IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 69966

K&P HOMES, A SERIES LLC OF DEK HOLDINGS, LLC,

Plaintiff-Appellant,

vs.

CHRISTIANA TRUST, A DIVISION OF WILMINGTON SAVINGS FUND SOCIETY, FSB, NOT IN ITS INDIVIDUAL CAPACITY BUT AS A TRUSTEE OF ARLP TRUST 3,

Defendant-Appellee.

Brief of *Amicus Curiae* Community Associations Institute in Support of Appellant's Opening Brief

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CERTIFIED QUESTION FROM UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA, D.C. (No. 2:15-cv-01534), PURSUANT TO N.R.A.P. 5

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NRAP 26.1 DISCLOSURE

The Community Associations Institute is a national, nonprofit research and education organization. It does not have "any parent corporation" and there is not a "publicly held corporation that owns 10% or more of its stock." Thus, there is no such corporation to which Rule 26.1 would apply. These representations are made in order that the judges of this Court may evaluate possible disqualifications or recusal.

Community Associations Institute has no partner corporations, and no publicly held company owns 10% or more of its stock. Don Springmeyer, Esq. (NV Bar No. 1021) and Bradley Schrager, Esq. (NV Bar No. 10217) are the only attorneys appearing for the amicus curiae in this case, and no others are expected to appear in this Court in this case. Wolf, Rifkin, Shapiro, Schulman & Rabkin, LLP is the only law firm whose partners or associates have appeared for the party or amicus in this case or are expected to appear in this Court in this case.

s/ Don Springmeyer

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I. STATEMENT OF INTEREST

Community Associations Institute ("CAI") respectfully submits this *amicus curiae* brief in support of Appellant's Brief and position that *SFR Investments Pool 1, LLC v. U.S. Bank, N.A.,* 334 P.2d 408 (Nev. 2014) ("SFR") should apply retroactively. This case is of substantial importance, involving the ability of a community association to recover delinquent assessments through the Nevada statutory lien priority vis-à-vis loan servicers.

The significant question presented in this case is whether *SFR* created a new principle of law in holding that Nevada's lien priority statute was a true lien priority. Beyond the parties here, this case is important for all community associations in the 21 states and the District of Columbia that have adopted state lien priorities similar to the Nevada statute. This approach is modeled on the Uniform Condominium Act ("UCA"), Uniform Common Interest Ownership Act ("UCIOA"), and Uniform Planned Community Act ("UPCA"), all drafted by the Uniform Law Commission (formerly known as the National Conference of Commissioners on Uniform State Laws). Approximately 67 million Americans—twenty percent (20%) of the U.S. population—reside in a community association.

CAI submits this brief in keeping with its longstanding interest in promoting understanding regarding the operation and governance of community associations.

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A. Common-Interest Communities

Common-interest communities—subdivisions, "planned communities," condominiums, and cooperatives—have similar functions: to maintain and insure common ground, operate with financial stability, preserve architectural design, and other functions. The unique form of self-governance in community associations provides for mandatory membership and authority to charge assessments to homeowners for common services. Without an effective means to collect assessments from delinquent homeowners, the financial burden of supporting the association would be transferred to other homeowners in the community. This increased burden would eventually cause the overall quality of the association and the property values of homeowners—and lenders—to decline.

B. Amicus Curiae CAI

CAI is a national, nonprofit research and education organization formed in 1973 by the Urban Land Institute and the National Association of Home Builders to provide effective and objective guidance for the creation and operation of condominiums, cooperatives, and homeowner associations. Nationally, members of CAI include associations, volunteer board members, managers, attorneys, accountants, lenders, vendors, insurers, and other professionals and service providers. CAI has 60 chapters across the country.

