IN THE SUPREME COURT OF THE STATE OF NEVADA

KENNETH RENFROE,

Appellant,

v.

LAKEVIEW LOAN SERVICING, LLC,

Respondent.

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Case No. 68907

APPEAL
from the Eighth Judicial District Court, Department XVI
The Honorable Douglas Herndon, District Judge
District Court Case No. A-14-700520-C

RESPONDENT'S ANSWERING BRIEF

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NRAP 26.1 DISCLOSURE

Pursuant to NRAP 26.1, the undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed:

Lakeview Loan Servicing, LLC (**Lakeview** or the **Company**) was formed under the laws of the State of Delaware on November 22, 2010. Lakeview's sole member is Bayview MSR Opportunity Corp. (**Bayview MSR**). Bayview MSR is wholly owned by Bayview MSR Opportunity Master Fund, L.P (**Bayview Master Fund**), which is 96.9% owned by Bayview MSR Opportunity Offshore, L.P. (**Bayview Offshore**). Bayview Offshore has a single limited partner, BSOF Master Fund L.P. (**BSOF**), which is an investment fund with various investors, none of which hold an ownership interest in BSOF that equals or exceeds 10 percent. As such, no investor through its interest in BSOF indirectly owns a 10 percent or greater interest in Lakeview.

These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

RESPONDENT'S ROUTING STATEMENT

Pursuant to NRAP 28(b)(2) and NRAP 17, Lakeview Loan Servicing, LLC states that this case raises as principal issues: (13) a question of first impression of common law; and (14) a question of statewide public importance.

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ISSUES PRESENTED

Whether the district court correctly granted Lakeview Loan Servicing, LLC's (**Lakeview**) motion to dismiss on the ground that Kenneth Renfroe's (**Renfroe**) quiet title action under NRS 116.3116 is preempted under the Supremacy Clause due to its conflict with federal mortgage insurance programs.

STATEMENT OF JURISDICTION

This Court has jurisdiction under NRAP 3A(b)(1), as the district court granted Lakeview's motion to dismiss on August 26, 2015, and a notice of entry was made on October 8, 2015. Renfroe filed his notice of appeal on September 24, 2015.

STATEMENT OF THE CASE

This is one of many cases regarding the proper interpretation and application of NRS 116.3116 following this Court's September 2014 decision in *SFR Investments Pool 1, LLC v. Bank of America, N.A.*, 334 P.3d 408 (Nev. 2014). Plaintiff-Appellant Renfroe claims that his purchase of certain property in Clark County, Nevada at a homeowners association's (**HOA**) foreclosure sale for $20,000.00 extinguished the deed of trust held by Lakeview, securing a loan of $172,296.00. Lakeview moved to dismiss Renfroe's complaint, arguing that Renfroe's action under NRS 116.3116 was preempted under the Supremacy Clause due to its conflict with federal mortgage insurance programs. The district court granted Lakeview's motion to dismiss on the basis, *inter alia*, that the Supremacy Clause preempted the foreclosure sale under NRS 116.3116 due to the statute's conflict with federal mortgage insurance programs.

STATEMENT OF FACTS

I. Factual Background

Brian and Jennifer Ferguson entered into a deed of trust with Countrywide Bank, FSB regarding the property located at 7736 Beach Falls Court, Las Vegas, Nevada 89149 in the amount of $172,296.00. (App43-55.) The deed of trust states that the loan at issue is insured by the Federal Housing Administration (**FHA**) and that the FHA Case Number is NV3324603617703. (*Id*. at 43.) The deed of trust

repeatedly references the Secretary of Housing and Urban Development (**HUD**), including how the lender is to make mortgage insurance premiums to HUD. (*See, e.g.*, *id*. at 46.) The deed of trust was assigned to Lakeview on August 1, 2013. (*Id*. at 57.)

Nevada Association Services, Inc. (**NAS**), on behalf of Desert Creek Homeowners Association (the **HOA**), recorded a notice of delinquent assessment lien against the property on June 5, 2013. (*Id*. at 60.) The notice stated that a total of $1,337.64 was owed to the HOA, but did not include the amount owed to the HOA for assessments themselves. (*Id*.) On October 11, 2013, NAS, on behalf of the HOA, recorded a notice of default and election to sell under homeowners association lien. (*Id*. at 62-63.) The notice stated that $2,398.32 was owed, but did not include the specific amount owed to the HOA for assessments. (*Id*.) On February 25, 2014, NAS, on behalf of the HOA, recorded a notice of foreclosure sale. (*Id*. at 65-66.) The notice stated that $3,716.32 was owed, but did not include the amount owed to the HOA for assessments themselves. (*Id*.)

On April 21, 2014, NAS, on behalf of the HOA, recorded a foreclosure deed, which stated that Renfroe purchased the property at a foreclosure sale for $20,000.00. (*Id*. at 68-70.)

