IN THE SUPREME COURT OF THE STATE OF NEVADA

CARRINGTON MORTGAGE HOLDINGS, LLC, Appellant, v. R VENTURES VIII, LLC, A NEVADA SERIES LIMITED LIABILITY COMPANY OF THE CONTAINER R VENTURES, LLC UNDER NRS 86.296, Respondent.

Supreme Court Case No. 70545
District Court Case No. A684151

APPEAL

From the Eighth Judicial District Court
The Honorable ELISSA CADISH, District Judge
District Court Case No. A-13-684151-C

OPENING BRIEF

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NRAP 26.1 DISCLOSURE

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

Carrington Holding Company, LLC

The Carrington Companies, LLC

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

ROUTING STATEMENT

Pursuant to NRAP 28(a)(5), Appellant Carrington Mortgage Holdings, LLC (**Carrington**) states that this case raises as principal issues: a question of first impression of common law (NRAP 17(a)(13)) and a question of statewide public importance (NRAP 17(a)(14)), as the principal issue raised on appeal is whether a payment for the full amount of the super-priority lien under NRS 116.3116 (as it existed before amendments went into effect in October 2015) extinguished that lien and preserved the priority of a first deed of trust. This appeal also raises issues based upon the Due Process and Supremacy Clauses of the United States Constitution.

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JURISDICTIONAL STATEMENT

This Court has jurisdiction under NRAP 3A(b)(1) because the district court entered summary judgment in favor of Respondent R Ventures VIII, LLC (**R Ventures**) on April 27, 2016. Notice of entry of the summary judgment was entered on May 2, 2016. Carrington filed a timely notice of appeal on June 1, 2016.

ISSUES PRESENTED

(1) Whether the district court erred by denying summary judgment to Carrington where the undisputed evidence shows that Bank of America, N.A. (**BANA**) sent payment for the full super-priority portion of the lien.

(2) Whether NRS 116.3116 is facially unconstitutional under the Due Process Clause.

(3) Whether the foreclosure was invalid based on the tri-party agreement between First 100, United Legal Services, and the HOA.

(4) Whether the Supremacy Clause bars a homeowners' association from foreclosing on property secured by an FHA-insured mortgage.

(5) Whether evidence that the HOA sold its interest in the property for 6% of the fair market value of the property at the time of the foreclosure sale established a material question of fact regarding commercial reasonableness sufficient to prevent summary judgment.

STATEMENT OF THE CASE

This is one of many cases regarding the proper interpretation and application of NRS 116.3116 following this Court's September 2014 decision in *SFR Investments Pool 1, LLC v. Bank of America, N.A.*, 334 P.3d 408 (Nev. 2014). R Ventures claims that its purchase of certain property in Clark County, Nevada, at an HOA foreclosure sale for $10,100.00 extinguished a $189,573.00 deed of trust held by Carrington. R Ventures moved for summary judgment, arguing that it was entitled to a judgment establishing it to be the holder of the property free and clear of Carrington's deed of trust due to the HOA foreclosure sale and the recitals in the trustee's deed that purportedly vested ownership of the property in R Ventures. The district court granted summary judgment for R Ventures and denied a cross-motion for summary judgment filed by Carrington.

First, the district court's decision should be reversed because Carrington's predecessor Bank of America tendered payment for nine months of HOA assessments prior to the HOA foreclosure sale, thereby extinguishing the super-priority portion of the HOA's lien. NRS 116 expressly limits the super-priority amount of an HOA lien to nine months' worth of assessments. Tender of that amount, even if rejected by an HOA, extinguishes the super-priority portion of the lien, leaving the HOA with a junior lien that cannot extinguish a senior deed of trust.

Second, the district court's decision should be reversed is because NRS 116.3116—as it existed before the Nevada Legislature amended it during the 2015 Term—is facially unconstitutional. On its face, the statute does not ensure that holders of senior mortgage liens receive notice before those liens are extinguished by an HOA foreclosure. Instead, senior lienholders must "opt-in" to receive advance notice of a foreclosure. Under binding law from the United States Supreme Court, such an "opt-in" regime is unconstitutional because it violates due process.

Third, prior to the HOA sale, the HOA impermissibly split its lien from the right to proceeds, in derogation of this Court's decision in *Edelstein* and its own CC&Rs. *See Edelstein v. Bank of New York Mellon*, 286 P.3d 249, 258 (Nev. 2012).

Fourth, NRS 116 is preempted in this case by the Supremacy Clause of the United States Constitution because of its conflict with federal mortgage insurance programs.

Finally, even if the statute were constitutionally valid and Bank of America had not tendered the super-priority amount, the district court's judgment cannot be allowed to stand. The district court stated that the recitations in the deed of foreclosure sale were "conclusive proof" that all legal requirements had been satisfied, a proposition that was flatly rejected by this Court in *Shadow Wood*

Homeowners Association, Inc. v. New York Community Bancorp, Inc., 366 P.3d 1105, 1110-11 (Nev. 2016). Additionally, the district court granted summary judgment despite evidence that the sale was conducted in a commercially unreasonable manner. That evidence created material questions of fact that precluded a summary judgment in R Ventures' favor.

STATEMENT OF FACTS

I. Factual Background

A. The Deed of Trust History

On May 17, 2008, borrower Joyce Pierce purchased property located at 6175 Novelty Street, Las Vegas, Nevada 89148. She later refinanced ownership of the property by way of a loan with Taylor Bean & Whitaker Mortgage Corporation in the amount of $189,573.00 secured by a deed of trust (the **senior deed of trust**) dated June 17, 2009. (J.A. at 340-49.) The deed of trust states that the loan at issue is insured by the Federal Housing Administration (**FHA**), and that the FHA case number is 332-4640005-703. (*Id*. at 340.) The deed of trust repeatedly references the Secretary of Housing and Urban Development (**HUD**), including how the lender is to make mortgage insurance premiums to HUD. (*See, e.g., id.* at 342.) Mortgage Electronic Registration Services, Inc. later assigned the deed of trust to Bank of America, N.A. (*Id*. at 351-52.) On February 3, 2015, Bank of

America assigned the deed of trust to Carrington Mortgage Services, LLC. (*Id*. at 354-57.)[1]

B. Red Rock's Foreclosure History and Bank of America's Tender

On April 23, 2010, Red Rock Financial Services, LLC (**Red Rock**), on behalf of Southern Terrace Homeowners Association (**HOA**), recorded a lien for delinquent assessments. (*Id*. at 183.) The notice stated the amount due to the HOA was $739.00, which included "assessments, late fees, interest, fines/violations and collection fees and costs." (*Id*.) According to Red Rock's records, in June of 2010 the HOA received payment for the entire amount referenced in the April 23, 2010 notice, including the super-priority amount equal to nine months of assessments. (*Id*. at 379-89.) Red Rock recorded a release of lien for delinquent assessments on July 27, 2010. (*Id*. at 391.)

On September 10, 2010, Red Rock, on behalf of the HOA, recorded a second lien for delinquent assessments. (*Id*. at 393.) The notice stated the amount due to the HOA was $2,581.69, which included "assessments, late fees, interest, fines/violations and collection fees and costs." (*Id*.) On November 14, 2012, Red Rock, on behalf of the HOA, recorded a notice of default and election to sell pursuant to the lien for delinquent assessments. (*Id*. at 395.) Per the notice, the borrower owed the HOA $2,359.84. (*Id*.)

