IN THE SUPREME COURT OF THE STATE OF NEVADA

NATIONSTAR MORTGAGE, LLC, Appellant, vs. SFR INVESTMENTS POOL 1, LLC, Respondent.	Case No. 69400	Electronically Filed Oct 25 2016 10:56 a.m. Elizabeth A. Brown Clerk of Supreme Court

APPEAL
from the Eighth Judicial District Court, Department VII
The Honorable Michael P. Villani, District Judge
District Court Case No. A-13-684715-C

APPELLANT'S REPLY BRIEF

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INTRODUCTION

Nationstar Mortgage, LLC (**Nationstar**) requests that this Court reverse a district court order granting summary judgment in favor of SFR Investments Pool 1, LLC (**SFR**). SFR claims that its purchase of property at a homeowners association's foreclosure sale for less than 8% of the market value of the property, extinguished the deed of trust securing a loan of $271,638. In this case, the district court erroneously granted SFR's motion for summary judgment.

This court should reverse the district court's order for failing to recognize that the provisions of NRS 116 governing foreclosures on HOA liens that applied before the 2015 amendments (the **HOA Lien Statute**) are preempted by federal law when they would extinguish Freddie Mac-owned deeds of trust, like the deed of trust at issue in this case.

This Court should also reverse the summary judgment on the independent basis that, prior to amendment in 2015, the HOA Lien Statute violated the due process clauses of the Nevada Constitution and the U.S. Constitution. The statute provides for a non-contractual, non-judicial foreclosure without ensuring notice to senior lien holders.

Third, the district court granted summary judgment without addressing material questions of fact on the issue of commercial reasonableness. This Court has recently overturned a district court ruling for failing to address the issue of

commercial reasonableness when it was at issue. *Wells Fargo Bank, N.A., v. Premier One Holdings, Inc.*, No. 67873, 2016 WL 3481164 at *2 (Nev. June 22, 2016) (unpublished). The district court here failed to address the commercial reasonableness of the sale. Thus, at the very least, this case should be remanded for further proceedings.

ARGUMENT

I. Extinguishment of the Freddie Mac-Owned Deed of Trust is Preempted by Federal Law

A. Nationstar Has Standing to Invoke the Federal Foreclosure Bar

The District Court held that Nationstar lacked standing to invoke the Federal Foreclosure Bar. That was error. Appellants' opening brief explained that under this Court's precedent and well-established principles of standing, Nationstar—both as beneficiary of record and through its contractual relationship with Freddie Mac—may raise the Federal Foreclosure Bar as a defense. SFR fails to address these arguments directly, attempting instead to sidestep them with an overly broad reading of *Armstrong v. Exceptional Child Center, Inc.*, 135 S. Ct. 1378 (2015), and an incorrectly narrow reading of HERA.

i. *Armstrong* Does Not Prohibit Private Parties from Invoking Federal Law

SFR relies on *Armstrong* to argue that Nationstar cannot raise the Federal Foreclosure Bar as a defense to SFR's quiet-title claim. SFR Br. 27-29. Undoubtedly, *Armstrong* stands for the limited proposition that the Supremacy Clause "does not create a cause of action." *Armstrong*, 135 S. Ct. at 1383.

But no one here argues that it does. Rather, Nationstar argues that the Federal Foreclosure Bar provides the substantive rule governing claims that no one could dispute are properly before the court. And in *Armstrong*, the U.S. Supreme Court held that when deciding a case properly before it, the court *must* apply federal law as the "rule of decision" when "state and federal law clash." *Id.* *Armstrong* expressly acknowledges that "once a case or controversy properly comes before a court, judges are bound by federal law." *Id*. at 1384. The Supremacy Clause cannot be a party's ticket into court, but, once there, it plainly requires that federal law be given full effect.

Nothing precludes a private party like Nationstar from asserting that federal law, due to its preemptive effect, provides the substantive law governing a cognizable dispute. Indeed, *Armstrong* itself establishes this when it approvingly cites *Mutual Pharmaceutical Co. v. Bartlett*, 133 S. Ct. 2466 (2013)—a tort case in which a private defendant successfully argued that federal law preempted state law, thereby defeating the private plaintiff's claim. *See Armstrong*, 135 S. Ct. at 1384. If the Supreme Court had adopted the contrary position SFR advocates—a position that would effectively negate the Supremacy Clause[1]—it would have had

[1] The Supremacy Clause expressly provides that state judges must recognize the binding effect of federal law. In its entirety, the clause reads:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and *the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding*.

U.S. Const. Art. VI Cl. 2 (emphasis added). That text cannot be squared with an

to distinguish, limit, or overturn *Bartlett*, not cite it approvingly.

Like *Bartlett*, this case involves indisputably cognizable claims—*e.g.*, quiet title—over which the court has jurisdiction. Unlike *Armstrong*, this case does not involve any assertion that the Supremacy Clause creates a free-floating "cause of action." Instead, as a defense to SFR's quiet-title claim, Nationstar argues that federal law clashes with the State Foreclosure Statute on which SFR relies. Accordingly, this is a prototypical Supremacy Clause case—one that is properly before the court on a cause of action independent of the Supremacy Clause, but where the clause requires that "judges are bound by federal law" and apply it as the "rule of decision." *Armstrong*, 135 S. Ct. at 1383-84.