II. Procedural Background

On May 9, 2014, Renfroe filed his complaint, seeking a declaratory judgment that he possessed title to the property free and clear of all liens and encumbrances. (*Id*. at 1-5.) On November 20, 2014, Lakeview filed a motion to dismiss Renfroe's complaint for failure to state a claim upon which relief could be granted. (*Id*. at 34-41.) On August 27, 2015, the district court entered an order granting Lakeview's motion to dismiss. (*Id*. at 141-43.) On October 8, 2015, a notice of entry of the order was entered. (*Id*. at 139-40.)

SUMMARY OF THE ARGUMENT

The district court's decision should be upheld because the Supremacy Clause preempts an HOA from foreclosing on property secured by an FHA-insured mortgage. It is well-settled that federal law, rather than state law, applies in cases involving FHA-insured mortgages. Consistent with this well-settled rule—and as recognized by several Nevada district court judges—the HOA Lien Statute must yield to the FHA's regulations. Consequently, an HOA cannot foreclose and extinguish an FHA-insured deed of trust. Accordingly, Renfroe's quiet title and declaratory judgment claims, which depend on the proposition that an HOA can extinguish an FHA-insured deed of trust, fail as a matter of law.

ARGUMENT

I. Standard of Review.

The Court reviews *de novo* a district court's dismissal for failure to state a claim upon which relief can be granted. *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008). When construing a motion to dismiss, the factual allegations in the complaint are treated as true, and all inferences are drawn in favor of the non-moving party. *Simpson v. Mars, Inc.*, 113 Nev. 188, 190, 929 P.2d 966, 967 (1997) (citing *Vacation Village v. Hitachi Am.*, 110 Nev. 481, 484, 874 P.2d 744, 746 (1994)). A district court should dismiss a crossclaim if its allegations are insufficient to establish the elements for a claim for relief. *Hamp v. Foote*, 118 Nev. 405, 408, 47 P.3d 438, 441 (2002).

The district court correctly dismissed Renfroe's claims. This Court should affirm the district court's ruling.

II. The District Court Correctly Granted Lakeview's Motion to Dismiss.

The district court's order granting Lakeview's motion to dismiss should be affirmed. The order correctly applied Nevada law to conclude that the statutory basis for Renfroe's quiet-title action was preempted under the Supremacy Clause of the U.S. Constitution due to its conflict with federal mortgage insurance programs. Renfroe unsuccessfully attempts to raise the objections that Lakeview lacks

standing and that there is no genuine conflict between the HOA Lien Statute and the federal programs. These objections lack any merit.

Several Nevada district court judges have previously concluded that foreclosures of mortgages insured by the Federal Housing Administration (**FHA**) are void when conducted pursuant to the HOA Lien Statute, as the HOA Lien Statute is preempted to the extent its operation would extinguish FHA-insured deeds of trust, like Lakeview's first deed of trust in this case. By destroying HUD's ability to incentivize lenders to make mortgage loans to at-risk borrowers and potentially eliminating HUD's ability to take title to the underlying real property, Nevada's HOA foreclosure scheme has the "effect of limiting the effectiveness of the remedies available to the United States." *Washington & Sandhill Homeowners Ass'n v. Bank of America, N.A.*, No. 2:13-CV-01845-GMN, 2014 WL 4798565, at *7 (D. Nev. Sept. 25, 2014) (Navarro, C.J.); *see also Saticoy Bay LLC v. SRMOF II 2012-1 Trust*, No. 2:13-CV-1199-JCM-VCF, 2015 WL 1990076, at *4 (D. Nev. Apr. 30, 2015) (Mahan, J.) ("Accordingly, the court reads the foregoing precedent to indicate that a homeowners' association foreclosure sale under Nevada Revised Statute 116.3116 may not extinguish a federally-insured loan."); *Nationstar Mortgage, LLC v. SFR Investments Pool 1, LLC*, No. 2:15-CV-00583-RCJ-PAL, 2016 WL 1718374, at *6 (D. Nev. Apr. 29, 2016) (Jones, J.) (first deed of trust holder "is entitled to summary judgment on this issue if it can show that the

Property was FHA-insured on the date of the CHOA foreclosure"); *Garcia v. Nationstar Mortgage, LLC,* No. 2-15-CV-00346-GMN-PAL, 2016 WL 3769340 (D. Nev. July 14, 2016) (Navarro, C.J.) (finding that case had similar facts to *Washington & Sandhill* and granting summary judgment on same reasoning to holder of FHA-insured first deed of trust); *cf. Saticoy Bay LLC v. Flagstar Bank, FSB,* No. 2:13-CV-1589-JCM-VCF, 2016 WL 1064463, at *3 (D. Nev. Mar. 17, 2016) (Mahan, J.) (holding that federal law preempts quiet title action under the HOA Lien Statue where loan was federally owned because "precedent forbids application of a state law that impedes a federal interest").