[1] The litigation asserts claims against Carrington Mortgage Holdings, LLC, rather than the real party in interest Carrington Mortgage Services, LLC.

On December 14, 2012, in response to the notice of default, Bank of America's counsel at Miles Bauer Bergstrom & Winters (**Miles Bauer**) contacted the HOA to obtain a payoff ledger for the 9-month super-priority lien. (*Id*. at 409-10.) The HOA responded on December 27, 2012, sending a ledger showing that the monthly master assessment amount was $62.00 per month, and that the HOA also charged an assessment amount of $8.00 per month. (*Id*. at 412-23.) On January 10, 2013, Miles Bauer tendered a check for $655.14—which was for *more* than the super-priority portion of the HOA's lien—which Red Rock rejected without explanation. (*Id*. at 435-37; 439; 405-07.)

C. First 100, LLC Purchased the HOA's Payment Rights Pre-Foreclosure

After Red Rock recorded the notice of default, the HOA sold its right to payment on a number of liens—including the lien at issue in this case—to First 100, LLC. (*Id*. at 359-75.) Per the agreement, First 100 paid the HOA $966.00 for the payment rights on the lien for the subject property. (*Id*. at 371.) The lien, however, remained with the HOA and was not sold to First 100. (*See id.* at 359-75.) The sale of the payment rights to First 100 required the HOA to retain United Legal Services as a foreclosure trustee. (*Id*. at 361.) First 100 covered all collection costs charged by Red Rock, as well as the fees charged by United Legal Services. (*Id*. at 363.)

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On May 9, 2013, United Legal Services recorded a notice of foreclosure sale on behalf of the HOA, alleging that $4,431.93 was required to satisfy the HOA's lien. (*Id*. at 397.) On June 3, 2013, United Legal Services, on behalf of the HOA, recorded a foreclosure deed. (*Id*. at 399.) Although the deed does not state the price R Ventures paid at the sale, R Ventures concedes it paid a mere $10,100.00 for its interest in the property. (*Id*. at 403.) The undisputed fair market value of the property at the time of the foreclosure was $163,000.00. (*Id*. at 528-48.)

II. Procedural Background

On June 26, 2013, R Ventures filed its complaint for quiet title and injunctive relief. (J.A. at 2-10.) On April 28, 2015, R Ventures and Carrington stipulated to add Carrington as a defendant, which the Court approved on May 8, 2015. (J.A. at 31-33.) Carrington filed its answer, counterclaims against R Ventures, and crossclaims against the HOA on July 27, 2015. (*Id*. at 46-69.)

On February 24, 2016, R Ventures and Carrington filed cross motions for summary judgment. The district court granted R Ventures' motion for summary judgment and denied Carrington's motion for summary judgment on April 27, 2016, and a notice of entry was filed on May 2, 2016. (*Id*. at 549-53; 554-61.)

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On May 19, 2016, Carrington filed a motion for reconsideration of the orders on summary judgment. (*Id*. at 568-84.) R Ventures opposed. (*Id*. at 601-06.) The district court denied Carrington's motion for reconsideration, and a notice of entry was filed on August 18, 2016. (*Id*. at 658-59; 660-64.)

On July 6, 2016, R Ventures moved for its attorneys' fees and costs. (*Id*. at 628-34.) Carrington opposed. (*Id*. at 646-51.) The district court granted R Ventures' motion for its attorneys' fees and costs on September 8, 2016. *Id*. at 701-03.) The court found, *inter alia*, that NRS 116.3116 provides for a mandatory award of reasonable attorneys' fees for a prevailing party, and that R Ventures' claims were the type contemplated by the statute. (*Id*.) The district court awarded R Ventures costs and fees in the amount of $25,465.50, and a notice of entry was filed on September 29, 2016. (*Id*.)

ARGUMENT

I. Standard of Review

"This [C]ourt reviews a district court's grant of summary judgment de novo." *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). A motion for summary judgment should be granted "when the pleadings and other evidence on file demonstrate that no 'genuine issue as to any material fact [remains] and that the moving party is entitled to judgment as a matter of law.'" *Id.*; NRCP 56(c). All evidence and inferences must be viewed in a light most favorable to the non-

moving party on a summary judgment motion. *Safeway*, 121 Nev. at 729, 121 P.3d at 1029.

II. The HOA Foreclosure Did Not Affect the Superior Deed of Trust because Bank of America's Tender Satisfied the Super-Priority Portion of the HOA Lien

This Court should reverse the district court's grant of summary judgment because Bank of America, as prior deed of trust beneficiary, tendered payment to the HOA for the super-priority lien that gave rise to R Ventures' interest in the property. The HOA's bad faith rejection of that tender does not blunt its impact on the subordinate title the HOA passed to R Ventures.

A. Bank of America's Tender of Nine Months of Assessments Satisfied the Super-Priority Portion of the HOA Lien

In *SFR Investments*, this Court twice noted that the holder of the first deed of trust "could have paid off the [HOA] lien to avert loss of its security[.]" *SFR Invs. Pool 1, LLC v. Bank of Am., N.A.*, 334 P.3d 408, 414 (Nev. 2014). Bank of America did just that.

1. Bank of America's tender of nine months of assessments extinguished the super-priority lien

Recently, this Court specifically held that a first deed of trust beneficiary's offer of payment to an HOA for the full amount of the HOA's super-priority lien extinguished the super-priority lien and protected the deed of trust *even though the HOA refused to accept payment*. In *Stone Hollow Avenue Trust v. Bank of*

America, N.A., No. 64955, 2016 WL ____ (Nev. Aug. 11, 2016), Stone Hollow purchased property at an HOA foreclosure sale, then sued Bank of America, seeking a judgment that it owned the property free and clear of Bank of America's security interest. After the district court granted summary judgment in Bank of America's favor, Stone Hollow appealed. On appeal, this Court first ordered reversal based on Stone Hollow's argument that it was a bona fide purchaser for value. But after reconsideration, this Court issued an order affirming the judgment based on Bank of America's tender of payment to the HOA. This Court found that the HOA's rejection of payment for the full super-priority amount of the lien was "unjustified," and that "[w]hen rejection of a tender is unjustified, the tender is effective to discharge the lien." *Id.*, slip op. at 1.

This Court's prescription for protecting a senior deed of trust—which Bank of America followed in this case—is well-grounded in Nevada law. For at least fifty years, this Court has consistently held that an offer to pay is sufficient tender. *See, e.g.*, *Ebert v. W. States Refining Co.*, 75 Nev. 217, 221-222, 337 P.2d 1075, 1077 (1959). Furthermore, tender is complete when "the money is offered to a creditor who is entitled to receive it[.]" *Cladianos v. Friedhoff*, 69 Nev. 41, 45, 240 P.2d 208, 210 (1952). After the money owed is offered to the creditor, "nothing further remains to be done, and the transaction is completed and ended." *Id.*

Other jurisdictions agree that tender is defined as "*an offer of payment* that is coupled either with no conditions or only with conditions upon which the tendering party has a right to insist." *Fresk v. Kramer*, 99 P.3d 282, 286-87 (Or. 2004) (emphasis added); *see also* 74 AM. JUR. 2D *Tender* § 22 (2014). It is irrelevant whether any money actually changes hands—tender is complete upon the offer to pay. *See Guthrie v. Curnutt*, 417 F.2d 764, 765-66 (10th Cir. 1969) ("[W]hen a party, able and willing to do so, offers to pay another a sum of money and is told that it will not be accepted, the offer is a tender without the money being produced."). Several courts have also held that a tender made, even if rejected, precludes foreclosure and discharges the subject lien. *See Bisno v. Sax*, 346 P.2d 814, 820 (Cal. Dist. Ct. App. 1959) ("[T]he acceptance of payment of a delinquent installment of principal or interest cures that particular default and precludes a foreclosure sale based upon such a preexisting delinquency. The same is true of a tender which has been made and rejected."); *Lichty v. Whitney*, 182 P.2d 582, 582 (Cal. Dist. Ct. App. 1947) ("A tender of the amount of a debt, though refused, extinguishes the lien of a pledgee."); *Segars v. Classen Garage & Serv. Co.*, 612 P.2d 293, 295 (Okla. Civ. App. 1980) ("A proper and sufficient tender of payment operates to discharge a lien.").

