Case No. 68810

SUPREME COURT
OF THE STATE OF NEVADA

U.S. HOME CORPORATION, a Delaware corporation,

Appellant,

vs.

THE MICHAEL BALLESTEROS TRUST; RODRIGO ASANION, individually; FEDERICO AGUAYO, individually; FELIPE ENRIQUEZ, individually; JIMMY FOSTER, JR., individually; THE GARCIA FAMILY TRUST; ARNULFO ORTEGA-GOMEZ, individually; ELVIRA GOMEZ-ORTEGA, individually; JOHN J. OLSON, individually; IRMA A. OLSON, individually; OMAR PONCE, individually; BRANDON WEAVER, individually; JON YATES, individually; and MINTESNOT WOLDETSADIK, individually,

Respondents.

On appeal from the Eighth Judicial District Court,
Clark County, Nevada, Case No. A-15-714219-D

APPELLANT'S SUPPLEMENTAL BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1. Appellant U.S. Home Corporation is a wholly-owned subsidiary of Lennar Corporation. Lennar Corporation has no parent company, and no publicly-traded entity owns 10% or more of its stock.

2. Payne & Fears LLP represented Appellant U.S. Home Corporation during the district court proceedings. Payne & Fears LLP will represent Appellant U.S. Home Corporation before this Court.

/s/ Chad D. Olsen
Chad D. Olsen, attorney of record for
Appellant U.S. Home Corporation

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ARGUMENT

This brief responds to the Nevada Justice Association's ("NJA") amicus brief and Respondents' ("Homeowners") supplemental brief.

I. THE COURT SHOULD NOT CREATE A BLANKET RULE AGAINST ARBITRATION AGREEMENTS IN CC&RS.

The NJA asks this Court to ignore current public policy and override current law by creating a "blanket rule refusing to enforce arbitration provisions in CC&Rs." (NJA Br. at 1–3, 11.) Thereafter, following the NJA's lead, the Homeowners make a similar request in their supplemental brief.[1] (Homeowners' Supp. Br. at 11.) Respectfully, for the reasons stated below, the Court should not take this extreme position in violation of the FAA and Nevada law.

A. Nevada Law Supports Arbitration Agreements in CC&Rs.

The Court should not override the Nevada legislature and public policy by creating a new blanket rule against arbitration agreements in CC&Rs. Rather than

[1] The NJA and Homeowners do not agree on how to create the blanket rule. The NJA argues that the Court should base the rule on a weighing of public policy and judicial economy (NJA Br. at 1–3, 11), but the Homeowners argue that the rule should be based on unconscionability. According to the Homeowners, arbitration agreements in CC&Rs are necessarily "self-serving and unfair," and thus, "*per se* unconscionable." (Homeowners' Supp. Br. at 11–12.) In fact, the Homeowners take their argument even farther, claiming—without providing a single citation for support—that CC&Rs are nothing but "gratuitous promises from homeowners." (*Id*. at 2–3.) This would mean that CC&Rs are completely unenforceable. *See Fant v. Champion Aviation*, Inc., 689 So.2d 32, 37 (Ala. 1997) ("The requirement of consideration means that a gratuitous promise is not enforceable."); *Jara v. Suprema Meats, Inc.*, 18 Cal. Rptr. 3d 187, 195 (Cal. Ct. App. 2004) (same).

creating such a blanket rule, the Court should simply follow the law already in place regarding the enforceability of arbitration agreements. Pursuant to NRS 38.219(1), an arbitration agreement contained in any "record" (which is defined as any tangible or electronically-stored "medium" that "is retrievable in perceivable form," NRS 38.213) "is *valid, enforceable and irrevocable*" unless unconscionable. (Emphasis added.) There is no dispute that the CC&Rs are a "record." (*See* Joint Appendix ("App.") 49–139.) Thus, unless unconscionable, arbitration agreements within CC&Rs must be enforced. *See Tallman v. Eighth Jud. Dist. Ct.*, 359 P.3d 113, 119 (Nev. 2015) ("While NRS 38.219(1) requires that the arbitration agreement be 'contained in a record,' it does not require that the written record of the agreement to arbitrate be signed.").