HOA foreclosures on FHA-insured mortgages circumvent and frustrate HUD's comprehensive foreclosure-avoidance scheme for at-risk borrowers. The purpose of the FHA Programs is to permit at-risk borrowers to purchase homes by providing mortgage insurance to those who otherwise cannot secure mortgage financing. Accordingly, the FHA Programs include guidelines and directives that limit and control foreclosures on FHA-insured mortgages. However, the HOA foreclosures ostensibly authorized by the HOA Lien Statute frustrate that goal by cutting short any foreclosure-avoidance efforts in favor of early foreclosure by HOAs.

Under the Supremacy Clause, state law that conflicts with federal law—including federal regulations—is preempted. *Crosby v. Nat'l Foreign Trade*

Council, 530 U.S. 363, 372 (2000); *Fid. Fed. Savings & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 153–54 (1982) (holding that federal regulations have the same preemptive force as federal statutes). Federal conflict preemption applies if the challenged state law "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Crosby*, 530 U.S. at 372–73 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)); *see also Munoz v. Branch Banking & Trust Co.*, 131 Nev. Adv. Rep. 23, 348 P.3d 689, 691 (2015) (preemption "occurs when the state law 'frustrates the purpose of the national legislation, or impairs the efficiencies of [the] agencies of the Federal government to discharge the duties for the performance of which they were created'" (quoting *McClellan v. Chipman*, 164 U.S. 347, 357 (1896))). A state law stands as an "obstacle" to federal law whenever it conflicts, interferes, or is inconsistent with "the full purposes and objectives of Congress." *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 873 (2000) (quoting *Hines*, 312 U.S. at 67).

Applying these principles immediately after the Nevada Supreme Court's *SFR Investments* decision, a Nevada district court judge held that "[b]ecause a homeowners association's foreclosure under Nevada Revised Statute § 116.3116 on a Property with a mortgage insured under the FHA insurance program would have the effect of limiting the effectiveness of the remedies available to the United States, the Supremacy Clause bars such foreclosure sales." *See Washington &*

Sandhill, 2014 WL 4798565, at *7. Similarly, another decision held "[a]llowing an HOA foreclosure to wipe out a first deed of trust on a federally-insured property… interferes with the purposes of the FHA insurance program." *Saticoy Bay LLC*, 2015 WL 1990076, at *4 (noting that "courts consistently apply federal law, ignoring conflicting state law, in determining rights related to federally-insured loans"). Because the deed of trust was federally insured, the court held "the homeowners' association sale in the instant case is void." *Id.* at *5. In this case, Judge Herndon correctly concluded that the HOA's foreclosure on property secured by an FHA-insured deed of trust is void.

A. As applied to FHA-insured mortgages, the HOA Lien Statute is preempted because it extinguishes a federal interest and interferes with the governance of a federal program.

The Supremacy Clause mandates preemption of state laws when the state "legislation as applied interferes with the federal purpose or operates to impede or condition the implementation of federal policies and programs." *Rust v. Johnson*, 597 F.2d 174, 179 (9th Cir. 1979). The federal program at issue here, the FHA Insurance Program, is part of a comprehensive scheme designed to induce lenders to provide loans to at-risk borrowers who could not otherwise obtain financing to purchase a home.[1] The FHA's purpose is broad and essential, as the "[FHA] is the

[1]*Mortgage Insurance for One to Four Family Homes Section 203(b)*, HUD.gov, http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/sfh/ins/203b--df (last visited September 21, 2016) ("[T]he Federal Government expands

largest insurer of mortgages in the world, insuring over 34 million properties since its inception in 1934."[2] The effects of the FHA Insurance Program are far-reaching: "FHA provides a huge economic stimulation to the country in the form of home and community development, which trickles down to local communities in the form of jobs, building suppliers, tax bases, schools, and other forms of revenue."[3]

Critical to the FHA Insurance Program's mission is a partnership between private lenders and the federal government. Through the programs, the federal government insures certain residential mortgage loans originated by private lenders for at-risk borrowers who qualify for assistance under FHA criteria. *See, e.g.*, 12 U.S.C. § 1701t ("[T]here should be the fullest practicable utilization of the resources and capabilities of private enterprise and of individual self-help techniques.").[4] By incentivizing private lenders to make loans to at-risk borrowers,

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homeownership opportunities for first time homebuyers and other borrowers who would not otherwise qualify for conventional mortgages on affordable terms, as well as for those who live in underserved areas where mortgages may be harder to get.").

[2]The Federal Housing Administration (FHA), HUD.gov http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/fhahistory (last visited September 21, 2016).

