IN THE SUPREME COURT OF THE STATE OF NEVADA

K&P HOMES, A SERIES LLC OF DEK HOLDINGS, LLC, a Nevada limited liability company, Appellant, vs. CHRISTIANA TRUST, A DIVISION OF WILMINGTON SAVINGS FUND SOCIETY, FSB, NOT IN ITS INDIVIDUAL CAPACITY BUT AS TRUSTEE OF ARLAP TRUST 3 Respondent.	**Supreme Court Case No.: 69966** (A certified question from the United States District Court, District of Nevada, Case No. 2:15-cv-01534-RJC-VCF)

Brief of *Amici Curiae* Mortgage Bankers Association, Nevada Mortgage Lenders Association, and Nevada Bankers Association

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NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel certifies that the following persons or entities as described in NRAP 26.1 have interests in the *Amici Curiae.* These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Pursuant to Rule 26.1 of the Nevada Rules of Appellate Procedure, Amicus Curiae Mortgage Bankers Association certifies that it is a nonprofit corporation and certifies that no publicly held parent company owns more than 10% of MBA.

Pursuant to Rule 26.1 of the Nevada Rules of Appellate Procedure, Amicus Curiae Nevada Mortgage Lenders Association certifies that it is a nonprofit corporation and that no publicly held parent company holds more than 10% of its stock.

Pursuant to Rule 26.1 of the Nevada Rules of Appellate Procedure, Amicus Curiae Nevada Bankers Association, certifies that it is a nonprofit corporation and that no publicly held parent company holds more than 10% of its stock.

The following is a list of all law firms whose partners or associates have appeared or are expected to appear for *Amici Curiae*, in this case:

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Neither *Amici*, nor their counsel are using a pseudonym in connection with this matter.

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STATEMENT OF INTEREST OF THE AMICUS CURIAE

Pursuant to Nevada Rule of Appellate Procedure 29(d)(3), the amici curiae hereby submit this statement of interest.

Mortgage Bankers Association ("MBA") is the national association representing the real estate finance industry—an industry that employs more than 280,000 people across the United States. Headquartered in Washington DC, MBA works to ensure the continued strength of the Nation's residential and commercial real estate markets, to expand homeownership, and to extend access to affordable housing to all Americans. MBA has more than 2,200 member companies, comprising mortgage companies, commercial banks, thrifts, real estate investment trusts, life insurance companies, mortgage brokers, and other organizations that provide money to facilitate real estate financing.

Nevada Mortgage Lenders Association ("NMLA") is a Nevada based industry association that seeks to ensure continued and improved access to affordable real estate financing options in the State of Nevada.

Nevada Bankers Association ("NBA") is a Nevada based industry association representing Nevada banks and banking professionals by providing a united voice dedicated to providing resources to provide economic growth and job creation throughout the State of Nevada.

MBA, NMLA and NBA (collectively referred to as "Amici") have nationwide and statewide perspectives on the mortgage market. As such, each have a keen interest in this litigation, as many of their members have offices in Nevada and, collectively, have made tens of thousands of mortgage loans to consumers in the State. Amici, through the authority granted by their respective leadership, jointly submit this brief to express their views concerning the likely impact that retroactive application of the decision in *SFR Investments Pool 1, LLC v. US Bank, N.A.* 334 P.3d 408 (Nev. 2014) (hereinafter the "SFR Decision") would have on mortgage lenders, Nevada consumers, and the mortgage market at large.

Amici submit this brief pursuant to the accompanying motion for leave under Nevada Rule of Appellate Procedure 29(c).

ARGUMENT

A. Introduction.

On September 18, 2014, in the SFR Decision, this Court held that homeowners association ("HOA") "super liens"—consisting of nine months of delinquent assessments owed to an HOA by a homeowner—may hold a true priority and thus the capacity, if left unsatisfied, to extinguish an otherwise first lien deed of trust in a non-judicial foreclosure sale. The SFR Decision represented a novel and dramatic shift in the law governing the real estate finance industry. It ran contrary to understood principles of secured lending, and to the business expectations of mortgage lenders, the servicers of their loans, and the housing finance market at large. In arriving at its decision, a key issue was left unresolved—whether or not the SFR Decision should be applied retroactively.[1] Amici therefore appreciate that the Court is now considering this important issue in the case at hand.