Moreover, because the legislature provided the test to determine the enforceability of arbitration agreements in NRS 38.219, creating a new blanket prohibition on arbitration would be tantamount to overriding NRS 38.219. Similarly, in NRS 116.2105(2), the legislature provided that CC&Rs "may contain any other matters the declarant considers appropriate"—giving complete deference to the declarant. The legislature did not qualify NRS 116.2105 by stating that CC&Rs may include any matters deemed appropriate "except for arbitration agreements." Thus, the Court should not now override the plain language of NRS 116.2105 by creating an exception to the law. *See Pope v. Motel 6*, 114 P.3d 277,

282 (Nev. 2005) ("The preference for plain meaning [of a statute] is based on the constitutional separation of powers—Congress makes the law and the judiciary interprets it," and ignoring "the plain meaning of [a statute] would be an impermissible judicial excursion into the legislature's domain").[2]

Finally, the Court does not need to weigh the advantages and disadvantages of arbitration, as the NJA urges. (*See* NJA Br. at 1–2.) The Nevada legislature already did so and determined that public policy favors arbitration. *See Tallman*, 359 P.3d at 118–19 ("NRS 38.219(1) expresses Nevada's fundamental policy favoring the enforceability of arbitration agreements. … 'As a matter of public policy, Nevada courts encourage arbitration and liberally construe arbitration clauses in favor of granting arbitration.'"). The legislature also already determined that CC&Rs may include any matter the declarant deems appropriate and that such provisions run with the land. *See, e.g.*, NRS 116.41095 (the "CC&Rs become a part of the title of your property" and that the buyer will be bound by the CC&Rs "whether or not you have read them or had them explained to you"). Thus, the

[2] The NJA argues that the absence of a regulation issued by "the Real Estate Division," affirmatively "allowing arbitration provisions in CC&Rs," shows that such agreements are not allowed in CC&Rs. (NJA Br. at 14.) However, an affirmative regulation is unnecessary because NRS 38.219 and NRS 116.2015 already permit arbitration agreements in CC&Rs. Thus, the absence of an unnecessary regulation does not prove anything. *See Todd v. State*, 931 P.2d 721, 726 (Nev. 1997) ("Absence of evidence is not evidence of absence.").

Court need only consider the law and policy already before it. There is no need to step into the legislature's shoes by weighing public policy or creating new law.

B. A Blanket Rule Would be Displaced by the FAA.

The Federal Arbitration Act applies when a contract containing the arbitration agreement evidences some transaction that merely involves or affects interstate commerce. 9 U.S.C. § 2. Thus, "[s]o long as 'commerce' is involved, the FAA applies." *Tallman*, 359 P.3d at 121; *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56–57 (2003) (the FAA applies to "the broadest permissible exercise of Congress' Commerce Clause power").

Here, the FAA applies. (*See* U.S. Home's Opening Br. at 13–14, 18–27.)[3] In their supplemental brief, the Homeowners argue that the FAA does not apply, but in doing so, they simply repeat the arguments already contained in their answering

[3] *See also Principal Investments v. Harrison*, 366 P.3d 688, 692 (Nev. 2016) ("*As the loan documents stipulate*, the … agreements evidence transactions involving commerce, so the … [FAA] applies.") (emphasis added); *Verano Condo. Homeowners Ass'n v. La Cima Dev., LLC*, No. D058217, 2013 WL 285583, at *2–3 (Cal. Ct. App. Jan. 25, 2013) ("We agree … that the arbitration provisions set forth in the … CC&Rs are covered by the FAA." The "development project was clearly intimately enmeshed with interstate commerce" because it was a large housing development with many units sold; involved multistate parties; the financing necessary for "both construction and individual purchases undoubtedly occurred through federally regulated and chartered financial institutions with long-recognized substantial effects on interstate commerce"; and, "[i]n the aggregate, the economic activity manifest in the … development project concerned raw materials, business goods, and retail and commercial finance instruments from all corners of the nation, representing a 'general practice' clearly entwined with 'interstate commerce in a substantial way.'").

brief. (*Compare* Supp. Br. at 1–5 *with* Answering Br. at 9–14.) Thus, U.S. Home has addressed these arguments. (U.S. Home's Reply Br. at 1–3, 6–15.)

Since the FAA applies, it is "the supreme Law of the Land" and will displace any conflicting state law. *Tallman*, 359 P.3d at 121 ("The Supreme Court has made it unmistakably clear that state courts 'must abide by the FAA, which is 'the supreme Law of the Land,' … and by the opinions of [the Supreme] Court interpreting that law.'").