CAI's sister organization, the Foundation for Community Association

Research (the "Foundation"), in its Statistical Review for 2014, estimates that the number of community associations has grown nationally from 10,000 in 1970 to 333,600 in 2014.[1] The Foundation estimates approximately 66.7 million Americans live in 26.7 million housing units in community associations, *i.e.* 20.7% or *one of every five Americans lives* in a community association.[2]

The phenomenal growth of community associations is attributable to several important benefits. Community associations:

- Have assumed many functions historically provided by local governments, thus easing the financial burden of municipalities.
- Offer economies of scale in construction and operation, and provide lower-cost entry housing for many homebuyers.
- Maintain home values that protect lenders' security with corresponding tax benefits for local government.

Lenders and government-sponsored entities ("GSEs") like Fannie Mae and Freddie Mac, as well as their loan servicers, benefit from the services provided by community associations because the value of properties comprising their collateral is protected.

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[1] Foundation for Community Association Research, Statistical Review 2014, National and State Data. http://www.cairf.org/foundationstatsbrochure.pdf. All industry data herein is contained in this study, unless specified otherwise.

[2] The Foundation estimates that, in 2014: $70 billion in assessments were collected from homeowners, associations were responsible for $4.95 trillion in home values (4th quarter), $22 billion were contributed to reserves for repair and replacement of roofs and other components, and a value of $1.6 billion in services provided by volunteer directors and committee members.

II. ARGUMENT

Analyzing the test adopted previously by this Court, the ruling in *SFR* should be applied retroactively. Under its three-part test, the Court considers (1) whether the decision establishes 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; (2) the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation; and (3) whether retroactive application could produce substantial inequitable results.[3]

In *SFR*, this Court held the priority portion of an association's lien (limited to nine months' assessments) is a true lien, not a payment priority. An association lien foreclosure, therefore, extinguishes a first deed of trust on the subject property.[4] This result is analogous to the priority afforded a local government's property tax lien.[5] The rationale behind granting lien priority for association assessments and local government taxes is based on the principle that collectability is vital, because the revenue supports delivery of essential common services such as maintenance and repair of infrastructure.

Thus, as discussed below, *SFR* did not overrule clear past precedent, nor did

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3 *Breihaupt v. USAA Prop. & Cas. Ins. Co.*, 867 P.2d 402, 405 (Nev. 1994).

4 *SFR Investments Pool 1, LLC v. U.S. Bank, N.A.*, 334 P.2d 408 (Nev. 2014).

5 *Id*. at 413-14.

SFR decide an issue of first impression, the resolution of which was not clearly foreshadowed. Indeed, *SFR* restated a long-standing principle of law that an association's limited lien priority, like local governmental tax liens, extinguishes a first deed of trust, a principle long understood by the mortgage loan industry and reflected in loan servicing practices.

Second, the statutory limited lien priority afforded associations in *SFR* recognizes the lengthy history of this priority dating back at least to 1978. *SFR* further recognizes the statute's purpose and effect of balancing the interests of associations and lenders. Thus, retroactive application of *SFR* furthers the purpose and effect of Nevada lien priority law, not retard its operation.

Third, retroactive application of *SFR* would reflect the decades-long understanding within the home loan mortgage industry that state statutes such as Nevada's law establish a lien priority for associations. Accordingly, lenders have known for many years that they had an obligation to pay this modest amount in order to protect their interests, and adopted regulations and practices to meet this objective. For these reasons, retroactive application of *SFR* would not produce substantial inequitable results.