This Court has adopted a three-factor analysis for determining whether a judicial ruling should apply retroactively:

> **(1)** The Court considers whether "the decision . . . establish[es] a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed."

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[1] *See, e.g., Wells Fargo Bank v. Premier One Holdings, Inc.*, Sup.Ct. Case 67873, Unpublished Order (June 22, 2016) (Noting the SFR Decision only decided two primary issues.)

> **(2)** The Court must look "to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation."
>
> **(3)** The Court considers whether retroactive application "could produce substantial inequitable results."

Breithaupt v. USAA Prop. & Cas. Ins. Co., 867 P.2d 402, 405 (Nev. 1994) (quoting *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106–07 (1971)).

In applying the *Breithaupt* analysis, Amici respectfully urge that this Court only apply the SFR Decision prospectively. As explained below, Amici profoundly believe from their vantage points that the SFR Decision **(1)** established a new principle of law; **(2)** that the effect of retroactive application would impede the rule's operation; and **(3)** that it would present profound, inequitable consequences. On the other hand, we understand limiting the SFR Decision to prospective application would effectively resolve thousands of lawsuits currently making their way through the State and Federal District Courts—clouding title to real property and impacting homeownership opportunities.

B. The SFR Decision established a new principle of law by deciding an issue of first impression.

The Amici are familiar with statewide and national legal trends affecting the mortgage industry. Over the years leading up to the case, although super lien legislation had been enacted in several states, first deed of trust holders paid HOAs the super lien amount due to them upon the holder's foreclosure on a property.

Whether the foreclosure of an HOA super lien under NRS 116.3116 had the capacity to extinguish a first deed of trust by non-judicial sale would eventually become an open question in Nevada. The SFR Decision, which rendered this Court's answer to this question, identified several cases that illustrate the different interpretations of the law, including:

- *7912 Limbwood Court Trust v. Wells Fargo Bank, N.A.*, 979 F.Supp. 2d 1142, 1149 (D.Nev. 2013)("[A] foreclosure sale on the HOA super priority lien extinguishes all junior interests, including first deed of trust.")
- *Cape Jasmin Court Trust v. Cent. Mortgage Co.*, No. 2:13-CV-1125-APG-CWH, 2014 WL 1305015, at *4 (D. Nev. Mar. 31, 2014)(Same as interpretation above.)
- *Bayview Loan Servicing, LLC v. Alessi & Koenig, LLC*, 962 F.Supp.2d 1222, 1225 (D. Nev. 2013)(First deed of trust and an association assessment lien are in parity such that the foreclosure of one does not extinguish the other.)
- *Diakanos Holdings, LLC v. Countrywide Home Loans, Inc.*, No. 2:12-CV-00949-KJD-RJJ, 2013 WL 531092, at *3 (D. Nev. Feb. 11, 2013) (Foreclosure by the association does not extinguish a first deed of trust.)

- *Bourne Valley Court Trust v. Wells Fargo Bank, N.A.*, 80 F.Supp.3d 1131, 1136 (D.Nev. 2015) (Pro, J.) ("Nevada state trial courts and decisions from the United States District Court for the District of Nevada were divided on the issue of whether HOA liens are true priority liens such that their foreclosure extinguishes a first deed of trust on the property.")

Therefore, even though this Court's SFR Decision would ultimately sustain the rights of HOA claims to extinguish a first lien under certain circumstances, the Court's ruling was new -- its resolution was not foreshadowed—given the clear, split in court and stakeholder opinions itemized above.

Highlighting this sentiment, following the SFR Decision, the Nevada Legislature acted relatively quickly to pass Senate Bill 306 (2015) only months after the ruling was issued.[2] The focus of the legislation was to address the lack of protection for financial institutions whose interests could now be lost without adequate notice to the priority claims of an HOA.

Finally, in the ruling which raised the issue currently before this Court, United States District Court Judge Robert C. Jones explained that the SFR Decision brought an unforeseen transformation to the real estate finance industry, as this ruling on

[2] SB 306 became effective October 1, 2015.