[3] *Id.*

[4] *See also* Housing Act of 1949, § 2, 42 U.S.C. § 1441 (policy of Housing Act of 1949 is to encourage private enterprise "to serve as large a part of the total need as it can"); Department of Housing and Urban Development Act of 1965, §§ 2, 3(a), 42 U.S.C. § 3531 (HUD to "encourage the maximum contributions that may be made by vigorous private home-building and mortgage lending institutions to housing, urban development, and the national economy"), 3532(b) (Secretary of HUD to do the same).

the FHA Insurance Program implements the "National Housing Act's strong policy in favor of *encouraging* private investment in housing." *Angleton v. Pierce*, 574 F. Supp. 719, 736 n.22 (D.N.J. 1983).[5] In managing the FHA Insurance Program, HUD, the federal agency charged with implementing the FHA, has issued comprehensive regulations to determine what mortgages will be insured, when a foreclosing mortgage servicer will be entitled to convey the home to HUD and in return receive the insurance proceeds, when payment to the servicer and conveyance of the property to HUD will be a matter of discretion rather than entitlement, and how HUD will dispose of the property once conveyed to it in a manner to best support the national housing objective.

This Court's recent decision in *Munoz* is instructive on the preemptive effect that should be applied to federal statutory schemes, like the National Housing Act, where the challenged state statute's impact on private entities frustrates a federal statutory or regulatory scheme. In *Munoz*, this Court considered the preemptive

[5] *The Federal Housing Administration (FHA)*, HUD.gov, http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/fhahistory (last visited September 24, 2016) ("FHA mortgage insurance provides lenders with protection against losses as the result of homeowners defaulting on their mortgage loans. The lenders bear less risk because FHA will pay a claim to the lender in the event of a homeowner's default."); *Mortgage Insurance for One to Four Family Homes Section 203(b)*, HUD.gov, http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/sfh/ins/203b--df (last visited September 21, 2016) ("[The 203(b)] program provides mortgage insurance to protect lenders against the risk of default on mortgages to qualified buyers."); *see also Hahn v. Gottlieb*, 430 F.2d 1243, 1249-51 (1st Cir. 1970); *Falzarano v. United States*, 607 F.2d 506, 512 (1st Cir. 1979).

effect of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (**FIRREA**) on a state statute, NRS 40.459(1)(c), which limits the amount of a deficiency judgment that a successor creditor can recover to the amount it paid to acquire the interest in the secured debt, less the amount of the secured property's actual value. 348 P.3d at 689. FIRREA governs the winding down of a failed bank, providing that the Federal Deposit Insurance Corporation (**FDIC**) will act as receiver for the failed bank and convert the bank's assets to cash to cover insured depositors and debtors to the maximum extent possible. *Id.* at 692. One category of a bank's assets are the loans it holds. Because the Nevada law limited the amount a subsequent private purchaser could recover on the loan, it made it less likely that a private party would purchase the loan, and hence would make it at least marginally more difficult for the FDIC to dispose of the assets. *Id*. Since the Nevada law interfered with FIRREA's express purpose of "facilitat[ing] the purchase and assumption of failed banks as opposed to their liquidation[,]" it was preempted by the federal law. *Id.* at 692-93.

Like the Nevada statute in *Munoz,* the HOA Lien Statute undermines the incentives federal insurance provides to private parties, which "frustrates the purpose … or impairs the efficiencies" of a federal program—here the FHA Insurance Program. *See id.* at *4 (quoting *McClellan*, 164 U.S. at 357). When Congress enacted the National Housing Act and when HUD first implemented it

by promulgating the FHA Insurance Program's regulations, those two entities struck the balance between the public treasury and the private partnership with loan originators that the HOA Lien Statute frustrates and impedes. Congress, in striking that balance, made decisions that "involve[d] a balancing of factors and a consideration of complex financial data," *Falzarano v. United States*, 607 F.2d 506, 512 (1st Cir. 1979), and "economic and managerial decisions" about which "courts are ill-equipped to superintend," *Hahn v. Gottlieb*, 430 F.2d 1243, 1249-51 (1st Cir. 1970). State interference with that careful and expert balancing could "discourage the increased involvement of the private sector" that is the goal of the National Housing Act, which created the FHA. *Id.* at 1250.

Recognizing the careful public-private balance Congress struck in enacting the FHA Insurance Program, the Ninth Circuit has consistently held that federal law, rather than state law, applies in cases involving FHA-insured mortgages, which "assure[s] the protection of the federal program against loss, state law to the contrary notwithstanding." *United States v. Stadium Apartments*, 425 F.2d at 358, 362 (9th Cir. 1970); *United States v. View Crest Gardens Apartments, Inc.*, 268 F.2d 380, 383 (9th Cir. 1959) ("[T]he federal policy to protect the treasury and to promote the security of federal investment which in turn promotes the prime purpose of the Act—to facilitate the building of homes by the use of federal credit—becomes predominant. Local rules limiting the effectiveness of the

remedies available to the United States for breach of a federal duty cannot be adopted."); *see also United States v. Victory Highway Vill., Inc.*, 662 F.2d 488, 497 (8th Cir. 1981) ("federal law, not [state] law, governs the rights and liabilities of the parties in cases dealing with the remedies available upon default of a federally held or insured loan.").