The drafters of NRS 116 also contemplated that tender of the super-priority amount should preserve a first deed of trust holder's interest in the foreclosed

property. The drafters of the Uniform Common Interest Ownership Act (the **Uniform Act**), adopted by Nevada as NRS 116, contemplated this result when drafting the super-priority provision, stating that "[a]s a practical matter, secured lenders will most likely pay the [nine] months assessments demanded by the association rather than having the association foreclose on the unit." Uniform Common Interest Ownership Act § 3116 cmt. 1 (1982) (cited with approval in *SFR Invs. Pool 1, LLC v. Bank of Am., N.A.*, 334 P.3d 408, 414 (Nev. 2014)).[2]

Further, the Nevada Real Estate Division of the Department of Business and Industry (the **Agency**), the agency charged with administering NRS 116, has explained that it is "likely that the holder of the first security interest will pay the super priority lien amount to avoid foreclosure by [an HOA]." 13–01 Op. Dep't of Bus. & Indus., Real Estate Div. 18 (2012) (hereinafter **Agency Letter**); *see also Folio v. Briggs*, 99 Nev. 30, 34, 656 P.2d 842, 844 (1983) (explaining that courts "are obliged to attach substantial weight to [an] agency's interpretation" of a statute it is charged with administering).

Here, Bank of America offered to do just that—pay a sum equivalent to "the nine months of assessments for common expenses"—in order to "fully discharge its obligations to the HOA." (J.A. at 410.) The HOA's agent, Red Rock,

[2] This Court cited to the official comments to the Uniform Act extensively when analyzing NRS 116.3116 in *SFR Investments*. *See* 334 P.3d at 412 ("An official comment written by the drafters of a statute and available to the legislature before the statute is enacted has considerable weight as an aid to statutory construction.").

responded to Bank of America's offer requesting that value with a statement of account that included a precise amount of monthly master assessments of $62.00 and assessments of $8.00, along with other amounts unrelated to the super-priority lien. (*Id.* at 412-23.) Bank of America tendered $655.14 to Red Rock—an amount in excess of the nine months of assessments. (*Id*. at 435-37.)

The HOA's rejection of Bank of America's tender did not neutralize it; the tender was complete when made. Here, Bank of America did not just *offer to pay* the super-priority lien—which would have been sufficient tender—it also *sent payment* in excess of the maximum amount of the super-priority lien.

The district court's decision incorrectly analyzed Bank of America's tender and held that the tender was "conditional" in that Bank of America conditioned that the remainder of the HOA lien was extinguished. (J.A. at 551.) But the tender was not conditional, and the tender satisfied the super-priority portion of the HOA's lien.

2. Bank of America tendered the correct amount

As to the precise value of super-priority lien, statutory language, agency interpretation, and this Court's precedent all set it at nine months of the assessments. NRS 1163116, *SFR Investments*, and the Agency Letter are consistent in stating that the super-priority lien includes only nine months of assessments and charges for maintenance and nuisance-abatement. Moreover, this

Court held in *Ikon Holdings* that the super-priority lien established by the HOA Lien Statute "is limited to an amount equal to the common expense assessments due during the nine months before foreclosure." *Horizons at Seven Hills Homeowners Assoc. v. Ikon Holdings, LLC*, 373 P.3d 66, 72 (Nev. 2016). Despite HOAs' frequent efforts to collect more than the statute provides—both by making greater demands on lenders and by hiding the value until they can foreclose on the undifferentiated liens—this Court's holding is clear: Nevada law limits the super-priority value in this case to nine months of assessments.

This super-priority amount is equal to the amount of assessments that "would have become due in the absence of acceleration during the nine months immediately preceding institution of an action to enforce the lien . . . ." *See* NRS 116.3116(2); *accord* Agency Letter (explaining that "the total amount of the super priority lien attributable to assessments is no more than 9 months of the monthly assessments reflected in the association's budget.").

Nothing in the record contradicts Bank of America's straightforward calculations. The payment *was in excess of* the super-priority amount. Bank of America therefore satisfied its obligations to the HOA under NRS 116 and protected the senior deed of trust from being wiped out by what was, in fact, a foreclosure on the HOA's remaining sub-priority lien.

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3. The district court erred when it held that Bank of America made a "conditional offer" of payment

The district court erred when it held that Bank of America's tender was "conditional" because it premised payment upon the condition that the remainder of the HOA's lien was extinguished. As set forth in the Miles Bauer's correspondence, Bank of America's tender was made pursuant to NRS 116.3116(2)(b) and was remitted to satisfy the nine months of delinquent assessments the HOA was entitled to collect from the beneficiary of the senior deed of trust. Bank of America was entitled to demand that its payment be applied to satisfy the super-priority portion of the lien. *SFR Investments* explains that the UCIOA—the model upon which NRS Chapter 116 is based—"forthrightly acknowledge[s] that the split-lien approach represents a 'significant departure from existing practice'" and "is a specially devised mechanism designed to 'strike[ ] 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 lenders***.'" *SFR Invs. Pool 1, LLC v. U.S. Bank, N.A.*, 334 P.3d 408, 412 (Nev. 2014) (citing 1982 UCIOA § 3–116 cmt. 1; 1994 & 2008 UCIOA § 3–116 cmt. 2) (emphasis added). *SFR Investments* continues: "As a practical matter, secured lenders will most likely pay the 6 [in Nevada, nine] months' assessments demanded by the association ***rather than having the association foreclose on the unit.***" *Id.* at 412-13 (emphasis added); *see* 7 Uniform Laws Anno. at 354 (holding the same).

That is precisely what occurred here. Bank of America redeemed the deed of trust by paying an amount equal to the nine months of unpaid assessments—the maximum owed per NRS 116 and the plain terms of *SFR Investments* and *Ikon Holdings*. The Miles Bauer communications did not set forth an improper condition of the payment, but instead merely confirmed that the payment was sufficient to satisfy the super-priority portion of the lien, thus negating any claim that the deed of trust would be extinguished. There was no tender of an amount less than owed which required a release of claims. The tender was intended to pay off the nine months of assessment constituting the super-priority lien and the facts of this case establish that the tender was sufficient.