A federal court in Nevada reached this same conclusion. In *Thunder Properties, Inc. v. Wood*, the court explicitly relied on *Armstrong* to hold that a private party had standing to challenge the constitutionality of the State Foreclosure Statute under the Supremacy Clause. *See* No. 3:14-cv-00068-RCJ-WGC2015, 2015 WL 1926768, at *4 (D. Nev. Apr. 28, 2015) ("[A]n evaluation of whether N.R.S. 116.3116 as applied to federally insured mortgages conflicts with [the Supremacy Clause] is a question of law that may be raised by any party, and not just a government agency" (citing *Armstrong*, 135 S. Ct. at 1383)). SFR makes no attempt to distinguish this holding.

SFR argues that cases such as *Beal Bank, SSB v. Nassau Cty.*, 973 F. Supp. 130, 133 (E.D.N.Y. 1997), and *Cambridge Capital Corp. v. Halcon Enterprises,*

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interpretation that would preclude parties before a state court from ever invoking the clause.

Inc., 842 F. Supp. 499, 499 (S.D. Fla. 1993), lack persuasive authority because they predate *Armstrong*. This argument is meritless. Those cases, like this one, involved property disputes properly before the court, and did *not* involve freestanding claims based on the Supremacy Clause. Nothing in *Armstrong* disturbs their holdings.

SFR's interpretation of *Armstrong* reads "enforcement" of a federal law to mean any instance in which a party may invoke or rely upon federal law in a judicial proceeding. If SFR were correct, why would the Supreme Court list examples of situations in which state and federal law clash and judges are to "assur[e] the supremacy of federal law"? *Armstrong*, 135 S. Ct. at 1383-84. Accordingly, courts interpreting the scope of *Armstrong* reject the reading SFR suggests. *See United States v. Supreme Court of New Mexico*, 824 F.3d 1263, 1280 n.9 (10th Cir. 2016) (holding that a statute's silence on private enforcement allowed private equitable claims, distinguishing it from the "broad 'judicially unadministrable'" Medicare statute at issue in *Armstrong* (citing *Armstrong*, 135 S. Ct. at 1384-86)); *Tri-Corp Hous. Inc. v. Bauman*, 826 F.3d 446, 448 (7th Cir. 2016) (limiting *Armstrong*'s prohibition on claims based on the Supremacy Clause to situations "when Congress has adopted a system that limits private enforcement to particular methods").

SFR's attempt to square its incorrect interpretation of *Armstrong* with this court's decision in *Munoz v. Branch Banking*, 131 Nev. Adv. Op. 23, 348 P. 3d 689 (2015) is unavailing. Indeed, by admitting that this Court "would have reached the same conclusion" had it considered *Armstrong*, SFR Br. 31, SFR

implicitly admits that its interpretation of that case is incorrect. Attempting to distinguish *Munoz*, SFR argues that the defendant there, an FDIC assignee, was given "special status" under FIRREA, evidencing Congress' intent to allow private actors to enforce federal law. But nothing in *Munoz* or the portions of FIRREA it describes include an *express* grant of authority to FDIC assignees by Congress to enforce, let alone invoke, federal law. All the assignees were given was "'super' holder-in-due-course status" and an extended statute of limitations in which they could enforce their claims. *See* SFR Br. 31. Those rights were not at issue in *Munoz*, which dealt with the amount a bank could recover in a deficiency judgment. But according to SFR, the creation of those rights was enough for this Court to conclude, consistent with *Armstrong*, that Congress "intended" to allow private parties to invoke federal law. In essence, SFR concedes that private parties may invoke federal law absent an express grant from Congress. Yet it argues that Nationstar requires an *express* grant from Congress to invoke the Federal Foreclosure Bar here. SFR cannot have it both ways.[2]

B. SFR's Interpretation of HERA is Erroneous

Through a narrow reading of two statutory provisions, SFR argues that Congress intended to limit enforcement of the Federal Foreclosure Bar to FHFA. But it misreads those provisions. Nothing in HERA or the regulations governing

[2] *Munoz* is not the only case in which this Court has recently allowed private litigants to invoke the Supremacy Clause in making preemption arguments. *See, e.g., Morrison v. Health Plan of Nev.*, 130 Nev. Adv. Op. 55, 328 P.3d 1165, 1168 (2014) (allowing private litigant to raise federal preemption argument regarding the Medicare Act (42 U.S.C. § 1395w)), *reh'g denied* (Sept. 24, 2014); *Holdaway-Foster v. Brunell*, 130 Nev. Adv. Op. 51, 330 P.3d 471, 473 (2014).

the Agency indicates that FHFA is the only entity entitled to invoke federal law to protect its property. To the contrary, the text on which SFR relies demonstrates that FHFA was given broad authority to implement its statutory mission through numerous avenues, and that the Federal Foreclosure Bar works automatically in cases where Agency property is at issue.

SFR first argues that because 12 U.S.C. § 4617(b)(2)(D)(ii) begins with the language "the Agency," no other entity is permitted to "preserve and conserve the property of the regulated entity [Freddie]." SFR Br. at 27-28. But this argument ignores the broad grant of authority given to FHFA in that section, which provides that the Agency may "take such action as may be appropriate" to preserve Freddie Mac's property. Nothing precludes FHFA's "action" from being the reliance upon Freddie Mac's existing contractual relationships with authorized servicers to protect the property interest. Indeed, SFR makes no argument that such an action would not be "appropriate." Thus, nothing in § 4617(b)(2)(D)(ii) can be read to limit Nationstar's invocation of the Federal Foreclosure Bar.