Consistent with the settled standard that federal law applies to federally-insured mortgages, *Washington & Sandhill* held that the HOA Lien Statute was preempted because "a homeowner[] association's foreclosure under Nevada Revised Statutes § 116.3116 on a Property with a mortgage insured under the FHA Insurance Program would have the effect of limiting the effectiveness of the remedies available to the United States," and, therefore, "the Supremacy Clause bars such foreclosure sales." 2014 WL 4798565, at *7. Indeed, "extinguish[ment] of a first secured interest" of a mortgagee where the mortgage is insured by HUD "would 'operate[ ] to impede or condition the implementation of federal policies and programs' and therefore 'must yield under the supremacy clause of the Constitution to the interests of the federal government.'" *Id.* at *6 (quoting *Rust*, 597 F.2d at 179). Similarly, Judge Mahan held in *Saticoy Bay LLC* that "a homeowners' association foreclosure sale under Nevada Revised Statute 116.3116 may not extinguish a federally-insured loan." 2015 WL 1990076, at *4 ("Allowing

an HOA foreclosure to wipe out a first deed of trust on a federally-insured property thus interferes with the purposes of the FHA insurance program.").

Furthermore, HUD's guidelines found in Mortgagee Letter 2013-18 relate to HUD's clear-title requirement that an insured lender present clear title to HUD in order to obtain a payoff from the insurance policy—and, importantly here, that a lender must pay outstanding HOA fees prior to a conveyance. http://portal.hud.gov/hudportal/documents/huddoc?id=13-18ml.pdf.[6] There is no provision for paying an HOA lien prior foreclosure. Accordingly, accepting that the HOA Lien Statute could extinguish a FHA-insured deed of trust would effectively render meaningless Mortgagee Letter 2013-18 and the process a lender must undertake to deliver clear title to HUD.

Foreclosure on and extinguishment of federally-insured mortgages "would run the risk of substantially impairing the Government's participation in the home mortgage market and of defeating the purpose of the National Housing Act." *Rust*, 597 F.2d at 179. The Supremacy Clause "forbids application of a state law that impedes a federal interest," and the federal interest in the mortgage is impeded where "the property was federally insured at the time of the HOA foreclosure sale." *Saticoy Bay*, 2015 WL 1990076, at *5. Because the HOA Lien Statute impedes the

[6] This public statement on a government website is subject to judicial notice. *See, e.g., Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998-99 (9th Cir. 2010).

operation of the FHA Insurance Program, the statute is preempted as applied to FHA-insured mortgages, like the deed of trust in this case.

B. As applied to FHA-insured mortgages, the HOA Lien Statute is preempted because it frustrates FHA's foreclosure-avoidance efforts.

In addition to threatening the partnership between private and public entities, allowing HOAs to foreclose on FHA-insured mortgages also threatens HUD's comprehensive regulations that seek to avoid foreclosure and keep at-risk borrowers in their homes. FHA loans are issued to borrowers who might otherwise not qualify for conventional mortgages due, for example, to their inability to make more than a minimal down payment or their having significantly lower credit scores than banks would otherwise approve.[7]

The FHA is not analogous to a private insurer. As a federal agency, "FHA insures mortgages so that lenders will be encouraged to make more mortgages available for people."[8] "HUD's mission is to create strong, sustainable, inclusive

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[7] Mortgage Credit Analysis for Mortgage Insurance on One- to Four-Unit Mortgage Loans (4155.1), ch. 4, § 2.A.2.a, *available at* http://portal.hud.gov/hudportal/documents/huddoc?id=4155-1_2_secA.pdf (last visited Sept. 22, 2016) ("In order for FHA to insure this maximum loan amount, the borrower must make a required investment of at least 3.5% of the lesser of the appraised value or the sales price of the property.").
Id. § 4.A.1.c (showing that borrowers with credit scores between 500 and 579 are eligible for a maximum Loan-To-Value ratio of 90%).

[8] *Discontinuing Monthly Mortgage Insurance Premium Payments*, HUD.gov, http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/comp/premiums/prem2001 (last visited Sept. 22, 2016).

communities and quality affordable homes for all."[9] This strong federal interest encompasses keeping borrowers in their homes for some period of time during default as the lender and borrower try to resolve the delinquency.[10] The FHA Programs include a comprehensive set of servicing guidelines that are aimed at keeping at-risk borrowers in their homes to the extent possible, including in circumstances where the borrowers are in financial distress. For example, before claiming a default and initiating foreclosure proceedings, the FHA Programs' regulations require that mortgagees consider forbearance and pre-foreclosure counseling[11]—which can take six months or more[12]—and provide that

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[9] *See* HUD's Mission Statement, *available at* http://portal.hud.gov/hudportal/HUD?src=/about/mission (last visited Sept. 22, 2016).