B. The HOA Cannot Extort Bank of America by Misrepresenting the Value of the Super-Priority Lien

The Legislature did not establish the super-priority lien for HOAs so that they could force lenders to guess what an HOA is owed at the risk of losing six-figure secured loans. It set a clear value—nine months' worth of assessments—based on the reasonable (though ultimately incorrect) assumption that HOAs would request and accept that amount and no more. Equity demands that a senior lienholder that complies with the law to the best of its ability not be wiped out by an HOA that does everything in its power to avoid receiving the sum authorized by the statute.

This Court has repeatedly held that "a deed of trust beneficiary's tender of the purported superpriority portion of an HOA's lien is a relevant consideration when determining whether an HOA foreclosure sale extinguishes the deed of trust." *Nationstar Mortg. v. Premier One Holdings, Inc.*, No. 67222, 2016 WL 1109122, at *1 (Nev. Mar. 18, 2016) (citing *Shadow Wood Homeowners Ass'n, Inc. v. New York Cmty. Bancorp, Inc.*, 366 P.3d 1105 (Nev. 2016)). In *Premier One Holdings*, this Court vacated a summary judgment in favor of a bank where the court failed to consider how the HOA's rejection of tender "bore upon the equities." *Id.* In this case, the district court also failed to address the equitable implications of the fact that the loan servicer offered to pay and then actually tendered the full super-priority amount prior to the sale, which, under Nevada law, preserved the first-priority position of the senior deed of trust.

All evidence in the record suggests that Bank of America correctly calculated and tendered more than the maximum possible value of the HOA's super-priority lien, satisfying that lien and leaving the HOA with only a sub-priority lien to transfer to R Ventures. But even if the straightforward calculation did not yield the actual value of the HOA's super-priority lien in this instance, equity cannot fault or punish Carrington. Bank of America's belt-and-suspenders approach to tender—offering to pay "the amount of nine months' of common assessments . . . whatever it is" *and* sending a check in excess of the maximum

possible value based on the HOA's response—gave the HOA every opportunity to request, accept, or clarify the super-priority value. (J.A. at 410.)

Recognizing that Bank of America redeemed the super-priority portion of the HOA lien through its tender would still leave R Ventures with exactly what it bargained for. R Ventures knew it was buying an interest that might be subject to Bank of America's senior deed of trust. The senior deed of trust was a matter of record, and the HOA's notices did not indicate any super-priority value in the lien that would indicate, even falsely, that its foreclosure could eliminate the senior deed of trust. R Ventures bought the HOA's interest for $10,100.00, when the fair market value of the property was $163,000.00. It has had the beneficial use of that property since 2013, a period that began while lenders and loan servicers like Bank of America and Carrington were adapting to new foreclosure requirements implemented through Nevada Assembly Bill 284. R Ventures thus received years of beneficial use of a $163,000.00 property for an investment of $10,100.00 that it made knowing that the $189,573.00 senior deed of trust might well survive the HOA's foreclosure. It is not entitled to more when it is undisputed that Bank of America tendered $655.14 to the HOA—a sum that represents the only credible calculation of the super-priority portion of the lien in the record.

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III. NRS 116 is Facially Unconstitutional under the Due Process Clause

Furthermore, the district court's judgment should be reversed because the provisions of NRS 116 that applied before the 2015 amendments are facially unconstitutional under the Due Process Clauses of the Nevada and U.S. Constitutions. NRS 116 did not mandate actual notice to a deed of trust holder prior to an HOA's foreclosure. Rather, NRS 116 impermissibly required 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, NRS 116 is invalid on its face.[3]

NRS 116 is unconstitutional on its face because it does not ensure that mortgagees at risk of losing property interests will receive notice and an opportunity to be heard.[4] An "elementary and fundamental requirement of due

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[3] Carrington's purported loss of a property interest pursuant to NRS 116 resulted from state action, and thus requires application of the Due Process Clause. *See, e.g., Culbertson v. Leland*, 528 F.2d 426, 432 (9th Cir. 1975) (holding that operation of innkeeper's lien statute that permitted non-judicial seizure to be state action); *J.D. Construction v. IBEX Int'l Group*, 126 Nev. 366, 376, 240 P.3d 1033, 1040 (2010) ("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."); *see also id.* at 376, 240 P.3d at 1041 (*citing Connolly Develop., Inc. v. Sup. Ct. of Merced Cnty.*, 553 P.2d 637, 644 (Cal. 1976)).

[4] A statute is unconstitutional on its face when "no set of circumstances exists under which the [statute] would be valid." *City of Los Angeles v. Patel*, 135 S. Ct. 2443, 2450 (2015) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)

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. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).[5] 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 nonjudicial 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 nonjudicial foreclosure sale that can extinguish the mortgagee's interest. *Id.* (emphasis added).

On its face, Nevada law does not "under all circumstances" ensure actual notice to deed of trust holders "of the pendency of an action and afford them an opportunity to present their objections." *Mullane*, 339 U.S. at 314. Mortgagees

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(alteration in *Patel*)). A litigant may attack a statute's facial unconstitutionality in violation of due process even if the party received actual notice that was not required by the law in question. *See, e.g.*, *Garcia-Rubiera v. Calderon*, 570 F.3d 443, 456 (1st Cir. 2009) (sustaining facial attack on notice provisions and holding that "actual notice cannot defeat [facial] due process claim").

[5] 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*, 287 P.3d 305, 310 (Nev. 2012), the due-process analysis under each Constitution is the same, and NRS 116 is unconstitutional under both.

must receive notice *only* if they have previously requested notice from the HOA. NRS 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" of the existence of a security interest more than 30 days before the HOA records the notice of default. 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.

In failing to require that notice be given to deed of trust beneficiaries under NRS 116, the Nevada Legislature initially diverged from other states that adopted similar statutes. In drafting NRS 116, the Nevada Legislature largely followed the Uniform Act upon which the statute is based. Section 3-116(j)(1) of the 1982 Uniform Act would have required that a foreclosure on the HOA's super-priority 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. In the process, it initially failed to ensure that affected deed of trust beneficiaries would receive adequate notice.

NRS 116 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—the pre-amendment HOA Lien Statute allowed the extinguishment of a first deed of trust without notice. Such a result—even when an "opt in" mechanism is available—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 Uniform Act highlighted the problem with Nevada's pre-amendment HOA Lien Statute, issuing the following comment as part of the 2008 version of the Uniform Act:

> In some states, nonjudicial foreclosure procedures require notice to subordinate lienholders only when those lienholders have recorded a timely request for notice of sale on the real property records. . . . The issue of notice to subordinate lienholders becomes more critical under this Act, given that subsection (c) gives the association a limited priority over the otherwise-first mortgage lender, thus rendering that lender a subordinate lienholder. *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, Uniform Common Interest Ownership Act cmt. 8 (2008) (emphasis added). To remedy this defect, the 2008 version of the Uniform Act included 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).

A number of courts have concluded that opt-in notice statutes do not protect the due-process rights of property interest holders. For example, in *Island Financial, Inc. v. Ballman*, 607 A.2d 76, 79-82 (Md. Ct. Spec. App. 1992), the Maryland Court of Special Appeals applied *Mennonite* to hold that the rights of a holder of a subordinate mortgage on certain property were violated when the holder failed to receive notice of the senior lienholder's foreclosure. The court held that the due-process violation existed even though the subordinate mortgage holder failed to take advantage of a Maryland statute that would have allowed it to "opt in" to receive notice of a subsequent foreclosure by recording a request for notice—in other words, a procedure materially identical to the "request for notice" procedure in NRS 116.31163. *Id.* at 81-82. According to the court, "[c]onstitutional due process protection does not exist only for those who follow the notice statute but encompasses all interests that may be affected by state action." *Id.* at 81.