Next, SFR points to 12 C.F.R. § 1237.3(a)(7), a regulation governing FHFA, to argue that FHFA has the "exclusive authority to investigate and prosecute claims" on behalf of Freddie Mac. SFR Br. at 28. But SFR's reading is incorrect. Nationstar is not "prosecut[ing]" or "investigat[ing]" claims on behalf of Freddie Mac; it is *defending* Freddie Mac's property interest, so the plain language of this supposed limitation does not apply. But even if it did, the regulation is not a limitation on enforcement of the Federal Foreclosure Bar. In its entirety, 12 C.F.R. § 1237.3 is a regulatory statement of the broad powers granted to FHFA as

conservator or receiver of the Enterprises.[3] The subsection that SFR cites, subsection (7), states that FHFA may "[p]reserve and conserve the assets and property of the regulated entity," and notes that FHFA has "the exclusive authority to investigate or prosecute claims" on behalf of a regulated entity, or delegate that authority to the entity. The neighboring subsections give FHFA additional authority to delegate or implement its mission through other entities. Subsection (8) says that the Agency may "[p]rovide by contract for assistance in fulfilling *any* function, activity, action, or duty, of the Agency as conservator or receiver" (emphasis added). Similarly, subsection (6) states that FHFA may "[p]erform all functions of the regulated entity in the name of the regulated entity that are consistent with the appointment as conservator or receiver." Thus, the regulation grants FHFA broad authority to fulfill its statutory mission through numerous avenues, including by acting through Fannie and Freddie or contracting with third parties. Such a grant includes allowing servicers to invoke the Federal Foreclosure Bar to protect Freddie Mac's interest.

Finally, SFR cites 12 U.S.C. § 4617(j)(1) for the proposition that the FHFA must "act," *i.e.* appear or otherwise take action, for the Federal Foreclosure Bar to apply. SFR Br. 28. The statute has no such requirement. It states that the subsections of 12 U.S.C. 4617(j) shall apply in any case in which the Agency is "*acting* as a conservator or a receiver." 12 U.S.C. 4617(j)(1) (emphasis added).

[3] Describing the proposed version of § 1237.3 (which is functionally identical to the final version), the Federal Register's analysis states that the section codifies the fact that "FHFA, as conservator, has the broad power to take necessary action to put the regulated entity in sound and solvent condition and to take appropriate action to preserve and conserve the assets and property of a regulated entity."

That is all that is required. Section 4617(j)(3) states that no property of the Agency "shall be subject to … foreclosure… without the consent of the Agency." Thus, for the Federal Foreclosure Bar to apply in a case (such as this one) involving conservatorship property, FHFA need only have been acting as a conservator at the time when the property would otherwise have been subject to foreclosure. Here, there is no question that FHFA was acting as conservator when the HOA Sale took place; FHFA has been acting as Conservators since September 6, 2008, when the director of FHFA placed Freddie Mac into conservatorship. No other action on the part of FHFA is needed.[4]

C. Nationstar Presented Conclusive Evidence of its Contractual Relationship with Freddie Mac

SFR claims that Nationstar did not introduce any admissible evidence to suggest that Freddie owns the deed of trust or that Nationstar is Freddie Mac's servicer. SFR Br. 33-35. That is not correct. Accompanying its Counter-Motion for Summary Judgment, Nationstar submitted excerpts from the deposition of Fay

[4] SFR also attempts to discredit the statutory interpretation provided by Amicus FHFA, but its arguments are unavailing. FHFA notes that there is "no condition precedent" for the operation of § 4617(j), and that the Federal Foreclosure Bar is effective by operation of law. FHFA Amicus Br. 7. SFR argues that this reading reverses the standard set forth in *Armstrong*. SFR Br. at 32. But SFR's argument ignores *Armstrong*'s direction that the Supremacy Clause creates a "rule of decision," and that once a case "properly comes before a court," then "judges are bound by federal law." *Armstrong*, 135 S. Ct. at 1383-84. In such a situation, federal law works automatically by operation of law—that law being the rule of decision of the Supremacy Clause. Thus, FHFA's reading is correct. Moreover, even if SFR was correct that Nationstar requires the express intent of Congress to invoke the Federal Foreclosure Bar, then, as explained above, invocation of the law is expressly permitted by the grant of broad discretionary authority given to FHFA to accomplish its statutory mission. *See* 12 U.S.C. § 4617(b)(2)(D)(ii).

Janati, a Nationstar employee who testified regarding Nationstar's contractual and servicing relationship with Freddie Mac. Ms. Janati testified that, for the loan in question:

- The loan was her (and, therefore, Nationstar's) account to service;
- Freddie Mac was the owner of the note;
- Nationstar and Freddie Mac have a contractual agreement giving Nationstar the authority to service the loan;
- The relationship was governed by the publicly available servicing guide.

Although SFR notes that the District Court did not come to a conclusion regarding the owner of the deed of trust, it presents no explanation for why the evidence Nationstar submitted would be inadmissible.

Attempting to muddle facts, SFR points to assignments of the Deed of Trust and argues that they do not name Freddie Mac. SFR Br. at 33-34. However, as explained in Nationstar's opening brief, the Court in *In re Montierth*, 131 Nev. Adv. Op. 56, 354 P. 3d. 648 (2015), adopted the Restatement approach, which holds that when a loan owner has an agent or contractual relationship with an entity who acts as the beneficiary of record of a deed of trust, the loan owner (though not the record beneficiary) remains a "secured creditor" and therefore maintains a secured property interest in the collateral. *Id.* at 650-51. The Restatement states that the owner of a loan may designate a third party as its servicer and "assignment of the mortgage from the originating mortgagee to the

servicer may be executed and recorded." Restatement § 5.4 cmt. c; *see also* Nationstar Br. at 18 (citing same). SFR's admission that "there is a dispute as to whether Freddie owns the deed of trust," SFR Br. at 34, supports the conclusion that the District Court's grant of summary judgment in its favor was improper.