[10] *See* HUD Mortgagee Letter 2010-04, at 1 (Jan. 22, 2010), http://portal.hud.gov/hudportal/documents/huddoc?id=10-04ml.pdf (last visited Sept. 22, 2016) ("Loss Mitigation is critical to both borrowers and FHA because it works to fulfill the goal of helping borrowers retain homeownership while protecting the FHA Insurance Fund from unnecessary losses.").

[11] *See* 24 C.F.R. § 203.501 (requiring that mortgagees "must consider" actions such as "special forbearance," meaning in cases where the mortgagor does not own other FHA-insured property and the default was caused by circumstances beyond the mortgagor's control, the forbearance agreement will not require increased payments before the original maturity date of the mortgage); HUD Administration of Insured Home Mortgages Handbook 4330.1, ch. 7, §§ 7-3, *available at* http://portal.hud.gov/hudportal/documents/huddoc?id=43301c7HSGH.pdf (last visited Sept. 22, 2016) (requiring that servicers "make a concerted effort to help the mortgagor resolve his/her financial problems," specifically addressing that a mortgage servicer should endeavor to be aware of marital difficulties, substance abuse, excessive gambling, loss of income, loss of employment, illness, and other factors, and then refer borrowers to counseling before initiating foreclosure).

noncompliance may result in a civil monetary penalty and withdrawal of HUD's approval of the mortgagee as a program participant, 24 C.F.R. § 203.500. In addition to forbearance,[13] FHA regulations require mortgagees to consider or attempt other forms of relief short of foreclosure, including modifying a loan's terms to make it more affordable. *Id.* at §§ 203.357, 203.370, 203.608, 203.616. Moreover, even where foreclosure is inevitable, FHA regulations identify a lengthy and exhaustive process that details the level and form of borrower communications required before foreclosure may begin.[14] Federal regulators have marshalled many decades of expertise to enact a comprehensive and detailed approach to foreclosure and foreclosure forbearance on FHA-insured mortgages, the goal of which is to expand the housing market for those who otherwise would not be able to purchase a home.

By allowing HOAs to foreclose on distressed borrowers, Nevada law conflicts with FHA regulations specifying foreclosure as a "last resort" for this

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[12] HUD Administration of Insured Home Mortgages Handbook 4330.1 app. 18, at 2, *available at* http://portal.hud.gov/hudportal/documents/huddoc?id=43301x18HSGH.pdf (last visited Sept. 22, 2016).

[13] *See* 24 C.F.R. §§ 203.471, 203.614.

[14] *See generally* HUD Administration of Insured Home Mortgages Handbook 4330.1, ch. 7, § 7-7, *available at* http://portal.hud.gov/hudportal/documents/huddoc?id=43301c7HSGH.pdf (last visited Sept. 24, 2016).

potentially vulnerable category of borrowers.[15] Nevada itself has recognized HOA foreclosures interfere with mortgagees' efforts to keep borrowers in their homes and has made some—albeit insufficient—effort to mitigate the controversial rush to foreclose by HOAs and their collection agents. In 2013, Nevada changed its law to bar HOAs from initiating non-judicial foreclosure proceedings after the mortgagee has recorded a notice of default and before it complies with Nevada's own foreclosure avoidance procedures (which generally require pre-foreclosure mediation). *See* NRS 116.31162(6)(b).

Although this amendment reflects the Nevada Legislature's own recognition of the harm caused by HOA foreclosures, it is not enough to avoid federal preemption as applied to FHA-insured loans because Nevada law still frustrates federal foreclosure forbearance objectives. As the Supreme Court has recognized, a "[c]onflict in technique can be fully as disruptive to the system Congress enacted as conflict in overt policy." *Amalgamated Ass'n of Street, Electric Ry., & Motor Coach Employees v. Lockridge,* 403 U.S. 274, 287 (1971). For example, under the 2013 amendment, nothing impedes HOAs from pursuing foreclosure and removing the borrower from the home where the mortgagee has not issued a notice of

[15] HUD Administration of Insured Home Mortgages Handbook 4330.1, ch. 9, § 9-3, *available at* http://portal.hud.gov/hudportal/documents/huddoc?id=43301c9HSGH.pdf (last visited Sept. 24, 2016) ("Foreclosure should be considered only as a last resort and shall not be initiated until all other relief options have been exhausted.").

default. Indeed, if anything, Nevada law directly undermines federal law by encouraging mortgagees to initiate foreclosure at the earliest possible time to at least temporarily prevent the HOA from proceeding with its own foreclosure. In contrast, the FHA Programs direct mortgagees on insured loans to work with the borrower and to evaluate modification and other alternatives ***before*** taking steps toward foreclosure.[16]