Similarly, in *Reeder & Associates v. Locker*, 542 N.E.2d 1371 (Ind. Ct. App. 1989), the Indiana Court of Appeals applied *Mennonite* to hold that a mortgagee who had failed to use the procedures in the applicable request-notice statute was

nonetheless entitled to actual notice of a foreclosure that would eliminate its security interest. As the court noted, "[c]onstitutional protection exists not only when a mortgagee complies with the [request-notice statute]; it exists any time an action which will affect a property interest protected by the [D]ue [P]rocess [C]lause of the U.S. Constitution occurs." *Id.* at 1373.[6]

Consistent with the many on-point decisions on the issue, the pre-amendment NRS 116 was unconstitutional on its face because it did not guarantee that beneficiaries of senior deeds of trust would receive notice of an HOA's foreclosure sale. The fact that a lienholder could record a request for notice was not enough; as the United States Supreme Court made clear in *Mennonite*, a

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[6] *Accord e.g.*, *Wylie v. Patton*, 720 P.2d 649, 655 (Idaho 1986) (reversing quiet title judgment after determining that lienholder failed to receive constitutionally required notice, even though lienholder failed to request notice under applicable statute); *City of Boston v. James*, 530 N.E.2d 1254, 1257 (Mass. App. Ct. 1988); ("'[A] party's ability to take steps to safeguard its interests does not relieve the State of its constitutional obligation.'") (quoting *Mennonite*, 462 U.S. at 799); *Jefferson Twp. v. Block 447A*, 548 A.2d 521, 524 (N.J. 1988) ("[A] person's entitlement to the notice required by due process cannot be conditioned on the requirement that he request it."); *In re Foreclosure of Tax Liens*, 103 A.D.2d 636, 640 (N.Y. App. Div. 1984) (holding that the state's constitutional obligation to notify mortgagees could not be "abrogated by requiring the mortgagee to request notice;" "The state has an obligation to all mortgagees, not merely to those who request notice."); *United States v. Malinka*, 685 P.2d 405, 408-09 (Okla. Civ. App. 1984) (holding Oklahoma tax foreclosure sale unconstitutional due to failure to guarantee notice to affected lienholders despite availability of request-notice procedures); *Seattle First Nat'l Bank v. Umatilla Cnty.*, 713 P.2d 33, 34-37 (Or. App. 1986) (holding publication notice statute unconstitutional as violative of due process despite request-notice statute).

"party's ability to take steps to safeguard its interests does not relieve the State of its constitutional obligation." 462 U.S. at 799. Accordingly, NRS 116 is unconstitutional, and the district court's decision should be reversed.

IV. The Foreclosure was Invalid based on the Tri-Party Agreement between First 100, United Legal Services, and the HOA

A. The HOA's Payment Right was Split from the Lien Prior to the HOA Foreclosure

This Court has held that, in order to pursue a nonjudicial foreclosure in Nevada, the foreclosing party must possess both the right to payment and the lien securing repayment. *Edelstein v. Bank of New York Mellon*, 286 P.3d 249, 258 (Nev. 2012). This is so because the holder of the repayment right is only entitled to repayment, and does not have the right under the deed to use the property as a means of satisfying repayment. *Id.* Conversely, the holder of the lien alone does not have a right to repayment, and therefore does not have an interest in foreclosing on the property to satisfy repayment. *Id.*

Here, First 100 purchased the payment rights under the HOA's lien prior to the foreclosure sale. (J.A. at 359-75.) The lien itself remained the property of the HOA, and was never assigned. The foreclosure was completed by the HOA. But, the HOA lacked standing to foreclose because it no longer possessed the payment rights under the lien at the time of the sale. Accordingly, as a matter of law, the

district court erred in granting R Ventures' motion for summary judgment because the HOA foreclosure sale was invalid as a matter of law.

B. The Tri-Party Agreement Violated NRS 116.3102(p) and the CC&Rs

Chapter 116 of the Nevada Revised Statutes delineates the powers of a homeowners' association. NRS 116.3102. A homeowners' association may "assign its right to future income, including the right to receive assessments for common expenses, but only to the extent the declaration expressly so provides." NRS 116.3102(p). This means that a homeowners' association's power to enter into a tri-party agreement like the one in this case is dependent upon express authorization from the homeowners' association's CC&Rs. This HOA's CC&Rs do not grant the HOA that power. The CC&Rs. provide for the right to charge assessments, when they are due, parties to receive notice of a delinquency, and the powers of the association to foreclose. (*See generally* J.A. at 443-526.) There is no provision that would permit the HOA to enter a tri-party agreement, in violation of *Edelstein*, to sell its accounts receivable pertaining to overdue assessments.

V. NRS 116 is Preempted by the Supremacy Clause

The district court erred when it held that NRS 116 was not preempted by the Supremacy Clause of the U.S. Constitution.

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A. As Applied to FHA-Insured Mortgages, NRS 116 is Preempted because it Extinguishes a Federal Interest and Interferes with the Governance of a Federal Program

The Supremacy Clause mandates preemption of state laws when the state "legislation as applied interferes with the federal purpose or operates to impede or condition the implementation of federal policies and programs." *Rust v. Johnson*, 597 F.2d 174, 179 (9th Cir. 1979). The federal program at issue here, the FHA Insurance Program, is part of a comprehensive scheme designed to induce lenders to provide loans to at-risk borrowers who could not otherwise obtain financing to purchase a home.[7] The FHA's purpose is broad and essential, as the "[FHA] is the largest insurer of mortgages in the world, insuring over 34 million properties since its inception in 1934."[8] The effects of the FHA Insurance Program are far-reaching: "FHA provides a huge economic stimulation to the country in the form of home

[7]*Mortgage Insurance for One to Four Family Homes Section 203(b)*, HUD.gov, http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/sfh/ins/203b--df (last visited September 21, 2016) ("[T]he Federal Government expands homeownership opportunities for first time homebuyers and other borrowers who would not otherwise qualify for conventional mortgages on affordable terms, as well as for those who live in underserved areas where mortgages may be harder to get.").

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

and community development, which trickles down to local communities in the form of jobs, building suppliers, tax bases, schools, and other forms of revenue."[9]

Critical to the FHA Insurance Program's mission is a partnership between private lenders and the federal government. Through the programs, the federal government insures certain residential mortgage loans originated by private lenders for at-risk borrowers who qualify for assistance under FHA criteria. *See, e.g.*, 12 U.S.C. § 1701t ("[T]here should be the fullest practicable utilization of the resources and capabilities of private enterprise and of individual self-help techniques.").[10] By incentivizing private lenders to make loans to at-risk borrowers, the FHA Insurance Program implements the "National Housing Act's strong policy in favor of *encouraging* private investment in housing." *Angleton v. Pierce*, 574 F. Supp. 719, 736 n.22 (D.N.J. 1983).[11] In managing the FHA Insurance Program,

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[9] *Id.*

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

[11] *The Federal Housing Administration (FHA)*, HUD.gov, http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/fhahistory (last visited September 24, 2016) ("FHA mortgage insurance provides lenders with protection against losses as the result of homeowners defaulting on their mortgage loans. The lenders bear less risk because FHA will pay a claim to the lender in the

HUD, the federal agency charged with implementing the FHA, has issued comprehensive regulations to determine what mortgages will be insured, when a foreclosing mortgage servicer will be entitled to convey the home to HUD and in return receive the insurance proceeds, when payment to the servicer and conveyance of the property to HUD will be a matter of discretion rather than entitlement, and how HUD will dispose of the property once conveyed to it in a manner to best support the national housing objective.