SFR argues that Nationstar lacks evidence of its servicing relationship, arguing that the Freddie Mac Single-Family Servicer Guide ("Guide") does not evidence a relationship between it and Freddie Mac. SFR Br. 34-35. However, Nationstar does not claim that the Guide is the sole agreement between Nationstar and Freddie regarding the particular property here. Indeed, it is not. It is part of the agreement that was evidenced by the testimony of Ms. Jantari, and SFR offered no evidence to refute that testimony. The Guide establishes the procedures and policies for all of Freddie Mac's servicers and "governs the business relationship between a Seller/Servicer and Freddie Mac relating to the sale and Servicing of Mortgages." As the testimony of Ms. Janati explained, the Guide provides various responsibilities and powers granted to Nationstar to protect Freddie Mac's property interest, evincing the servicing relationship recognized in *Montierth*. As a result of that relationship, Freddie Mac retains its property interest in the loan while Nationstar acts as the beneficiary of record of the deed of trust, and Nationstar may assert the Federal Foreclosure Bar to protect that interest.

II. The Sale of the Property was Commercially Unreasonable

Finally, SFR incorrectly argues that Nationstar failed to present evidence that the HOA's foreclosure sale was commercially unreasonable. Nationstar presented evidence of a grossly inadequate price, which would serve as proof of a commercially unreasonable foreclosure. The Restatement (Third) of Property (Mortgages) states that under the gross inadequacy standard: "a court is warranted in invalidating a sale where the price is less than *20 percent of fair market value*. Section 8.3 cmt b (emphasis added). Further, "in extreme cases a price may be so low (typically *well under 20% of fair market value*) that it would be an abuse of discretion for the court to refuse to invalidate it." *Id.* (emphasis added). Here, the property was sold for an amount less than *8% of fair market value*. Under the Restatement view, the HOA's foreclosure sale here would surely be overturned.

The result should not be any different under Nevada law. "To say that a mortgagee with power to sell, who has an encumbrance on the estate of *less than one-third of its value*—an encumbrance which five or six months' rent will discharge—has the right to sell the estate absolutely to the first man he meets who will pay the amount of the encumbrance, without any attempt to get a larger price for it, would in our opinion be equivalent to *saying fraud and oppression* shall be protected and encouraged." *Runkle v. Gaylord*, 1 Nev. 123, 129 (1865) (emphasis added) (quoted in *Golden*, 79 Nev. at 513, 387 P.2d at 994). SFR's contention that

"[w]hen purchasing a property at a forced sale, market value has no applicability…" is not supported by the law, the Restatement, or common sense. As a matter of law, forced sales prices are compared to non-forced, arm's length market value to determine whether the price paid was "inadequate." *Golden v. Tomiyasu*, 79 Nev. at 504-505, 387 P.2d at 989-990 (comparing a sales price of $18,025.73 to a "market value" of $200,000, less the amount owed on a first deed of trust not extinguished by the sale).

SFR argues that the incredibly inadequate sale price was not commercially unreasonable because it accurately reflected the current conditions of the market. Essentially, SFR's argument appears to be that whatever price an HOA's foreclosure fetched would be the fair market price, and thus should not be set aside. That argument would prevent *any* challenge to foreclosure sales for being commercially unreasonable, and render meaningless this Court's holding that "grossly inadequate price" is an element in an action to set aside a foreclosure sale. *See, e.g., Shadow Wood Homeowners Assoc. v. N.Y. Community Bancorp, Inc.*, 131 Nev. Adv. Op. 5, 366 P.3d 1105, 1110 (2016). In order to judge whether the sale price adequately reflected fair market value, there must be some measure of fair market value *other than the sales price*.

Here, the property was sold for much less than the 33% of fair market value identified as fraudulent or oppressive in *Runkle*. This miniscule sales price alone is

enough to show that the HOA sale here was commercially unreasonable under binding Nevada law, as well as the "traditionally and widely held view" espoused in the most recent Restatement.

III. SFR Cannot Claim The Benefit Of The Bona Fide Purchaser Doctrine.

A. SFR has the burden of proof

SFR asserts that it was entitled to judgment on the basis that it was a bona fide purchaser for value. In doing so, SFR improperly attempts to shift the burden of proof to Nationstar to show that SFR was *not* a bona fide purchaser. However, the bona fide purchaser doctrine is an affirmative defense, *W. Charleston Lofts I, LLC v. R & O Const. Co*., 915 F. Supp. 2d 1191, 1195 (D. Nev. 2013) (citing *Berge v. Fredericks*, 95 Nev. 183, 591 P.2d 246, 247-48 (1979)), and SFR bears the burden of proof to show that it was a bona fide purchaser. SFR has not presented *any* evidence to show whether it lacked notice of the pre-existing deed of trust: it only contends that it had no relationship with the HOA prior to the foreclosure sale, which has no relevance to Freddie Mac's federally-protected property interest. Its brief fails to address the key fact in this case that defeats a bona fide purchaser defense—that SFR knew of the deed of trust when it bought the property.