A blanket prohibition against arbitration conflicts with the FAA for at least three reasons. First, it conflicts with the FAA's enforceability test, which, just like Nevada law, provides that arbitration agreements are "valid, irrevocable, and enforceable" unless unconscionable. 9 U.S.C. § 2. Second, making such a blanket rule places arbitration provisions on unequal footing with other CC&Rs provisions, which is prohibited. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (courts must "place arbitration agreements on an equal footing … and enforce them according to their terms").[4] Third, creating a blanket rule exhibits the exact type of hostility towards arbitration that the FAA prohibits. *Id.* at 334 ("When state

[4] *Hall St. Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 581 (2008) ("Congress enacted the FAA to replace judicial indisposition to arbitration with a 'national policy favoring [it] and plac[ing] arbitration agreements on equal footing with all other contracts.'"); *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 270 (1995) (a court may not "decide that a contract is fair enough to enforce all its basic terms … but not fair enough to enforce its arbitration clause").

law prohibits outright the arbitration of a particular type of claim, the FAA displaces the conflicting rule."); *Verano*, 2013 WL 285583, at *2–3 ("[T]he FAA would preclude the application of conflicting state law, including limitations on the use of arbitration in construction defect cases. … The [FAA] makes any such state policy unlawful, for that kind of policy would place arbitration clauses on an unequal 'footing,' directly contrary to the Act's language and Congress' intent.").

II. U.S. HOME HAS STANDING TO ENFORCE THE CC&RS.

The NJA and Homeowners argue that U.S. Home lacks standing to enforce the CC&Rs. (NJA Br. at 3–5; Homeowners' Supp. Br. at 4–5.) This is not true. Moreover, this was not an issue argued before the district court. *Old Aztec Mine, Inc. v. Brown*, 623 P.2d 981, 983 (Nev. 1981) ("A point not urged in the trial court … is … waived and will not be considered on appeal.").

U.S. Home is a declarant under the CC&Rs (*see* App. at 54, 58), so it is a party to the agreement[5] and it reserved the right to enforce the arbitration agreement. (*See, e.g.*, App. at 55 (the provisions in the CC&Rs "shall inure to the benefit of, … and may be enforced by Declarants or either of them").) As such, U.S. Home has standing.

[5] Courts treat CC&Rs like contracts. *Pinnacle Museum Tower Assn. v. Pinnacle Mkt. Dev. (US), LLC*, 282 P.3d 1217, 1227 (Cal. 2012) ("[C]ourts have described recorded declarations as contracts"); *Diaz v. Ferne*, 84 P.3d 664, 665–66 (Nev. 2004) ("The rules of construction governing … contracts apply to the interpretation of [CC&Rs].").

For instance, in *B.C.E. Dev., Inc. v. Smith*, the homeowners argued that the developer's (or declarant's) successor-in-interest had no standing to enforce the CC&Rs because it "owned no land in the subdivision." 264 Cal. Rptr. 55, 56–60 (Cal. Ct. App. 1989). The court rejected this argument, holding that "the talisman for enforcement is not the rigid requirement of retention of an interest in land, but rests instead upon a determination of the intention of those creating the covenant." *Id.* at 58. Thus, the successor-in-interest had standing to enforce covenants even though it owned no land because the CC&Rs vested enforcement rights in the "declarant, its successors or assigns." *Id.* at 59. The court stated,

> The most logical enforcement entity for policing the CC&Rs is the entity created for that purpose in the declaration itself—the declarant or its successor in interest. Having accepted title subject to this condition, [the homeowners] are not now in a position to complain that enforcement in accordance therewith is inequitable. The trial court was correct in holding that the CC&Rs could be enforced by action of the entity so designated in the declaration, even though that entity owned no land in the subdivision.

Id. at 60; *see* Restatement (Third) of Property (Servitudes) § 8.1, cmt. d (2000) ("Ownership … is not a prerequisite to enforcement," and a "Developer [who] retained the right to enforce the covenants after all units had been sold" still has "standing to enforce the covenant").[6]

[6] *See also Promenade at Playa Vista Homeowners Assn. v. W. Pac. Hous., Inc.*, 133 Cal. Rptr. 3d 41, 49 (Cal. Ct. App. 2011) (citing 8 Miller & Starr, Cal. Real Estate (3d ed. 2011) ("If the restrictions evidence a clear intent to permit

[footnote continued]