This Court's recent decision in *Munoz* is instructive on the preemptive effect that should be applied to federal statutory schemes, like the National Housing Act, where the challenged state statute's impact on private entities frustrates a federal statutory or regulatory scheme. In *Munoz*, this Court considered the preemptive effect of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (**FIRREA**) on a state statute, NRS 40.459(1)(c), which limits the amount of a deficiency judgment that a successor creditor can recover to the amount it paid to acquire the interest in the secured debt, less the amount of the secured property's actual value. 348 P.3d at 689. FIRREA governs the winding down of a failed bank,

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event of a homeowner's default."); *Mortgage Insurance for One to Four Family Homes Section 203(b)*, HUD.gov, http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/sfh/ins/203b--df (last visited September 21, 2016) ("[The 203(b)] program provides mortgage insurance to protect lenders against the risk of default on mortgages to qualified buyers."); *see also Hahn v. Gottlieb*, 430 F.2d 1243, 1249-51 (1st Cir. 1970); *Falzarano v. United States,* 607 F.2d 506, 512 (1st Cir. 1979).

providing that the Federal Deposit Insurance Corporation (**FDIC**) will act as receiver for the failed bank and convert the bank's assets to cash to cover insured depositors and debtors to the maximum extent possible. *Id.* at 692. One category of a bank's assets are the loans it holds. Because the Nevada law limited the amount a subsequent private purchaser could recover on the loan, it made it less likely that a private party would purchase the loan, and hence would make it at least marginally more difficult for the FDIC to dispose of the assets. *Id*. Since the Nevada law interfered with FIRREA's express purpose of "facilitat[ing] the purchase and assumption of failed banks as opposed to their liquidation[,]" it was preempted by the federal law. *Id.* at 692-93.

Like the Nevada statute in *Munoz*, the HOA Lien Statute undermines the incentives federal insurance provides to private parties, which "frustrates the purpose … or impairs the efficiencies" of a federal program—here the FHA Insurance Program. *See id.* at *4 (quoting *McClellan*, 164 U.S. at 357). When Congress enacted the National Housing Act and when HUD first implemented it by promulgating the FHA Insurance Program's regulations, those two entities struck the balance between the public treasury and the private partnership with loan originators that the HOA Lien Statute frustrates and impedes. Congress, in striking that balance, made decisions that "involve[d] a balancing of factors and a consideration of complex financial data," *Falzarano v. United States*, 607 F.2d

506, 512 (1st Cir. 1979), and "economic and managerial decisions" about which "courts are ill-equipped to superintend," *Hahn v. Gottlieb*, 430 F.2d 1243, 1249-51 (1st Cir. 1970). State interference with that careful and expert balancing could "discourage the increased involvement of the private sector" that is the goal of the National Housing Act, which created the FHA. *Id.* at 1250.

Recognizing the careful public-private balance Congress struck in enacting the FHA Insurance Program, the Ninth Circuit has consistently held that federal law, rather than state law, applies in cases involving FHA-insured mortgages, which "assure[s] the protection of the federal program against loss, state law to the contrary notwithstanding." *United States v. Stadium Apartments*, 425 F.2d at 358, 362 (9th Cir. 1970); *United States v. View Crest Gardens Apartments, Inc.*, 268 F.2d 380, 383 (9th Cir. 1959) ("[T]he federal policy to protect the treasury and to promote the security of federal investment which in turn promotes the prime purpose of the Act—to facilitate the building of homes by the use of federal credit—becomes predominant. Local rules limiting the effectiveness of the remedies available to the United States for breach of a federal duty cannot be adopted."); *see also United States v. Victory Highway Vill., Inc.*, 662 F.2d 488, 497 (8th Cir. 1981) ("federal law, not [state] law, governs the rights and liabilities of the parties in cases dealing with the remedies available upon default of a federally held or insured loan.").

Consistent with the settled standard that federal law applies to federally-insured mortgages, *Washington & Sandhill* held that NRS 116 was preempted because "a homeowner[] association's foreclosure under Nevada Revised Statutes § 116.3116 on a Property with a mortgage insured under the FHA Insurance Program would have the effect of limiting the effectiveness of the remedies available to the United States," and, therefore, "the Supremacy Clause bars such foreclosure sales." 2014 WL 4798565, at *7. Indeed, "extinguish[ment] of a first secured interest" of a mortgagee where the mortgage is insured by HUD "would 'operate[ ] to impede or condition the implementation of federal policies and programs' and therefore 'must yield under the supremacy clause of the Constitution to the interests of the federal government.'" *Id.* at *6 (quoting *Rust*, 597 F.2d at 179). Similarly, Judge Mahan held in *Saticoy Bay LLC* that "a homeowners' association foreclosure sale under Nevada Revised Statute 116.3116 may not extinguish a federally-insured loan." 2015 WL 1990076, at *4 ("Allowing an HOA foreclosure to wipe out a first deed of trust on a federally-insured property thus interferes with the purposes of the FHA insurance program.").

Foreclosure on and extinguishment of federally-insured mortgages "would run the risk of substantially impairing the Government’s participation in the home mortgage market and of defeating the purpose of the National Housing Act." *Rust*, 597 F.2d at 179. The Supremacy Clause "forbids application of a state law that

impedes a federal interest," and the federal interest in the mortgage is impeded where "the property was federally insured at the time of the HOA foreclosure sale." *Saticoy Bay*, 2015 WL 1990076, at *5. Because NRS 116 impedes the operation of the FHA Insurance Program, the statute is preempted as applied to FHA-insured mortgages, like the deed of trust in this case.

B. As Applied to FHA-Insured Mortgages, NRS 116 is Preempted because it Frustrates FHA's Foreclosure-Avoidance Efforts

In addition to threatening the partnership between private and public entities, allowing HOAs to foreclose on FHA-insured mortgages also threatens HUD's comprehensive regulations that seek to avoid foreclosure and keep at-risk borrowers in their homes. FHA loans are issued to borrowers who might otherwise not qualify for conventional mortgages due, for example, to their inability to make more than a minimal down payment or their having significantly lower credit scores than banks would otherwise approve.[12]

The FHA is not analogous to a private insurer. As a federal agency, "FHA insures mortgages so that lenders will be encouraged to make more mortgages

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

available for people."[13] "HUD's mission is to create strong, sustainable, inclusive communities and quality affordable homes for all."[14] This strong federal interest encompasses keeping borrowers in their homes for some period of time during default as the lender and borrower try to resolve the delinquency.[15] The FHA Programs include a comprehensive set of servicing guidelines that are aimed at keeping at-risk borrowers in their homes to the extent possible, including in circumstances where the borrowers are in financial distress. For example, before claiming a default and initiating foreclosure proceedings, the FHA Programs' regulations require that mortgagees consider forbearance and pre-foreclosure counseling[16]—which can take six months or more[17]—and provide that