B. SFR was not a bona fide purchaser for value.

SFR concedes, to qualify as a bona fide purchaser, it must prove that it purchased the property (i) for value; and (ii) without notice of a competing or superior interest in the same property. *Berge*, 95 Nev. at 185, 591 P.2d at 247. SFR cannot satisfy the second element, as the Deed of Trust constitutes a competing or superior interest in the property of which SFR admittedly had notice prior to its purchase of the property. SFR is also imputed with knowledge of federal law, and made *no inquiry* as to whether the deed of trust was owned by Freddie Mac or Fannie Mae – which precludes extinguishment of a Deed of Trust – despite the Deed of Trust clearly stating it is a FNMA/FHLMC uniform instrument. SFR is charged with knowledge of what reasonably diligent search would have disclosed. *Allison Steel Mfg. Co. v. Bentonite, Inc.*, 86 Nev. 494, 498, 471 P.2d 666, (1970).

When SFR purchased the property, this Court had not yet decided *SFR Investments*, and many Nevada trial courts and federal district courts had held that an HOA lien could not extinguish a senior deed of trust as a matter of law. The "potency" of the Deed of Trust is apparent from the 92% discount that SFR received on the Property. Second, the HOA's foreclosure sale did not extinguish the Deed of Trust because the HOA Lien Statute is preempted by federal law and facially unconstitutional under the Due Process Clause. Even if the statute were constitutional, the HOA's foreclosure sale was still invalid because the sale was not

commercially reasonable. For those reasons, SFR is precluded from being a bona fide purchaser.

IV. SFR Cannot Rely on Recitals to Validate an Invalid Foreclosure Sale.

A. Recitation of compliance with the HOA Lien Statute is not a substitute for actual compliance.

SFR's contention that recitations of compliance with the HOA Lien Statute is equivalent to actual compliance with the statute's notice provisions is precluded by this Court's decisions and is inconsistent with the requirements of NRS 116. The notion that recitals in a deed conclusively establish compliance was rejected by this Court in *Shadow Wood*, where this Court held, as a matter of law, that deed recitals under NRS 116.3116 cannot be conclusive as to the facts of whether statutory requirements were met. *Shadow Wood*, 132 Nev. at __, 366 P.3d at 1110-12. In *Shadow Wood*, the foreclosure deed contained a recital virtually identical to the recital in this case.[5] This Court rejected the argument that the recital prevented any challenge to the foreclosure, on several grounds. First, there is "long-standing and broad inherent power of a court to sit in equity and quiet title, including setting aside a foreclosure sale if the circumstances support such action." *Id*. at 1112. Second, "the recitals made conclusive by operation of NRS 116.31166 implicate

[5] *Compare Shadow Wood*, 132 Nev. at __, 366 P.3d at 1108-09 ("All requirements of law regarding the mailing of copies of notices and the posting and publication of the copies of the Notice of Sale have been complied with.") *with* (II A.A. 289) (identical).

compliance only with the **statutory prerequisites** to foreclosure." *Id*. (emphasis added). Finally, this Court cited case law from other jurisdictions "under which equitable relief may still be available in the face of conclusive recitals, at least in cases involving fraud." *Id*. This led the Court to conclude that the mere inclusion in the foreclosure deed of "conclusive recitals" relating to NRS 116.31166 did not preclude a challenge to the HOA Trustee's foreclosure. *Id*.

SFR continues to suggest that NRS 116.31166(1–2) means that an HOA's compliance with the HOA Lien Statute rests solely on reciting compliance with the statute's notice provisions in a foreclosure deed. SFR's interpretation is flawed because it would render NRS 116.31166(3) void.

NRS 116.31166(3) requires that the foreclosure sale be conducted *pursuant to NRS 116.31162, 116.31163, and 116.31164* to vest the purchaser at the HOA foreclosure sale with title to the property. This Court has explained that the Legislature's use of "pursuant to" means "in compliance with; in accordance with; under…[a]s authorized by; under…[i]n carrying out." *In re Steven Daniel P*., 129 Nev. Adv. Op. 73, 309 P.3d 1041, 1044 (2013). The court further explained that "pursuant to" is a "restrictive term" that mandates compliance. *Id*. at 1044. By using the phrase "pursuant to" in NRS 116.31166(3) with reference to NRS 116.31162, 116.31163 and 116.31164, the Nevada Legislature mandated compliance with those statutes. Consequently, an HOA's foreclosure sale does not

vest title without equity or right of redemption unless the HOA actually complied with NRS 116.31162, 116.31163, and 116.31164, not just 116.31166(1).

SFR's interpretation of NRS 116.31166 not only renders the notice requirements of 116.31162, 116.31163, and 116.31164 meaningless, it also would lead to absurd results. Following SFR's logic, an HOA could fail to record any of the three notices the HOA Lien Statute requires, *falsely* recite that it did in fact record the notices, and the court would be compelled to hold that the notices were in fact recorded, *even if* the opposing party produced irrefutable evidence that proved the recitals were false.

NRS 116.31166(1) is modeled after the UCIOA, which makes clear that "a recital of the *facts* of nonpayment of the assessment and of the giving of the notices required by this subsection are *sufficient proof of the facts recited*. . . ." UCIOA § 3-116 (1)(4) (emphasis added). Nothing in UCIOA or NRS 116.31166(1) allows a purchaser to rely on unsupported legal conclusions regarding compliance.