A. *SFR* Is Supported By Multiple Jurisdictions, Finding Associations Have a "True" Lien.

Twenty-three jurisdictions have adopted a lien priority statute: Alabama, Alaska, Colorado, Connecticut, Delaware, District of Columbia,

Florida, Hawaii, Illinois, Maryland, Massachusetts, Minnesota, Missouri, Nevada, New Hampshire, New Jersey, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, West Virginia, and Puerto Rico.[6]

SFR did not decide an issue of first impression whose resolution was not clearly foreshadowed by centuries of lien priority case law and decades' experience with the statutory lien priority of the uniform acts. In this regard, the Court's assertion that *SFR* was a case of "first impression" should be properly understood as acknowledging that there was not an explicit Nevada case establishing controlling precedent on the precise fact pattern with respect to the Nevada lien priority statute enacted in 1991. In *SFR*, this Court explained its understanding of what the statute has meant since the date it became law, and its interpretation should be given retroactive effect.[7]

Further, *SFR*'s resolution of this priority dispute in light of the statute was clearly foreshadowed for several reasons. First, the consequence of lien priority (extinguishment of junior liens in the event of foreclosure) is well-established generally, and there is nothing in pre-existing Nevada law to suggest that a properly-conducted foreclosure does not extinguish all subordinate liens. A

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[6] Foundation for Community Association Research, *Community Association Fact Book 2014*, http://www.cairf.org/research/factbook/introduction.pdf, at 32.

[7] *Morales-Izquierdo v. Department of Homeland Security*, 600 F.3d 1076, 1087-88 (9th Cir. 2010); *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312-13 (1994).

lender's mistaken belief that it has first priority when applicable law says it has second priority is not a defense. Indeed, lenders chose an interpretation to promote their own self-interests by avoiding the obligation to pay associations a modest portion of their borrowers' delinquent assessments.

Second, Nevada law already recognized the concept of split priority with respect to liens. For example, the common law optional-obligatory distinction with respect to future advance priority, which was Nevada law (consistent with the general common law rule) until Nevada adopted a future advance priority statute in 1985 that gave full priority to optional advances. Under the common law rule, a mortgagee would have had a split priority in the case where it made an optional future advance after an intervening lien arose. This was well-established law in Nevada prior to 1988.[8] Another example is where the lender modifies an existing mortgage loan. The modification is given the same priority as the original loan vis-à-vis an intervening lienor, but not to the extent of material prejudice to the intervening lienor (e.g., where the modification may have increased the interest rate or the principal amount). In that case, a split priority arises as well (mortgage is senior to intervening lienholder, except to the extent that the modification works a material prejudice to intervening lienholder; to that extent, modified mortgagee is

[8] See, *e.g.*, *Southern Trust Mortg. Co. v. K & B Door Co., Inc.*, 104 Nev. 564, 763 P.2d 353 (1988) (applying optional-obligatory rule to 1981 mortgage, though characterizing future advances as obligatory rather than optional); *Chartz v. Cardelli*, 52 Nev. 1, 279 P. 761 (1929) (citing optional-obligatory rule).

subordinated). Also, recent Nevada decisions have favorably cited Sections 7.3 and 7.6 of the Restatement of Mortgages, which (in the replacement mortgage and equitable subrogation contexts) contemplate and allow for split lien priority to the extent of material prejudice to an intervening lienholder.[9] Thus, the suggestion that split lien priority was somehow unprecedented is specious.

Third, in our specific context, Nevada is not alone in holding that the association's lien is a "true" lien. Prior to *SFR*, in every state in which this issue has been litigated, the courts have ruled—consistent with common law precedent—that the association's foreclosure of its priority lien extinguished all subordinate liens, and none held to the contrary.[10] *SFR* did not overrule clear past precedent, and there is no basis for arguing that it did. The unanimity of court decisions in other states belies the suggestion that "resolution [of the issue] was not clearly foreshadowed."

After *SFR*, the Rhode Island Supreme Court held a condominium association's statutory lien priority extinguishes a prior-recorded first mortgage upon foreclosure by the association.[11] The Rhode Island Court considered the multiple opportunities and safeguards for lenders to protect their interests and

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[9] See, *e.g.*, *Houston v. Bank of America Federal Savings Bank,* 119 Nev. 485, 78 P.3d 71 (2003).