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

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

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

[16] *See* 24 C.F.R. § 203.501 (requiring that mortgagees "must consider" actions such as "special forbearance," meaning in cases where the mortgagor does not own other FHA-insured property and the default was caused by circumstances beyond the mortgagor's control, the forbearance agreement will not require increased payments before the original maturity date of the mortgage); HUD Administration of Insured Home Mortgages Handbook 4330.1, ch. 7, §§ 7-3, *available at*

noncompliance may result in a civil monetary penalty and withdrawal of HUD's approval of the mortgagee as a program participant, 24 C.F.R. § 203.500. In addition to forbearance,[18] FHA regulations require mortgagees to consider or attempt other forms of relief short of foreclosure, including modifying a loan's terms to make it more affordable. *Id.* at §§ 203.357, 203.370, 203.608, 203.616. Moreover, even where foreclosure is inevitable, FHA regulations identify a lengthy and exhaustive process that details the level and form of borrower communications required before foreclosure may begin.[19] Federal regulators have marshalled many decades of expertise to enact a comprehensive and detailed approach to foreclosure and foreclosure forbearance on FHA-insured mortgages, the goal of which is to

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http://portal.hud.gov/hudportal/documents/huddoc?id=43301c7HSGH.pdf (last visited Sept. 22, 2016) (requiring that servicers "make a concerted effort to help the mortgagor resolve his/her financial problems," specifically addressing that a mortgage servicer should endeavor to be aware of marital difficulties, substance abuse, excessive gambling, loss of income, loss of employment, illness, and other factors, and then refer borrowers to counseling before initiating foreclosure).

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

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

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

expand the housing market for those who otherwise would not be able to purchase a home.

By allowing HOAs to foreclose on distressed borrowers, Nevada law conflicts with FHA regulations specifying foreclosure as a "last resort" for this potentially vulnerable category of borrowers.[20] Nevada itself has recognized HOA foreclosures interfere with mortgagees' efforts to keep borrowers in their homes and has made some—albeit insufficient—effort to mitigate the controversial rush to foreclose by HOAs and their collection agents. In 2013, Nevada changed its law to bar HOAs from initiating non-judicial foreclosure proceedings after the mortgagee has recorded a notice of default and before it complies with Nevada's own foreclosure avoidance procedures (which generally require pre-foreclosure mediation). *See* NRS 116.31162(6)(b).

Although this amendment reflects the Nevada Legislature's own recognition of the harm caused by HOA foreclosures, it is not enough to avoid federal preemption as applied to FHA-insured loans because Nevada law still frustrates federal foreclosure forbearance objectives. As the Supreme Court has recognized, a "[c]onflict in technique can be fully as disruptive to the system Congress enacted

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

as conflict in overt policy." *Amalgamated Ass'n of Street, Electric Ry., & Motor Coach Employees v. Lockridge*, 403 U.S. 274, 287 (1971). For example, under the 2013 amendment, nothing impedes HOAs from pursuing foreclosure and removing the borrower from the home where the mortgagee has not issued a notice of default. Indeed, if anything, Nevada law directly undermines federal law by encouraging mortgagees to initiate foreclosure at the earliest possible time to at least temporarily prevent the HOA from proceeding with its own foreclosure. In contrast, the FHA Programs direct mortgagees on insured loans to work with the borrower and to evaluate modification and other alternatives ***before*** taking steps toward foreclosure.[21]

The U.S. Supreme Court and other federal courts have found preemption of state law under the Supremacy Clause in much less compelling circumstances than those presented here. For instance, in *De la Cuesta*, the Supreme Court held a Federal Home Loan Bank Board regulation permitting—but not requiring—federal savings and loan associations to include "due-on-sale" clauses in their mortgage contracts preempted state law that restricted the use of such clauses. "By further

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

limiting the availability of an option the Board considers essential to the economic soundness of the thrift industry, the State has created 'an obstacle to the accomplishment and execution of the full purposes and objectives' of the due-on-sale regulation." 458 U.S. at 156 (citations omitted). Here, HUD explicitly directs mortgage servicers to exercise restraint in proceeding with foreclosures to help keep borrowers in their homes. *See supra* note 10. Because the HOA Lien Statute impermissibly restricts the discretion of both the servicer and HUD in addressing borrower default, it is preempted under the Supremacy Clause as applied to FHA-insured mortgages.[22]

Finally, the preemptive effect here is modest. Nothing about HUD regulations or federal preemption requires HOAs to give up their partial payment priority, NRS 116.3116(2); they simply require that HOAs yield to the FHA-insured mortgagee with respect to the timing of their recovery out of foreclosure

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

proceeds. *See* NRS 116.31162. The HOAs will still receive the fees that are entitled to super-priority status following a sale conducted by the mortgagee. But allowing an HOA to foreclose on an FHA-insured loan plainly frustrates the objectives of HUD regulations in restricting foreclosures on at-risk FHA borrowers where specified foreclosure avoidance measures offer some promise of keeping the borrowers in their homes.

Because NRS 116 "interferes with the federal purpose or operates to impede or condition the implementation" of the FHA Programs, it is preempted as applied to FHA-insured mortgages, like Lakeview's deed of trust in this case. *See Rust*, 597 F.2d at 179. Since R Ventures' quiet-title action is entirely dependent on the validity of the preempted state law, its quiet title and declaratory judgment claims fail. Accordingly, the district court erred in granting R Ventures' motion for summary judgment, and denying Carrington's motion for summary judgment.

VI. The District Court Erred by Granting Summary Judgment in Light of Disputed Material Facts

The district court committed error by granting summary judgment despite the tender described above. Additionally, the district court erred by granting summary judgment on the ground that the deed issued to R Ventures at the foreclosure sale was conclusive proof that all legal requirements to obtain title were satisfied and that all procedures had been followed. (J.A. at 550.) This Court squarely rejected that proposition in *Shadow Wood*. *See Shadow Wood*

Homeowners Ass'n, Inc. v. New York Cmty. Bancorp, Inc., 366 P.3d 1105 (Nev. 2016). Finally, the district court erred by disregarding evidence that the HOA's foreclosure sale was not commercially reasonable. (*Id.*)

A. Bank of America's Evidence of Tender of the Super-Priority Amount Due Created a Genuine Issue of Fact Barring Summary Judgment in R Ventures' Favor

First, assuming *arguendo*, that Bank of America's tender did not require summary judgment in Carrington's favor, it would, at a minimum, prevent the summary judgment the district court entered for R Ventures. It is undisputed that Bank of America made a general offer to pay nine months of assessments to the HOA. It is likewise undisputed that Bank of America actually tendered $655.14 to the HOA, after receiving documentation indicating that the HOA charged master assessments of $62.00 per month, and assessments of $8.00 per month. Nothing in the record contradicts Bank of America's initial offer, its specific tender, or its calculation of the super-priority portion of the HOA lien. If these undisputed facts are somehow insufficient to show decisively that the senior deed of trust survived the HOA foreclosure, they are at least sufficient to create a genuine issue of fact precluding summary judgment for R Ventures.

B. The District Court Erred by Granting Summary Judgment on the Basis of Recitals in the Foreclosure Deed

Second, the district court erred when it granted summary judgment to R Ventures on the basis that "the recitals in the foreclosure deed are conclusive" with

respect to the issues Carrington raised regarding the commercial reasonableness of the sale of the property and the sufficiency of any notice provided. (J.A. at 550.) This Court stated in *SFR Investments*, "NRS 116.3116(2) gives an HOA a true superpriority lien, *proper foreclosure of which* will extinguish a first deed of trust." *SFR Invs. Pool 1, LLC v. U.S. Bank, N.A.*, 334 P.3d 408, 419 (Nev. 2014) (emphasis added.). But R Ventures has not demonstrated that the HOA"s foreclosure was "proper."