Pursuant to NRS 116.31166, the deed recitals that are conclusive proof of the matters recited are limited to: (a) default, (b) the elapsing of the 90 days, and (c) the giving of notice of sale. NRS 116.31166(1). Here, the pertinent "facts," such as actual dates, are not provided; therefore, the presumption described in NRS 116.31166(1) is inapplicable. The Trustee's Deed does not attest to any facts showing compliance with: (1) mailing of the Notice of Delinquent Assessment; (2)

service of the Notice of Default by certified mail on the owners of record and all parties of interest that requested notice; (3) that 90 days passed between the mailing of the notice of default and publication of the Notice of Sale; (4) proof of mailing of all required notices; (5) posting of the Notice of Sale on the Property; (6) posting of the Notice of Sale in three public places for twenty consecutive days prior to the foreclosure sale; or (7) publication of the Notice of Sale in a newspaper for three consecutive weeks prior to the sale. NRS 116.311635(1)(a). For SFR to be entitled to summary judgment, all those requirements must be met.

B. Even if the HOA complied with the notice statute, that does not mean Nationstar's other arguments are invalid.

Finally, SFR argues that even without the recitals in the Trustee's Deeds, the district court's grant of summary judgment should be affirmed because evidence in the record indicates that the HOA did provide proper notice under NRS 116. But even if that is true, that is not a counter to any of Nationstar's arguments in opposition to SFR's motion for summary judgment and in support of its own motion. Serious questions remain following the *SFR Investments* decision, and must be decided in order to affirm the district court's judgment in this case.

V. NRS 116's Statutory Foreclosure Scheme is Unconstitutional

The lower Court's decision should be reversed because the pre-2015 amendment foreclosure scheme under NRS 116 violates constitutional due process requirements. Since the district court's decision, the Ninth Circuit agreed that NRS

116.3116 is facially unconstitutional because it is an "opt-in" notice scheme. *Bourne Valley Court Trust v. Wells Fargo Bank*, ___ F.3d ___, No. 15-15223, 2016 WL 4254983 (9th Cir. Aug. 12, 2016). This decision was correct, as the HOA Lien Statute impermissibly requires those with a security interest on a Nevada property potentially subject to an HOA lien to "opt-in" to their constitutional protections by requesting notice prior to the HOA's foreclosure—a requirement that fails to provide the mandatory notice guaranteed by the Due Process Clause. As such, the HOA Lien Statute is invalid on its face.

Under both state and federal law, elimination of a property interest by means of a statutory foreclosure scheme is a form of state action and thus subject to due-process requirements. In *J.D. Construction v. IBEX Int'l Group*, 126 Nev. 366, 376, 240 P.3d 1033, 1040-41 (2010), J.D. Construction placed a mechanic's lien on property owned by Ibex. *Id*. at 370, 240 P.3d at 1036. J.D. Construction was *not* a state actor. *See id*. This Court held that "[a] mechanic's lien is a 'taking' in that the property owner is deprived of a significant property interest, which entitles the property owner to federal and state due process." *Id*. at 376, 240 P.3d at 1040 (citing *Connolly Develop., Inc. v. Sup. Ct. of Merced County*, 17 Cal. 3d 803, 132 Cal. Rptr. 477, 553 P.2d 637, 644 (1976)). The Court further opined that due process is satisfied if both parties are allowed the opportunity to present their case. *Id*. (citing *Mathews v. Eldridge*, 424 U.S. 319, 349 (1976)).

Similarly, the Ninth Circuit has held a private seizure of property pursuant to an innkeeper's lien statute constitutes state action. *Culbertson v. Leland*, 528 F.2d 426, 432 (9th Cir. 1975). The Arizona statute at issue in *Culbertson* authorized the keeper of a hotel or lodging house to seize—without notice or judicial procedure—the personal property of a lodger who failed to pay rent. *Id.* at 427. The court held the state action requirement was met because the parties "had no contractual relationship concerning [the] property," and consequently it was the statute, and not a private agreement, that "was the *sine qua non* for the activity in question." *Id.* The court distinguished cases where a "written instrument defined the rights of the parties," and thus "can be left and has traditionally been left to private hands." *Id.* at 431. In those cases, the court explained, "the written agreement of the parties set forth their respective rights and liabilities; the statute merely reiterated and confirmed their arrangement," and thus the repossession "did not deprive [the debtor] of any rights which he had not already yielded voluntarily and for consideration." *Id.* at 432. The innkeeper and the tenant had not contracted to permit the non-judicial seizure. That seizure was authorized solely by state statute. As a consequence, "the state's involvement through that statute is not insignificant," and thus constituted state action. *Id.* The same logic could apply to HOA liens.

A. The HOA Lien Statute does not ensure notice or an opportunity to be heard prior to elimination of property rights.

An "elementary and fundamental requirement of due process . . . is notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of an action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).[6] The U.S. Supreme Court has applied this standard in the same context as this case—where a mortgagee's property interest was purportedly extinguished by a non-judicial foreclosure. *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 800 (1983). The *Mennonite* Court held that the Due Process Clause required that "[n]otice by mail or other means ***as certain to ensure actual notice*** [to the mortgagee] is a minimum constitutional precondition" to a non-judicial foreclosure sale that can extinguish the mortgagee's interest. *Id.* (emphasis added).