[10] *Chase Plaza Condo. Ass'n Inc. v. J.P. Morgan Chase Bank, N.A.*, 98 A. 3d 166 (D.C. Ct. App. 2014); *Summerhill Village Homeowners Ass'n v. Roughley*, 270 P.3d 639 (Wash. Ct. App. 2012).

[11] *Twenty Eleven, LLC v. Michael J. Botelho, et al.*, 127 A.3d 897 (R.I. 2015).

concluded, "Regardless of whether or not lenders choose to employ these safeguards, the bottom line is that 'statutory principles of priority, not the monetary value of the respective liens, control.'"[12] Thus, a foreclosure of the association's lien extinguishes the otherwise first-mortgage lien.[13]

B. *SFR* Recognizes NRS §116.3116(2) Balances the Interests of Associations and Lenders.

Each homeowner in a common interest community is obligated to pay assessments to the association, which relies on full and prompt payment to operate, maintain, repair and replace, and insure the common property.[14]

Recognizing the critical role of assessment revenue for community associations, the Massachusetts Appeals Court stated:

> [W]e acknowledge the legislative concern for prompt collection of common expense assessments. Failure… to pay… common expense assessments would have a serious financial impact on the stability of a condominium association.[15]

The inability of an association to collect assessments fully and

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12 *Id.*

13 *Id. See also Drummer Boy Homes Ass'n, Inc. v. Britton*, 474 Mass. 17, 2016 Mass. LEXIS 189 (Mass. 2016); *Chase Plaza Condo. Ass'n Inc. v. J.P. Morgan Chase Bank, N.A.*, 98 A. 3d 166 (D.C. Ct. App. 2014); *Summerhill Village Homeowners Ass'n v. Roughley*, 270 P.3d 639 (Wash. Ct. App. 2012).

14 Joint Editorial Board for Uniform Real Property Acts, *The Six-Month "Limited Priority Lien" for Association Fees Under the Uniform Common Interest Ownership Act* (June 1, 2013) ("*JEB Report*") at 1.

15 *Blood v. Edgar's, Inc.*, 632 N.E.2d 419 (1994) (describing assessments as the "life's blood" of the association).

promptly would result either in (a) reduced maintenance and repair, which would reduce property values and compromise the collateral of all lenders in the community or (b) increased assessments for the other owners who already are paying their fair share, which would also affect the ability of borrowers to repay loans to all lenders in the community.[16]

While either result would affect mortgage lenders with loans in the community, it must be noted that until a lender completes its foreclosure, it is not liable to pay assessments. Thus, as the association copes with loss of revenue, the lender gets a "free ride" on the backs of homeowners who are paying the assessments—at higher amounts—to maintain and insure buildings and common property, directly benefiting the mortgagees (and the respective properties) that are not paying anything.

NRS §116.3116, modeled after UCIOA Section 3-116, strikes an equitable balance between the association's ability to collect delinquent assessments and the lender's interest in securing its asset.[17] The UCIOA drafters described the purpose of the uniform acts (dating back to the UCA in 1977) as follows:

> The 6 months' priority [in Nevada, 9 months] for the assessment lien strikes an equitable balance between the need to enforce collection of unpaid assessments and the obvious necessity for protecting the priority of the security interests of mortgage lenders. As a practical matter, mortgage lenders will

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16 *JEB Report* at 1.

17 UCIOA § 3-116, cmt. 1; *JEB Report* at 1.

> most likely pay the six months' assessments...rather than having the association foreclose on the unit.[18]

This approach realizes the association is an involuntary creditor required to advance services in return for a promise of future payments, and the owners' default in these payments could impair the association's financial stability and its practical ability to provide services.[19]

Accordingly, mortgage lenders are on notice of statutory lien priorities in Nevada and other states that have adopted such statutes. Lenders have the opportunity to protect their security by paying the super-priority portion of the association's lien and obtaining a release of the lien. Thus, for decades, the government-sponsored enterprises issued detailed regulations directing loan servicers to pay the association's lien priority, as discussed below.

