enforce that modification – not sought judicial review of a mediation in which a certificate would not be issuing.

1. The District Court Should Not Have Considered Prior Negotiations and Agreements in Reviewing the Mediation Process, As They Were Not Properly Before the District Court.

NRS 107.086(8) authorized the Supreme Court to "establish[] procedures to protect the mediation process from abuse and to ensure that each party to the mediation acts in good faith." NRS 107.086(5) provides that should a party fail to comply with the statute, the "court may issue an order imposing such sanctions against the beneficiary of the deed of trust or the representative as the court determines appropriate." Likewise, Foreclosure Mediation Rule 21 permits the district court to review the mediation and hold a hearing regarding the same "for the limited purposes of determining bad faith, enforcing agreements made between the parties within the Program, including temporary agreements, and determining appropriate sanctions pursuant to NRS Chapter 107 as amended."

No provision gives the district court the authority to engage in a broad review of the parties' entire relationship and make a broad judgment about who was in the right. Yet that is what happened in this case. In evaluating Wells Fargo's good faith, it reviewed not only the October 2010 mediation, but the Renslows' previous attempts to reduce their loan payment beginning in 2009.

The district court acknowledged that its review should be limited to the mediation. (JA at 305 "agree[ing] with Wells Fargo's underlying legal theory that review is limited to the foreclosure mediation and that other claims must be brought through independent actions.") While the district court acknowledged this limitation, however, it did not, in practice, abide by it. Rather, the court held that what occurred prior to the foreclosure

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mediation is relevant to what happens at the mediation, as it considered "the entire relationship between the parties." (JA at 305.)

The district court overruled counsel's frequent objections to take extensive testimony regarding events outside the mediation process. Notably, of the district court's forty-four paragraphs of factual findings, nearly thirty paragraphs focus solely on events outside the mediation process. (*See* JA at 303-04, ¶¶ 9-37) Only four paragraphs even address the mediation. (*See* JA at 304, ¶¶ 38-42.) Likewise, a substantial portion of the district court's discussion centers on the HAMP trial period. (*See generally* JA at 300-37.) The district court's factual and legal conclusion that Wells Fargo's conduct impaired the Renslows' ability to obtain a refinancing of their mortgage (JA at 315-16) was based entirely on events that had nothing to do with the mediation. The district court's Order is replete with references and discussion of the failed HAMP modification and its ramifications. The Order makes clear that the district court was punishing Wells Fargo for the failure of the HAMP modification. But while those events were a precursor to the mediation, they were not part of the mediation process or whether Wells Fargo participated in the mediation in good faith. It cannot be denied that these events prior to mediation, specifically the HAMP modification, provided much more than mere "context" and influenced the district court's ruling. The district court's Order was therefore substantially and improperly influenced by events outside of the mediation process, and cannot stand. See *Association of Flight Attendants v. Horizon Air Indus.*, 976 F.2d 541, 549 (9th Cir. 1992) (citing *Chambers v. NASCO*, 501 U.S. 32, 74 (1991) (Kennedy, J., dissenting) ("It is impermissible to allow a District Court acting pursuant to its inherent authority to sanction such prelitigation primary conduct. A court's inherent authority extends only to remedy abuses of the judicial . . . process. When a federal court, through invocation of its inherent powers, sanctions a party for bad-faith prelitigation conduct, it goes well beyond the exception to the American Rule and violates the Rule's careful balance between open access to the federal court system and penalties for the willful abuse of it.").

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The district court's order in turn underscores why the Foreclosure Mediation Program is not judicial in character, and the danger of the judiciary being forced into an administrative role, as occurred here. The mediator here improperly weighed matters that should not even have been before that mediator, and now those matters have been bootstrapped into a court-ordered modification of a home mortgage and a huge fine. All of this is done within what looks like a court's inherent powers, but those powers here are not appurtenant to any judicial proceeding or suit about good faith and fair dealing or HAMP or anything else. This case shows how the legislature, though meaning well in passing NRS 107.086, reduced the judiciary to acting by mere fiat, unmoored to the due processes the Courts are made to carry out, in which they are high skilled, and which are vitally necessary for justice. This Court should reverse.

2. The Petition for Judicial Review Was Not the Appropriate Vehicle for the Renslows To Seek an Extension of a HAMP Trial Modification.

The district court exceeded the scope of permissible judicial review by allowing the Renslows to turn the proceeding into a vehicle to secure on a permanent basis the temporary HAMP loan modification they were offered. The Renslows' counsel candidly represented that they filed a Petition for Judicial Review because they wanted to enforce the modifications they were previously offered. (JA at 62.) Counsel explained that they wanted "to have their loan modified like they thought they were going to have when they participated in good faith in the HAMP program." (JA at 62.) And this is what they got – an order that they would henceforth pay almost exactly the amount of the HAMP modification (reducing their mortgage payment from $1,708.83, as originally agreed, to $1,145 per month instead of HAMP's $1,127.06 per month). Yet a petition for judicial review of mediation is not an appropriate vehicle to enforce the HAMP modification.

Indeed, FMR 21 authorizes the district court to review the mediation and hold a hearing regarding the same "for the limited purposes … ***enforcing agreements made between the parties within the Program***, including temporary agreements." (emphasis

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added). FMR 21 does not authorize the district court to specifically enforce other loan modifications or negotiations that occurred outside of the Program. Again, the district court does not dispute this legal tenet. (JA at 305.) By letting the Renslows enforce a claimed right to a modification arranged a year prior, and from well outside the auspices of the Program, the district court exceeded even the authority conferred upon it by the Foreclosure Mediation Rules, and clearly erred.

VI. CONCLUSION

Based on the foregoing, the Court should declare the Program unconstitutional on one of the above bases, reverse the district court's imposed loan modification, reinstate the terms of the original loan, and vacate the sanctions imposed against Wells Fargo.

Dated this 3rd day of October, 2011.

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read the Appellant's Opening Brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 3rd day of October, 2011.

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CERTIFICATE OF SERVICE

As an employee of Snell & Wilmer L.L.P., and I certify that I served a copy of the foregoing **APPELLANT'S OPENING BRIEF** on the 7th day of October, 2011, via electronic service through the Second Judicial District Court's ECF System upon each party in the case who is registered as an electronic case filing user and via U.S. First Class Mail, as follows:

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