Nevada law does not "under all circumstances" ensure actual notice to a deed of trust holder "of the pendency of an action and afford them an opportunity to present their objections." *Mullane*, 339 U.S. at 314. Mortgagees must receive notice *only* if they have previously requested notice from the HOA. NRS

[6] Because the Nevada Constitution's Due Process Clause "virtually mirror[s] the language in the United States Constitution," *Reinkemeyer v. Safeco Ins. Co. of Am.*, 117 Nev. 44, 50, 16 P.3d 1069, 1072 (2001), and Nevada courts look to federal case law interpreting the United States Constitution for guidance, *see Hernandez v. Bennett-Haron*, 128 Nev. Adv. Op. 54, 287 P.3d 305, 310 (2012), the due-process analysis under each is the same, and the HOA Lien Statute is unconstitutional under both.

116.31163 requires that a notice of default and election to sell be provided only to a holder of a recorded security interest who "has requested notice" or "has notified the association" more than 30 days before recording the notice of default of the existence of a security interest. NRS 116.31163 (1)–(2). Section 116.311635 similarly requires that notice of an HOA foreclosure sale be sent only to those mortgagees of record who have requested notice under NRS 116.31163, or those who have "notified the association." NRS 116.311635(1)(b)(1)–(2). A third provision concerning notice of delinquent assessments does not require notice to mortgagees at all. NRS 116.31162.

Nevada Legislature diverged from how other states have drafted similar statutes. In drafting the HOA Lien Statute, the Nevada Legislature largely followed the Uniform Common Interest Ownership Act (**UCIOA**), upon which the statute is based. If adopted in full, Section 3-116(j)(1) of the 1982 UCIOA would have required that a foreclosure on the HOA's superpriority lien "must be foreclosed in like manner as a mortgage on real estate [or by power of sale under [insert appropriate state statute]]." In this instance, however, Nevada drafted a unique provision and created the requirements for foreclosing on an HOA lien from scratch—and in the process, failed to ensure that deed of trust beneficiaries would receive adequate notice.

The HOA Lien Statute explicitly permits the total extinguishment of a first deed of trust without *any* notice to the mortgagee holding that deed. If a mortgagee does not request notice—or, put differently, fails to "opt in" to its constitutional rights—Nevada law will allow the extinguishment of a first deed of trust without notice. Such a result contravenes *Mennonite*, which holds that a "party's ability to take steps to safeguard its interests does not relieve the State of its constitutional obligation." 462 U.S. at 799; *see also Mullane*, 339 U.S. at 314 (notice must be afforded "under all circumstances").

The drafters of the UCIOA have tacitly acknowledged the problem with Nevada's statute, issuing the following comment as part of the 2008 version of the uniform law:

> It would be manifestly unfair for an association's foreclosure sale to extinguish the lien of the otherwise-first mortgage lender if the association did not in fact provide the lender with notice of that sale.

Uniform Law Commission, UCIOA cmt. 8 (2008). To remedy this defect, the 2008 version of the uniform act includes a new section expressly stating that an association's foreclosure "does not terminate an interest that is subordinate to the lien to any extent unless the association provides notice of the foreclosure to the record holder of the subordinate interest." *Id.* § 3-116(r).

B. The HOA Lien Statute cannot be saved by a broad reading of the notice provisions of NRS 116.31168.

The district court's order appeared to conclude that the qualified incorporation of NRS 107.090 into one subsection of the HOA Lien Statute salvages the constitutionality of the entire statute. However, this interpretation is contradicted by both the plain text of the statute and axiomatic tenets of statutory construction. Nothing in the HOA Lien Statute incorporated the notice provisions of NRS 107.090 wholesale. The statute only required notice to those who have affirmatively opted in.

Section 116.31168 is entitled, "Foreclosure of liens: *Requests* by interested persons for notice of default and election to sell; right of association to waive default and withdraw notice or proceeding to foreclosure." Section 116.31168(1) reads as follows:

> **Foreclosure of liens: *Requests* by interested persons for notice of default and election to sell; right of association to waive default and withdraw notice or proceeding to foreclosure.**
>
> The provisions of NRS 107.090 apply to the foreclosure of an association's lien as if a deed of trust were being foreclosed. The *request* must identify the lien by stating the names of the unit's owner and the common-interest community.

NRS 116.31168 (italicized emphasis added). Although "request" is not defined, it is a vital component of both the title and the relevant subsection of NRS 116.31168. It refers back to the more specific sections of NRS Chapter 116 that

govern notice—for instance, NRS 116.311635, which provides that a notice of sale be provided to a holder of a first deed of trust or any other lienholder only "if either of them has notified the association, before the mailing of the notice of sale, of the existence of the security interest, lease or contract of sale, as applicable." Similar provisions govern the notice of default and election to sell. *See* NRS 116.31163.

The Ninth Circuit recently recognized the problem with the district court's interpretation in *Bourne Valley*. 2016 WL 4254983, at *4. The court noted that multiple sections of NRS 116 "required any secured creditor to request notice of default from a homeowners' association before the homeowners' association had any obligation to provide such notice." *Id*. The opinion further concluded that interpreting NRS 107.090 as mandating actual notice to first deed of trust holders would "impermissibly render the express notice provisions of Chapter 116 entirely superfluous." *Id*.

An interpretation holding that this general statute, which includes references to a "request," requires mandatory notice when three other provisions specifically impose only "opt-in" notice would violate multiple Nevada canons of construction. *See, e.g., State Tax Comm'n ex rel. Nev. Dep't of Taxation v. Am. Home Shield of Nev., Inc.*, 127 Nev. 382, 388, 254 P.3d 601, 605 (2011) ("A specific statute controls over a general statute."); *id.* at 386, 254 P.3d at 604; *Nev. Power Co. v. Haggerty*, 115 Nev. 353, 366, 989 P.2d 870, 878 (1999).