C. GSEs Consented to the Statutory Priority Lien.

At issue in *SFR* was whether the association's priority lien is a "true" lien that extinguishes the lender's lien. Seven years after its creation, the Federal Housing Finance Agency ("FHFA") now alleges that its consent was required under the Housing and Economic Recovery Act of 2008 §4617(j) ("HERA"). FHFA contends it has never given consent, and never will give consent; yet, HERA does not provide procedures or criteria for when FHFA

[18] *Id.*
[19] *Id.*

would consent or how consent may be requested.[20]

Fannie Mae, Freddie Mac, the Mortgage Bankers Association, and the American Bankers Association served on the Advisory Committee to the UCA, drafted in 1977 and adopted in 1980. GSEs were aware of and supported community associations' "super-priority" liens. Indeed, Henry Judy, General Counsel of Freddie Mac when the UCA was drafted, published a detailed analysis in 1978 recognizing that an association's ability to collect assessments affects not only the homeowners but also all other mortgage lenders having loans in the community.[21] Despite decades of acceptance, GSEs never revised their guidelines nor argued that HERA §4617(j) requires FHFA's consent prior to *SFR*. GSEs certainly implied consent by conduct reflecting a long history of directing their loan servicers to avoid the association's lien priority. For example, Freddie Mac's guidelines require loan servicers to:

> pay any condominium, HOA and PUD regular assessments that are assessed prior to the foreclosure sale date that are, or may become, a lien prior to a Freddie Mac Mortgage or that, if not paid, would result in the subordination of Freddie Mac's interest in the Mortgaged Premises.[22]

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[20] Furthermore, FHFA's recent interpretation of HERA §4617(j) should be disfavored because it presents a colorable takings claim. Thus, the court should favor an interpretation that would avoid creating a constitutional issue rather than one that raises a potential constitutional violation.

[21] Judy and Wittie, *Uniform Condominium Act: Selected Key Issues*, Real Property, Probate and Trust Journal at 475 (Summer 1978).

[22] *Freddie Mac Bulletin 2014-2* (February 14, 2014) at 2.

Freddie Mac also requires loan servicers to pay pre-foreclosure assessments included in an association's lien priority over the mortgage lien, and Freddie Mac confirms it will reimburse the servicer for such payment.[23]

Freddie Mac's directives obligate loan servicers to protect the asset securing the mortgage loan by authorizing them to recover any payments made to associations from Freddie Mac or the borrower. Since inception in 2008, FHFA did not direct the GSEs to change such directives.[24] [25]

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[23] *Freddie Mac Selling/Servicing Guide* (March 2, 2016), Section 9701.10(a).

[24] Besides FHFA's consent argument being a sham, lenders are in a better position to request notice of association foreclosure on a property than the association is to locate the lender. Subsequent assignments and transfers of the security are registered on the private Mortgage Electronic Registration Systems, Inc. ("MERS"), rather than recorded in the public records, depriving parties (such as the association) and investors of an opportunity to identify the current real party in interest with respect to the security. Reiss, *et al.*, *MERS Litigation – Brief of Amicus Curiae the Legal Services Center of Harvard Law School and Law Professors in Support of Appellee* (May 5, 2015), Brooklyn Law School, Legal Studies Paper No. 411, available at SSRN: http://ssrn.com/abstract=2602929. Thus, any expectation that the association must locate and notify the current holder of the deed of trust is unrealistic. Further, the 9-months' priority is likely all an association will recover due to the economic crisis and extent of debt its delinquent homeowners accrue. NRS §116.3116(2) was implemented to require lenders to pay the "super-priority" lien to protect their security interests; finding otherwise now amounts to a second bailout for the GSEs.