Even the case law cited by the NJA supports this principle. For example, in *Bramwell v. Kuhle*, a married couple subdivided and sold their vacant land *without reserving the power to review proposed construction*. 6 Cal. Rptr. 839 (Cal. Ct. App. 1960). Instead, through restrictive covenants, the married couple vested that right in an architectural committee. Thus, the court concluded that the married couple had disposed of all interests and they could no longer enforce the restrictions or approve proposed construction. *Id.* at 840. Further, in *Shaff v. Leyland*, the New Hampshire court analyzed the types of covenants intended to be enforced by owners versus those intended to be enforced by non-owners. 914 A.2d 1240 (N.H. 2006). The court noted that, if "intent is expressed in the language of the covenant," which is determined "at the time of the creation of the covenants," a non-owner may enforce the covenant. *Id.* at 1245. Thus, as stated in the Restatement, "an original covenantor [could] enforce a covenant in gross regardless of the ownership of benefited land." *Id.*

III. ENFORCING ARBITRATION WILL, IF ANYTHING, DECREASE LITIGATION, NOT INCREASE IT.

The NJA argues that this Court should create a blanket prohibition against arbitration because, unless the Court does so, "invidious consequences virtually

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enforcement by the declarant, *there is authority* for the original declarant and its successors who hold no remaining interest to sue to enforce the restrictions as equitable servitudes even after they have transferred all interests in the subdivision.") (emphasis in original).

guarantee a proliferation of lawsuits and appeals." (NJA Br. at 2, 8–11.) This makes no sense. In fact, the NJA fails to cite a single authority to support its theoretical "flood of additional litigation." (*Id.* at 8.)

The NJA argues that failing to ban arbitration will increase court burdens because parties will take their "unconscionability challenges" to the courts. (*Id.* at 8–11.) But this is exactly what is already being done under Nevada law. How can continuing with the status quo create a flood of "additional litigation"? The NJA provides no answer to this (because there is none).

Moreover, if there is a blanket ban on arbitration, then parties will have no alternative but to seek redress through the courts. Thus, if anything, creating a blanket ban on arbitration will increase, not decrease, court burdens.

Further, providing a clear ruling that arbitration agreements in CC&Rs are enforceable if conscionable may deter challenges to those arbitration agreements, thereby decreasing trial-court burdens. Similarly, with such a clear ruling, trial courts may be less inclined to deny motions to compel arbitration, which could lead to fewer appeals. *See* NRS 38.247 (an appeal may be taken from "[a]n order denying a motion to compel arbitration").

IV. ***PINNACLE* IS PERSUASIVE.**

Knowing the *Pinnacle* case directly contradicts their arguments, the NJA and Homeowners attempt to distinguish *Pinnacle*. Instead of arguing that the

Pinnacle court's reasoning or holding is wrong, they argue that *Pinnacle* should be ignored because parts of California's law (the Davis-Stirling Act) are different than NRS 116. (*See* NJA Br. at 11–15.)[7] These distinctions are nonexistent and immaterial.

The NJA urges this Court to ignore *Pinnacle* because that decision "largely turned on considerations of unconscionability," which is a "is a fact-specific" analysis. (*See* NJA Br. at 14.) But, as stated, this type of analysis is exactly what federal and Nevada law require. *See* 9 U.S.C. § 2; NRS 38.219. Thus, the Court should follow the *Pinnacle* example, not ignore it.

In addition, the NJA argues that section 5930 the Davis-Stirling Act and NRS 116.4117 are different in that section 5930 allows for alternative dispute resolution, while NRS 116.4117 "preserves the right to judicial relief as a primary remedy in lieu of arbitration." (*See* NJA Br. at 12–14.) According to the NJA, this distinction is significant because section 5930 was "pivotal to the result in *Pinnacle*." (*Id.* at 12.) This argument is misleading for many reasons.

First, the *Pinnacle* court did not rely on section 5930 to reach its decision. It referenced the alternative dispute resolution requirement in section 5930 (or its

[7] The Homeowners' attempt to distinguish *Pinnacle* merely repeats the arguments stated in their answering brief. (*Compare* Supp. Br. at 12–13 *with* Answering Br. at 7–9.) Thus, U.S. Home already addressed these arguments. (U.S. Home's Reply Br. at 3–4.)

predecessor, section 1369.520) only to illustrate how arbitration agreements within CC&Rs is consistent with section 5930's requirement of alternative dispute resolution of certain, specific claims between associations and homeowners. *Pinnacle*, 282 P.3d at 1230. Indeed, before it noted this consistency, the court already concluded that nothing in the Davis-Stirling Act "prohibits a recorded declaration from containing arbitration covenants." *Id.* at 1229.