The interpretation adopted by the district court would suggest the Legislature enacted multiple request-notice provisions but intended them to have no meaning. "When interpreting a statute, [courts] must give its terms their plain meaning, considering its provisions as a whole so as to read them in a way that would not render words or phrases superfluous or make a provision nugatory." *Southern Nevada Homebuilders Ass'n v. Clark County*, 121 Nev. 446, 449, 117 P.3d 171, 173 (2005). The district court's interpretation of the HOA Lien Statute, if adopted by this court, would render *entire* statutory subsections nugatory. The following subsections of the HOA Lien Statute would be completely superfluous: NRS 116.31163(1), NRS 116.31163(2), NRS 116.311635(b)(1), NRS 116.311635(b)(2). It would even render the second sentence of NRS 116.31168(1)—fully half of the subsection—completely meaningless.

A review of the underlying statutory subsections demonstrates the absurd result that would attach if the district court's interpretation is adopted. The first two subsections, NRS 116.31163(1) and NRS 116.31163(2), provide that a notice of default and election to sell need only be provided to a mortgagee who has "requested notice pursuant to NRS 107.090 or NRS 116.31168." The next two, NRS 116.311635(b)(1) and NRS 116.311635(b)(2), require that notice of the foreclosure sale itself—the event that purportedly extinguishes the constitutionally-protected property interest of a mortgagee—be sent *only* to those who have

requested "notice under NRS 116.31163," and the "holder of a recorded security interest or the purchaser of the unit, *if either of them have notified the association* . . . of the existence of the security interest." NRS 116.311635(b) (emphasis added). The district court's interpretation depends on the assumption that the Nevada Legislature drafted a series of five interlocking request-notice provisions—the four request-notice provisions and NRS 116.31168(1), which also references a "request" for notice—four and a half of which have no meaning whatsoever, because a reference found in one of those subsections negates all the rest and requires an HOA to provide lienholders with actual notice of a foreclosure sale.

Even were NRS 107.090 incorporated, that section is also a request-notice provision. That provision is entitled "*Request for notice* of default and sale; Recording and contents; mailing of notice; *request* by homeowner's association; effect of *request*." NRS 107.090 (emphasis added). Notably, other sections of the HOA Lien Statute also refer to NRS 107.090 as a request-notice provision, rather than the actual notice provision SFR claims it to be. *See* NRS 116.31163(1) (requiring that the Notice of Default be sent to those who have "requested notice pursuant to NRS 107.090 or NRS 116.31168[.]"). The argument that NRS 116.31168's reference to NRS 107.090 requires an HOA to provide a lienholder with actual notice of an HOA foreclosure sale renders every one of these opt-in provisions meaningless.

C. This Court did not resolve the facial unconstitutionality issue in *SFR Investments*.

This Court has not yet decided the particular challenge in this case. SFR mistakenly cites the decision in *SFR Investments Pool 1, LLC v. Bank of America, N.A.*, 130 Nev. Adv. Op. 35, 334 P.3d 408, 418 (2014) in support of its argument that this Court has already held that the opt-in requirement did not violate the due process clause. *SFR* issued no holding regarding the constitutionality of the statute, and in fact could not reach the due process claim because of the procedural posture of the case. *See SFR Investments*, 130 Nev. at __, 334 P.3d at 418. In *SFR Investments*, the mortgagee made an *as-applied*, rather than *facial*, challenge to the HOA Lien Statute, arguing that the notice it received was insufficient under the Due Process Clause. *SFR Investments*, 130 Nev. at __, 334 P.3d at 418. The Court did not reach that as-applied challenge, however, because "at the pleadings stage, we credit the allegations of the complaint that [the HOA] provided all statutorily required notices as true and sufficient to withstand a motion to dismiss." *Id.*

D. Whether Actual Notice was Given is Irrelevant

Whether Nationstar had actual notice of the "super-priority" lien amount is irrelevant. An unconstitutional law is void. *Journigan v. Duffy*, 552 F.2d 283, 289 (9th Cir. 1977). Consequently, a successful facial challenge invalidates the statute itself. *Foti v. City of Menlo Park*, 146 F.3d 629, 635 (9th Cir. 1998); *Dehne v. Avanino*, 219 F. Supp. 2d 1096, 1102 (D. Nev. 2001). Actual notice does not

change the analysis. *Garcia-Rubiera v. Calderon*, 570 F.3d 443, 456 (1st Cir. 2009).[7] *Bourne Valley* itself recognized that Wells Fargo's failure to "present evidence that it did not receive notice" in that case did not affect its facial challenge. *See Bourne Valley*, No. 15-15233, at 7.[8]

CONCLUSION

For all of the above reasons, the district court's judgment should be reversed.

DATED: October 24, 2016

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[7] *See also Planned Parenthood v. Casey*, 505 U.S. 833, 894 (1992).

[8] The Ninth Circuit has consistently rejected arguments that facially unconstitutional statutes can be ameliorated by voluntary practices that satisfy Constitutional requirements. *See, e.g., Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 789 (9th Cir. 2014).

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 answering 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 answering 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 6,953 words.

FINALLY, I CERTIFY that I have read this **Appellant's Reply 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.

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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 24th day of October, 2016.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 24th day of October, 2016, I served and deposited for mailing in the U.S. Mail a true and correct copy of the foregoing **APPELLANT'S REPLY BRIEF**, postage prepaid and addressed to:

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