HOA super liens departed from long-established industry practice. Judge Jones stated in relevant part:

> . . . and the practice in the real estate industry prior to [the SFR Decision] was to treat [HOA assessment lien foreclosure] sales as not extinguishing first mortgages, such that traditional investors would not bother to bid at such sales where the home was worth less than the first mortgage.[3]

Considering the circumstances, including the subsequent work of the Legislature, the Amici believe that Judge Jones observation is correct. This Court's view was new and should not apply retroactively.

C. Retroactive application would impede NRS 116.3116's operation, in light of its history.

It is vital to review the entirety of NRS 116.3116's history—even post-SFR Decision—in order to conclude retroactivity would seriously hinder the operation of the law. Following the SFR Decision, first deed of trust holders faced persistent problems in dealing with HOAs—for example, the lack of real means of communication between lenders and the hundreds of associations in Nevada, unwillingness and inability of some HOAs to provide accurate payoff demands,[4] and

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[3] *Christina Trust v. K&P Homes,* 2015 WL 6962860 (D. Nev., Nov. 9, 2015)(3:WFZ0537-0548)

[4] *See,* Respondent's Answering Brief, filed May 14, 2015, by NAS and Peccole. (ADD:30).

payoff demands grossly exceeding statutory maximums.[5] Many first deed of trust holders or their servicers would not even receive HOA foreclosure notices when an HOA sold its super lien assessment rights due to incomplete public records.[6] These issues also existed in the lead-up to the SFR Decision, as the law's components began to be first judicially considered.

As indicated, the SFR Decision triggered quick action by the Nevada Legislature to ensure that mechanisms were established for first deed of trust holders and HOAs to better protect their respective interests. Among the provisions, the legislation established: 1) the right to cure and redeem the property after an assessment lien sale; 2) additional notice requirements designed to ensure that the affected financial institutions received adequate notice of a lien sale; and, 3) which costs can be included in an HOA's super lien amount. The enactment of Senate Bill 306 reshaped the rights and obligations among lenders, servicers, and HOAs.

Loans with super lien issues from before SB 306's effective date will not be expressly protected by the Legislature's changes, but retroactive application of an extinguishment standard from the date of the SFR Decision would fundamentally impede the intent of NRS 116.3116, as amended. The enacted legislation concerns

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[5] *See, Horizons at Seven Hills Homeowners Association v. Ikon Holdings, LLC*, 132 Nev. Adv. Op. 35 (April 28, 2016).

[6] *Court Ruling on Unpaid Homeowners Association Fees Raise Risks in RMBS and SFR Deals*, Moody's ResiLandscape, Nov. 2014, p. 8, Amici Appendix Exhibit 1.

a procedure for giving fair opportunity to all parties to protect their interests, and given the split in opinions that had come to exist on super liens, subjecting these deed of trust holder interests to extinguishment retroactively would be a hindrance to the law's operation.

D. Retroactive application would produce substantial, inequitable results.

1. Non-traditional investors would profit from HOA priority.

In 2013, it began to be reported that non-traditional investors were buying super liens at HOA foreclosure sales for the purpose of renting the affiliated properties then asserting the priority of their liens when first deed of trust holders came forward to enforce their rights against the collateral for their loans under Nevada's non-judicial foreclosure process.[7] These investors would receive windfall profits from retroactivity, based in a law with split operational opinions at that point in time.

2. Significant losses and costs for lenders, servicers and mortgage guarantors would result.

If the SFR Decision were applied retroactively, it could potentially cause significant loan losses to first deed of trust holders in Nevada which could exceed

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[7] Hubble Smith, *Shrewd Investors Snap up HOA Liens, Rent Out Houses*, Las Vegas Review Journal, Mar. 18, 2013 (Attached to Christiana Trust Addendum to Respondent's Opening Brief Exhibit 1) (The author colloquially referred to the practice as a "lien scheme.")

hundreds of millions of dollars. According to statistics compiled by the Nevada Real Estate Division, HOA lien sales increased dramatically in the lead-up to the SFR Decision, from an average of 40 per year between 2007 and 2009 to over 1,100 in 2013.[8] Based on the experience of the case at hand, the losses a first deed of trust holder might experience could be expected to exceed $200,000 per unit.[9] Assuming conservatively that there are as many as 1,000 comparable units in pending litigation today, losses – from a decision applied retroactively – could exceed $200,000,000.00.