Second, contrary to the NJA's argument, section 5930 does *not* even address construction-defect claims, such as those at issue in the underlying action in this case. Instead, section 5930 relates to actions *to enforce* CC&Rs or the Davis-Stirling Act, and it requires alternative dispute resolution as a prerequisite before filing such an action. Thus, nothing about section 5930 suggests that, while arbitration is authorized under California law, it should not be allowed in this case.

Third, the NJA fails to point out that NRS 116.4117, like section 5930, also permits a person to bring a civil action *to enforce* CC&Rs or NRS 116. Thus, given that the underlying disputes in this case concern construction defects, not an enforcement of the CC&Rs or NRS 116, NRS 116.4117 is inapplicable and does *not* show that the Homeowners have the "right to judicial relief" in this construction-defect action.

Moreover, even if applicable, NRS 116.4117 contains the same alternative dispute resolution requirement that is contained in section 5930. Although the NJA

argues that NRS 116.4117 gives homeowners the "right" to file a "civil action," the NJA fails to point out that NRS 116.4117 also states that it is "[s]ubject to the requirements set forth in NRS 38.310," which, in turn, requires mediation and arbitration if there is an agreement. (*See* NJA Br. n. 39 ("NRS 38.310(1) … authorizes agreements to arbitrate disputes regarding CC&Rs."). Accordingly, the alternative dispute resolution requirements in NRS 116.4117 and section 5930 are the same, and the NJA's attempt to distinguish these two statutes is flawed.

In fact, the Davis-Stirling Act also states that, in construction-defect cases, a homeowner may file a "complaint" or "civil action" against a home builder, after pre-litigation procedures have been followed. (Cal. Civ. Code §§ 6000, 6150.) Nevertheless, despite these references to a "complaint" and "civil action," the court in *Pinnacle* still ordered the plaintiff to take its construction-defect claims to arbitration rather than continuing with traditional litigation. Thus, like Nevada law, the Davis-Stirling Act's reference to "a civil action" does not preclude arbitration if there is an agreement to arbitrate.

Finally, the NJA and Homeowners ignore the similarities between this case and *Pinnacle*. Just like this case, the issue in *Pinnacle* was whether an arbitration agreement in CC&Rs was enforceable. The court first addressed the FAA, noting that the lower courts found that the FAA applies due to "multistate materials and products incorporated into the" community. *Pinnacle*, 282 P.3d at 1223. The court

accepted this "determination of the lower courts because the issue was not preserved for review." *Id.*

The *Pinnacle* court then determined that arbitration agreements may be included within CC&Rs because:

i. State and federal policies favor arbitration. *Id.* at 1223–30.

ii. CC&Rs are the "primary means of achieving the stability and predictability so essential to the success of a shared ownership housing development," and "[h]aving a single set of recorded covenants … protects the intent, expectations, and wishes of those buying into the development …." *Id.* at 1225.

iii. "[T]he recording of a declaration … 'provides sufficient notice to permit the enforcement' of the covenants and … purchasers are 'deemed to agree' to them." *Id.* at 1225–26.

iv. The Davis-Stirling Act "grants developers latitude to place in declarations any term they deem appropriate." As such, "placement of arbitration covenants in a recorded declaration violates none of the Davis-Stirling Act's proscriptions." *Id.* at 1228–29.

Finally, after analyzing (and rejecting) many of the same arguments raised in this case regarding procedural and substantive unconscionability,[8] the *Pinnacle* court concluded "that construction disputes involving the developer must be resolved by the expeditious and judicially favored method of binding arbitration." *Id.* at 1235.

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[8] *Compare Pinnacle*, 282 P.3d at 1231–34 *with* (U.S. Home's Opening Br. at 27–54; U.S. Home's Reply Br. at 16–28).

V. THE HOMEOWNERS' AND NJA'S ARGUMENTS REGARDING UNCONSCIONABILITY DEMONSTRATE A CLEAR HOSTILITY TOWARDS ARBITRATION THAT MUST BE REJECTED.

The Homeowners argue that the arbitration agreement in the CC&Rs is procedurally and substantively unconscionable. (Homeowners' Supp. Br. at 5–11.) This is a repeat of the arguments contained in their answering brief. (*Compare* Answering Br. at 20–21, 27–30.) Accordingly, U.S. Home has already addressed these arguments. (U.S. Home's Reply Br. at 16–28.)