The U.S. Supreme Court and other federal courts have found preemption of state law under the Supremacy Clause in much less compelling circumstances than those presented here. For instance, in *De la Cuesta*, the Supreme Court held a Federal Home Loan Bank Board regulation permitting—but not requiring—federal savings and loan associations to include "due-on-sale" clauses in their mortgage contracts preempted state law that restricted the use of such clauses. "By further limiting the availability of an option the Board considers essential to the economic soundness of the thrift industry, the State has created 'an obstacle to the accomplishment and execution of the full purposes and objectives' of the due-on-sale regulation." 458 U.S. at 156 (citations omitted). Here, HUD explicitly directs mortgage servicers to exercise restraint in proceeding with foreclosures to help

[16] Decisions HUD has made about how much time and effort banks are required to expend before foreclosing are careful and important ones. "HUD has very broad discretion in order to achieve national housing objectives," *United States v. Antioch Found.*, 822 F.2d 693, 695 (7th Cir. 1987), including in the context foreclosure avoidance. As noted, such decisions "involv[e] a balancing of factors and a consideration of complex financial data." *Falzarano*, 607 F.2d at 512.

keep borrowers in their homes. *See supra* note 10. Because the HOA Lien Statute impermissibly restricts the discretion of both the servicer and HUD in addressing borrower default, it is preempted under the Supremacy Clause as applied to FHA-insured mortgages.[17]

Finally, the preemptive effect here is modest. Nothing about HUD regulations or federal preemption requires HOAs to give up their partial payment priority, NRS 116.3116(2); they simply require that HOAs yield to the FHA-insured mortgagee with respect to the timing of their recovery out of foreclosure proceeds. *See* NRS 116.31162. The HOAs will still receive the fees that are entitled to superpriority status following a sale conducted by the mortgagee. But allowing an HOA to foreclose on an FHA-insured loan plainly frustrates the objectives of HUD regulations in restricting foreclosures on at-risk FHA borrowers where specified foreclosure avoidance measures offer some promise of keeping the borrowers in their homes.

[17] Similarly, in *Forest Park II v. Hadley*, 336 F.3d 724 (8th Cir. 2003), a state statute required owners of federally subsidized low-income housing to comply with prepayment requirements and schedules that differed from those imposed under federal law and HUD regulations. *Forest Park II* noted it was possible to comply with both laws. At issue were conflicting notice requirements and "Forest Park could give 365 days notice to the state and 250 days notice to HUD." *Id.* at 732. But by requiring more notice under state law, the private entity would be required to wait longer than it otherwise would have before it could prepay its loans. While the Eighth Circuit recognized that compliance with both statutes was possible, it reasoned that such an argument did "not address the principal problem with these state statutes—they fly in the face of the Constitution's Supremacy Clause." *Id.*

Because the HOA Lien Statute "interferes with the federal purpose or operates to impede or condition the implementation" of the FHA Programs, it is preempted as applied to FHA-insured mortgages, like Lakeview's deed of trust in this case. *See Rust*, 597 F.2d at 179. Since Renfroe's quiet-title action is entirely dependent on the validity of the preempted state law, its quiet title and declaratory judgment claims fail. Accordingly, this Court should affirm the district court's decision granting Lakeview's motion to dismiss.

C. The *Freedom Mortgage* decision is not persuasive and should not be followed.

Renfroe cites extensively to the decision of the United States District Court in *Freedom Mortgage Corp. v. Las Vegas Dev. Group, LLC,* 106 F. Supp. 3d 1174 (D. Nev. 2015). Renfroe relies on *Freedom Mortgage* to argue that "[Lakeview] failed to prove how extinguishment of its deed of trust conflicted with federal law." Appellant's Br. at 12. However, sharing a few broad goals is not determinative of whether conflict preemption applies. Federal conflict preemption applies whenever the state law "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Crosby*, 530 U.S. at 372–73 (emphasis added).

Freedom Mortgage is inconsistent with settled precedent establishing that federal law, rather than state law, applies in cases involving FHA-insured mortgages "to assure the protection of the federal program against loss, state law to

the contrary notwithstanding." *United States v. Stadium Apartments, Inc.*, 425 F.2d 358, 362 (9th Cir. 1970); *see also United States v. Victory Highway Vill., Inc.*, 662 F.2d 488, 497 (8th Cir. 1981) ("[F]ederal law, not [state] law, governs the rights and liabilities of the parties in cases dealing with the remedies available upon default of a federally held or insured loan."). Unlike the *Freedom Mortgage* holding, the *Washington & Sandhill* and *Saticoy Bay* holdings recognize that allowing an HOA to foreclose on and extinguish a federally-insured mortgage "would run the risk of substantially impairing the Government's participation in the home mortgage market and of defeating the purpose of the National Housing Act." *See Rust*, 597 F.2d at 179. Therefore, the *Freedom Mortgage* decision is not a persuasive authority.

D. Lakeview has standing to bring this Supremacy Clause argument.

In the opening brief, Renfroe repeats the challenges to Lakeview's standing that it made before the district court. Judge Herndon rightly rejected these arguments in his decision granting Lakeview's motion to dismiss.