Retroactive application would allow these losses to result in widespread harm to the Nevada economy—with many lenders suffering substantially large losses, relative to their resources. Some financial institutions may be forced to close or curtail operations. Other lenders may simply choose not to do business in Nevada for fear over future risk-based impacts, and the end result, as explained in detail below, will be higher costs and less credit access for Nevada consumers. Moreover, a retroactive application of the SFR Decision, both in Nevada and nationally, would have enormous adverse impacts on the potential for growth in the housing economy. Accordingly, the decision to limit the SFR Decision to prospective application would

[8] *See*, Compilation of NRED Statistics, Ex. 54 of Christiana Trust Addendum to Resp't Opening Br.

prevent much of this harm and allow lenders and HOAs to move forward on clear terms under the revised statute.

Amici note that the Federal Housing Finance Agency ("FHFA") has also filed a brief highlighting the potential loss to the United States government by virtue of a retroactive application. Government sponsored enterprises ("GSEs"), such as Fannie Mae and Freddie Mac, also provide financing for a large percentage of residential loans in this country and have a large stake in this Court's ruling. These GSEs are currently in conservatorship under the auspices of the FHFA. Therefore, significant retroactivity-based losses by the GSEs would ultimately be borne by United States taxpayers. Just as troubling, the GSEs might decide to limit their future potential for risk exposure in Nevada, either by raising rates to compensate for any losses experienced from retroactivity or by refusing to buy Nevada loans subject to HOA super lien. This outcome would lessen our citizens' homeownership opportunities.

3. Outstanding lawsuits and corresponding title issues.

As pointed out by Christiana Trust in its Responding Brief, there have been countless lawsuits to quiet title and for declaratory and other relief in State and Federal District Courts regarding the HOA super lien issues at hand.[10] Each of these

[10] Respondent's Answering Brief, p. 47; Ex. 54 of Christiana Trust Addendum to Resp't Opening Br.

unresolved lawsuits represents a significant, unresolved title issue which almost certainly renders the affected property uninsurable in a future arms-length transaction.[11] Amici understand that if this Court limited the SFR Decision to prospective application, it would resolve nearly all of these outstanding cases without further correction or legal action. The title to each property would quickly become insurable and sellable again. Finally, neither the HOAs nor their sales agents would be faced with the financially crippling prospect of being forced to disgorge proceeds received at these assessment lien sales.[12]

CONCLUSION

Amici believe that because the SFR Decision: **(1)** established a new principle of law; **(2)** that the effect of retroactive application would impede the rule's operation; and **(3)** that it would present profound, inequitable consequences if applied retroactively – consequences that would adversely impact the broader housing market in Nevada. Accordingly, in the interest of the market and in an effort

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[11] *See,* Communiqué, p. 26, Attached to Ex. 2 of Christiana Trust Addendum to Resp't Opening Br.; *see also,* Las Vegas Review Journal, p.2, Attached Ex. 1 of Christiana Trust Addendum to Resp't Opening Br.

[12] In the numerous equitable defenses to the assessment lien sales, the result would be to unwind the proposed foreclosure sale resulting in the parties being returned to the position that they were in immediately preceding the conduct of the sale. This would force the association and their sales agent to return any funds received as a result of the assessment lien sale.

to resolve thousands of lawsuits and title issues, Amici request that this Court establish a prospective application of the SFR Decision.

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CERTIFICATE OF SERVICE

Pursuant to NEFCR 9(b)(d)(e), I certify that on the 20th day of July, 2016, a true and correct copy of the **FILE BRIEF OF AMICI CURIAE MORTGAGE BANKERS ASSOCIATION, NEVADA MORTGAGE LENDERS ASSOCIATION, AND NEVADA BANKERS ASSOCIATION** was transmitted electronically through the Court's e-filing system to the attorney(s) associated with this case.

DATED this 20th July, 2016.

An employee of Brooks Hubley, LLP