The NJA purports to "not take a position on" the issue of unconscionability (NJA Br. at 9), but it nonetheless makes several unconscionability arguments. First, the NJA complains that the CC&Rs are "nearly 100 pages long" and the arbitration agreement is "sandwiched between the declarant's right to repair and the designation of neighborhoods." (*Id.* at 6.) U.S. Home already addressed these issues. (U.S. Home's Opening Br. at 30–36; U.S. Home's Reply Br. at 17–18.) In short, the arbitration agreement in the CC&Rs is conspicuous and no evidence shows otherwise. (*Id.*)

Next, the NJA suggests that an "unsigned provision" in the CC&Rs is no basis to compel arbitration. (NJA Br. at 7.) U.S. Home also already briefed this argument, and nothing raised by the NJA warrants a new response. (U.S. Home's Opening Br. at 15–17; U.S. Home's Reply Br. at 1–3); *Tallman*, 359 P.3d at 119 (the "written record of the agreement to arbitrate" need not "be signed.").

Third, the NJA argues that arbitration "subverts homebuyers' fundamental right to judicial redress." (NJA Br. at 5–8, n. 13.) This same argument, if accepted, would invalidate *any* other arbitration agreement. It flies in the face of the policies favoring arbitration. *See* 9 U.S.C. § 2; NRS 38.219; *Exber, Inc. v. Sletten Const. Co.*, 558 P.2d 517, 522 (Nev. 1976) ("[T]he parties are not to be deprived by the courts of the benefits of arbitration, for which they bargained—speed in the resolution of the dispute, and the employment of the specialized knowledge and competence of the arbitrator.").

Moreover, as stated by the NJA, forfeiting access to the courts "can, of course, be done. But it should be done knowingly and deliberately." (*Id.* at 7.) Here, pursuant to NRS 116, the Homeowners knowingly and deliberately agreed to arbitrate. Any other rule would upend NRS 116. (*See* U.S. Home's Opening Br. at 15–18, 30–46; U.S. Home's Reply Br. at 1–3, 16–18.)[9]

Finally, the NJA asserts that an arbitration agreement cannot be placed within CC&Rs because "the legitimate objectives of a development scheme" do

[9] *See generally Hamm v. Arrowcreek Homeowners' Ass'n,* 183 P.3d 895, 903 (Nev. 2008) ("binding arbitration" does not violate access to the courts because "the arbitration award may be vacated and a rehearing granted pursuant to NRS 38.241"); *Lyman v. Mor Furniture For Less, Inc.*, 2007 WL 2300683, at *3 (D. Nev. Aug. 7, 2007) (the presence of an arbitration provision indicating that "disputes … will be settled by arbitration" is clear notice that the right to a jury trial is being waived).

not include arbitration. (NJA Br. at 6.)[10] There is no support for this position. In fact, it is opposite the plain language of NRS 116.2105(2), which provides that CC&Rs "may contain any other matters the declarant considers appropriate." *See also Pinnacle*, 282 P.3d at 1229 ("Even assuming that a covenant requiring arbitration of construction disputes does not fall within traditional notions of an equitable servitude, the Davis-Stirling Act … specifies that a declaration 'may contain any other matters the original signator of the declaration [the developer] or the owners consider appropriate.'").

CONCLUSION

Courts throughout the country, especially in post-*Concepcion* cases, are re-affirming public policies favoring arbitration and reversing blanket bans and judicial hostility against arbitration. Respectfully, this Court should do the same. *See, e.g.*, *Tallman*, 359 P.3d at 120–22 (discussing the FAA and *Concepcion*, and their effect on state-court decisions).

For the foregoing reasons, U.S. Home respectfully requests that this Court hold that (1) the FAA applies, and (2) the arbitration agreements requiring Homeowners to arbitrate their claims are enforceable.

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[10] The Homeowners appear to take a similar position. (*See* Homeowners' Supp. Br. at 11–12 ("[A]rbitration provisions embedded within the CC&Rs are certainly not 'appropriate' or beneficial to the common-interest community ….").)

DATED: March 30, 2017 PAYNE & FEARS LLP

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman Font.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more and contains 4,091 words.

3. Finally, I hereby certify that I have read this appellate 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: March 30, 2017 PAYNE & FEARS LLP

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CERTIFICATE OF SERVICE

I hereby certify that on March 30, 2017, I deposited a true and correct copy of the above and foregoing, APPELLANT'S SUPPLEMENTAL BRIEF, on this date by electronic transmission through the court's electronic filing program.

/s/ Nancy Babas
Nancy Babas
An employee of PAYNE & FEARS LLP

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