Renfroe argues that Lakeview "did not have 'prudential standing' to assert rights and claims that belong to either FHA or HUD." Appellant's Br. at 7. This argument is confused on several levels. Renfroe cites to *Freedom Mortgage*, which only discussed "prudential standing" in holding that the challenger lacked "prudential standing to challenge the HOA's foreclosure on the [property] under

the **Property Clause**." *Freedom Mortgage*, 106 F. Supp. 3d at 1180 (emphasis added). Lakeview's appeal[18] does not assert a challenge under the Property Clause, but under the Supremacy Clause, and so *Freedom Mortgage* is inapplicable.[19] Renfroe offers no other support for the far-reaching proposition that HUD has the exclusive right to argue that a state law is preempted due to its conflict with HUD regulations. It misconstrues this Court's use of the phrase "special status" in *Munoz*—which held a Nevada statute to be preempted by a federal statute (FIRREA) even though the challenger was a bank, not a federal agency—as being relevant to that challenger's standing. Appellant's Br. at 21-22 (quoting *Munoz*, 348 P.3d at 692). However, *Munoz*'s discussion of "special status" was completely unrelated to the issue of standing; rather, the discussion occurred in a general explanation of how the statute functioned. *See Munoz*, 348 P.3d at 692. *Munoz* held a Nevada statute to be preempted by federal law despite the absence of a federal agency or actor as a party, and did not do so on the basis of any special right or status possessed by the bank. Therefore, it refutes Renfroe's "prudential standing" objection.

[18] Lakeview notes that it asserted a challenge under the Property Clause in the district court proceeding.

[19] Although *Freedom Mortgage* also ruled against the bank'' Supremacy Clause challenge, it did not do so on standing grounds, but rather, as discussed *supra*, Sec. II.C., on the substantive ground that the HOA lien statute is consistent with FHA Insurance Program. *See Freedom Mortgage*, 106 F. Supp. 3d at 1183-89.

Relatedly, Renfroe also challenges Lakeview's standing on the ground that it has not transferred the deed of trust to a federal agency, and so "the federal government never acquired an interest in the deed of trust or in the Property before the deed of trust was extinguished by the HOA foreclosure sale held on April 18, 2014. Appellant's Br. at 11. However, the U.S. Supreme Court frequently applies the Supremacy Clause to preempt state law even where the federal government did not have title to subject property. Renfroe completely ignores these cases[20] in its brief. Furthermore, both the *Washington & Sandhill* and *Saticoy Bay* decisions found conflict preemption to apply regardless of whether the federal government had a vested property interest. *See Washington & Sandhill*, 2014 WL 4798565, at *6 (declining to consider whether a Property Clause argument because the mortgage interest was only "insured by HUD at the time of the foreclosure," and holding that "extinguish[ment] of a first secured interest" insured by HUD "would operat[e] to impede or condition the implementation of federal policies and programs" (internal quotation marks omitted)); *Saticoy Bay*, 2015 WL 1990076, at *4 ("any arguments turning on federal ownership of the property. . . do not dictate the court's holding").[21]

[20] *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372–73 (2000); *Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861, 873 (2000); *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

[21] Renfroe makes several misleading claims about *Washington & Sandhill* in his brief. It alleges that *Washington & Sandhill* "identified two conditions" for

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The decision below correctly concluded that the statutory basis for Renfroe's quiet-title action is preempted under the Supremacy Clause of the U.S. Constitution due to its conflict with the FHA Insurance Program. Therefore, the Court should affirm the district court's order granting Lakeview's motion to dismiss.

CONCLUSION

Renfroe has failed to give any grounds to reverse the district court's order granting Lakeview's motion to dismiss. For all of the reasons in this brief, the district court's judgment should be affirmed.

DATED this 28th day of October, 2016.

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standing, one being that the mortgagee must "convey title to the Property to HUD." Appellant's Br. at 9. The decision discusses this "condition" when describing how HUD can acquire title under the FHA Insurance Program; it does not state that HUD must have title as a prerequisite for a bank to have standing. 2014 WL 4798565, at *6.

CERTIFICATE OF COMPLIANCE

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 opening brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman and 14 point font size.

I FURTHER CERTIFY that this reply brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the answer exempted by NRAP 32(a)(7)(C) it is proportionally spaced, has a typeface of 14 points or more and contains 4980 words.

FINALLY, I CERTIFY that I have read this **Respondent's Answering 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 answering 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 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 answer is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 28th day of October, 2016.

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CERTIFICATE OF SERVICE

In accordance with N.R.A.P. 25, I HEREBY CERTIFY that I am an employee of Akerman LLP, and that on this 28th day of October, 2016, I caused to be served a true and correct copy of the foregoing **RESPONDENT'S ANSWERING BRIEF** via this Court's electronic filing system to the following:

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