[25] If FHFA prevails in limiting associations' lien priority to merely a payment priority, this would force associations to wait until the bank foreclosure is completed before a new owner that pays assessments can obtain the property, and in some states, this takes over 1,000 days, as per Freddie Mac's own guidelines. *Freddie Mac Bulletin 2016-5* (March 9, 2016) at 3. Community associations have been plagued by "zombie foreclosures", where banks fail to complete the foreclosure process in a timely and reasonable manner, resulting in vacant, zombie

In Massachusetts, prior to adopting its lien priority statute in 1992, "the first mortgagee had little incentive to initiate a foreclosure action against the unit owner because its security interest was not in jeopardy."[26] Since 1992, Massachusetts law provides, "when a condominium association initiates a lien enforcement action, it can obtain the so-called 'super-priority' status over a first mortgagee for six months' worth of common expenses."[27]

Thus, for decades, loan servicers consented to statutory lien priorities in states having such acts, including the priority portion of the association's lien extinguishing the mortgage loan by virtue of an association foreclosure sale.[28]

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properties that suck revenue out of associations. Accordingly, a ruling in FHFA's favor would make community associations dependent on bank foreclosures, subjecting associations to years of waiting for banks to foreclose before any assessments can be collected.

[26] *Drummer Boy Homes Ass'n, Inc. v. Britton*, 474 Mass. 17, 2016 Mass. LEXIS 189 (Mass. 2016) at 13.

[27] *Id.* at 15.

[28] See Freyermuth and Whitman, *Can Associations Have Priority over Fannie or Freddie?* Probate & Property (July-August 2015) ("*Freyermuth*") at 30 ("FHFA's consistent conduct as conservator for the GSEs has manifested FHFA's effective consent to state law lien priority and enforcement rules validating association lien foreclosure sales…").

III. CONCLUSION

For all the reasons discussed above, *amicus curiae* Community Associations Institute respectfully urges retroactive application of *SFR*.

SFR states a long-standing principle of law, recognized by the lenders and foreshadowed by their own practices. Retroactive application of *SFR* would further the purpose and effect of Nevada lien priority law by balancing the interests of associations and lenders. Retroactive application of *SFR* would not produce substantial inequitable results because *SFR* reflects the home loan mortgage industry's decades-long understanding and awareness that such state statutes establish an association lien priority and that lenders had an obligation to pay this modest amount in order to protect their interests.

In *SFR*, this Court explained its understanding of the Nevada statute since enactment in 1991. As a matter of public policy determined by state legislators, Nevada homeowners in community associations expect that the statute would protect them to the extent of the limited priority. For decades, lenders have been

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well aware of the risks if they chose to disregard the statute; indeed, any harm incurred was self-inflicted. Accordingly, *SFR* should be applied retroactively.

Dated: August 26, 2016.

Respectfully Submitted,

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RULE 28.2 ATTORNEY CERTIFICATION

The undersigned counsel has read the brief, and to the best of the attorney's knowledge, information and belief, the brief is not frivolous or interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. This brief complies with all applicable Nevada Rules of Appellate Procedure, including the requirement of Rule 28(e) that every assertion in the briefs regarding matters in the record be supported by a reference to the page and volume number, if any, of the appendix where the matter relied on is to be found. Pursuant to Nevada Rules of Appellate Procedure 32(a)(4)-(7), the undersigned certifies the attached brief is proportionately spaced, using Microsoft Word in Times New Roman 14-point font, and is not more than 15 pages, excluding the exempted portions as provided in N.V. R. App. P. 32(a)(7)(C). The brief is **4,683** words in length.

Dated this 26th day of August, 2016.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the **Brief of Amicus Curiae Community Associations Institute in Support of Appellant's Opening Brief** was electronically filed with the Clerk of the Supreme Court of Nevada on August 26, 2016 by using the Court's e-filing system to the following attorneys:

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CHRISTIANA TRUST, A DIVISION OF WILMINGTON SAVINGS FUND SOCIETY, FSB, NOT IN ITS INDIVIDUAL CAPACITY BUT AS A TRUSTEE OF ARLP TRUST 3,

Defendant-Appellee.

Motion for Leave to File *Amicus* Brief Out of Time of *Amicus Curiae* Community Associations Institute in Support of Appellant's Brief

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CERTIFIED QUESTION FROM UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA, D.C. (No. 2:15-cv-01534)

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Pursuant to the Nevada Rules of Appellate Procedure 29(a) and 29(e), the Community Associations Institute ("CAI"), a nonprofit corporation, respectfully submits its motion for leave to file, out of time, an *amicus curiae* brief in support of Appellant K&P Homes, a Series LLC of DEK Holdings, LLC.

The significant question presented in this case is whether *SFR Investments Pool 1, LLC v. U.S. Bank, N.A.*, 334 P.2d 408 (Nev. 2014) ("SFR"), should apply retroactively. CAI desires to file the attached brief as *amicus curiae*, but did not learn of this matter until shortly after July 15, 2016, when an *amicus* brief was filed by the Federal Housing Finance Agency, and subsequent briefs were filed by *amici* Mortgage Bankers Association, Nevada Mortgage Lenders Association, and Nevada Bankers Association, all in support of Respondent.

Review of this matter strongly persuades CAI that an amicus brief would benefit this court. Accordingly, CAI respectfully requests leave to file its *amicus* brief out of time. A copy of CAI's brief is filed with this motion.

CAI is a national, nonprofit research and education organization formed in 1973 by the Urban Land Institute and the National Association of Home Builders to provide effective and objective guidance for the creation and operation of condominiums, cooperatives, and homeowner associations.

Members of CAI include a broad spectrum of parties, including homeowner and condominium associations, volunteer leaders serving as directors of

associations, managers, attorneys, accountants, lenders, vendors, title insurers, and other professionals and service providers. CAI has 60 chapters across the country.

Associations rely on payment of assessments by their homeowner members to fund the delivery of services; indeed, associations *depend* on assessments, which courts have described as an association's lifeblood. Without the ability to collect assessments, the financial burden of supporting the association would be transferred to other homeowners in the community who are already paying their fair share.

The issues in this case are of significant importance across the country. Approximately 66.7 million people – one in every five Americans – live in a common interest community operated with a community association. The Nevada statutory approach for lien priorities, modeled after the uniform acts, has been adopted as public policy by state legislatures in 21 states, plus the District of Columbia and Puerto Rico. Accordingly, this Court's determination may affect millions of homeowners across the country living in a community association.

The essential issue presented here is whether *SFR* should be applied retroactively. *SFR* considered the Nevada statute as adopted in 1991, and held that the association's statutory lien has priority, and when the lien is properly foreclosed it extinguishes a first deed of trust. *SFR* did not overrule clear past precedent with respect to lien priorities, nor did it decide an issue of first

impression the resolution of which was not clearly foreshadowed. Indeed, *SFR* stated a long-standing principle of law that an association's lien priority, like a local governmental property tax lien, extinguishes a junior lien—a principle understood by the mortgage loan industry and reflected in loan servicing practices for decades.

CAI, as discussed in its proposed *amicus* brief, strongly encourages this Court to apply *SFR* retroactively. This brief is submitted in keeping with CAI's longstanding interest in promoting understanding regarding the operation and governance of community associations.

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CAI has filed this motion and its *amicus* brief included herewith promptly upon learning of this pending matter, and its brief is limited to the issues presented. Under the Nevada Rules of Appellate Procedure, this Court has broad discretion to accept this *amicus* brief out of time, and movant requests the Court accept its submission.

Date: August 26, 2016.

Respectfully submitted,

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Community Associations Institute

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the **Motion for Leave to File Amicus Brief Out of Time of Amicus Curiae Community Associations Institute in Support of Appellant's Brief** was electronically filed with the Clerk of the Supreme Court of Nevada on August 26, 2016 by using the Court's e-filing system to the following attorneys:

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