This Court rejected the notion that bare recitals in a deed conclusively prove compliance 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 Homeowners Ass'n, Inc. v. New York Cmty. Bancorp, Inc.*, 366 P.3d 1105, 1111-12 (Nev. 2016). The relevant language in the trustee's deeds upon sale in this case and *Shadow Wood* is identical: "All requirements of law have been complied with, including but not limited to, the elapsing of the 90 days, the mailing of copies of the notice of Lien of Delinquent Assessment, and Notice of Default, and the mailing, posting, and publication of the Notice of Foreclosure Sale." *Compare Shadow Wood*, 366 P.3d at 1110 *with* J.A. at 399.

This Court rejected this very argument—that the recital prevented any challenge to the foreclosure—on several grounds. First, courts possess a "long-

standing and broad inherent power . . . to sit in equity and quiet title, including setting aside a foreclosure sale if the circumstances support such action." *Shadow Wood*, 366 P.3d at 1112. Second, "the recitals made conclusive by operation of NRS 116.31166 implicate 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 fact that an HOA's foreclosure deed contains the "conclusive recitals" of NRS 116.31166 did not preclude a challenge to the HOA's foreclosure. *Id*. Therefore, because the district court's decision depended upon this now-rejected proposition, the summary judgment should be overturned.

Even prior to *Shadow Wood*, R Ventures' position was fatally flawed because it overlooked the requirements of NRS 116.31166(3), which extend beyond the matters recited in the trustee's deed. Its reading of NRS 116.31166 ignores the axiom that no part of a statute should be construed to render another void. *See Harris Assocs. v. Clark County Sch. Dist.*, 119 Nev. 638, 642, 81 P.3d 532, 534 (2003); *accord, e.g., Banegas v. State Indus. Ins. Sys.*, 117 Nev. 222, 229, 19 P.3d 245, 250 (2001) ("[W]ords within a statute must not be read in isolation, and statutes must be construed to give meaning to all of their parts and language within the context of the purpose of the legislation."). Further, where statutory

provisions may be viewed as conflicting, they must be harmonized. *See, e.g. Int'l Game Tech., Inc. v. Second Judicial Dist. Court ex rel. County of Washoe*, 124 Nev. 193, 201, 179 P.3d 556, 561 (2008); *Acklin v. McCarthy*, 96 Nev. 520, 523, 612 P.2d 219, 220 (1980) ("An entire act must be construed in light of its purpose and as a whole.").

Ignoring these two maxims, R Ventures contended that under NRS 116.31166(1–2), an HOA's compliance with NRS 116 rests solely on reciting compliance with the statute's notice provisions in a foreclosure deed. According to this argument, because the foreclosure deed in this case contains these recitations, summary judgment can be granted on R Ventures' quiet title claim without *any* evidence of actual compliance with NRS 116.

R Ventures' interpretation would render NRS 116.31166(3) null. R Ventures essentially argues that the recitals in the foreclosure deed are conclusive proof that the foreclosure extinguished Carrington's deed of trust under NRS 116.31166(1–2). But that argument ignores NRS 116.31166(3)'s requirement 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. As this Court has explained, the Legislature's use of "pursuant to" means "[i]n compliance with; in accordance with; under . . . [a]s authorized by; under . . . [i]n carrying out." *In re Steven Daniel P.*, 309 P.3d 1041, 1044 (Nev. 2013) (alteration in original)

(quoting BLACK'S LAW DICTIONARY at 1356 (9th ed. 2009)). Furthermore, "pursuant to" is a "restrictive term" that mandates compliance. *Id*. Here, 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, NRS 116.31163, and NRS 116.31164, not just NRS 116.31166(1).

R Ventures' interpretation of NRS 116.31166 not only would write the notice requirements of NRS 116.31162, NRS 116.31163, and NRS 116.31164 out of existence, it also would lead to absurd and unjust results. According to R Ventures' logic, an HOA could fail to record *any* of the three notices the HOA Lien Statute requires, *falsely* recite that they did in fact record the notices, and the court would be forced to hold that the notices were in fact recorded, *even if* the opposing party produced irrefutable evidence that proved the recitals were false. And there is no limiting principle to R Ventures' position; a dishonest HOA could collude with a dishonest purchaser to sell property without any proper announcement to the current owner or other security holders and still take title to the property free and clear under the aegis of a patently false, yet "irrefutable" recitation. The Nevada Legislature could not have possibly intended such unjust consequences.

C. The District Court Erred by Granting Summary Judgment despite Material Questions of Fact Surrounding the Commercial Reasonableness of the HOA's Foreclosure

Finally, the district court erred by granting summary judgment despite evidence establishing material questions of fact as to whether the HOA's foreclosure was conducted in a commercially unreasonable manner. NRS 116 requires that HOA foreclosure sales be commercially reasonable, stating that "every contract or duty governed by this chapter imposes an obligation of good faith in its performance or enforcement." NRS 116.1113. The drafters of this section defined good faith as follows:

> [g]ood faith . . . means observance of two standards: 'honesty in fact,' and observance of reasonable standards of fair dealing. While the term is not defined, [it is] derived from and used in the same manner as . . . Sections 2-103(i)(b) and 7-404 of the Uniform Commercial Code.

Uniform Common Interest Ownership Act § 1-113 cmt. (1982). Nevada's version of the UCC defines "good faith" as "honesty in fact and the observance of *reasonable commercial standards* of fair dealing." NRS 104.1201(2)(t) (emphasis added).

Nevada courts have confirmed that this commercial reasonableness standard applies to the disposition of collateral. *See, e.g., Jones v. Bank of Nev.*, 91 Nev. 368, 373, 535 P.2d 1279, 1282 (1975). Likewise, courts in other states interpreting the same provision at issue here, Uniform Act § 1-113, have held that the

disposition of real property must be commercially reasonable. *Will v. Mill Condo. Owners' Ass'n*, 848 A.2d 336, 340 (Vt. 2004) ("Although the rules generally applicable to real estate mortgages do not impose a commercial reasonableness standard on foreclosure sales, the [Uniform Act] does provide for this additional layer of protection.").

Granting super-priority to nominal HOA liens over substantial senior deeds of trust "represents a 'significant departure from existing practice.'" *SFR Invs. Pool 1, LLC v. U.S. Bank, N.A.*, 334 P.3d 408, 412 (Nev. 2014) (quoting the official comments to the Uniform Act § 1-116). However, NRS 116.1113's requirement that the foreclosure of these super-priority liens be commercially reasonable serves to protect first deed of trust holders from unreasonable foreclosures. In this case, two main questions of material fact exist relating to whether the HOA followed reasonable commercial standards of fair dealing.

1. The HOA's refusal to accept Bank of America's tender shows bad faith, particularly because it subsequently entered into a tri-party agreement with United Legal Services and First 100

First, Red Rock's decision to refuse Bank of America's super-priority tender and instead purport to sell the property for a small fraction of the senior deed of trust shows bad faith. When Bank of America offered to pay the super-priority amount to Red Rock, the HOA had two choices: (1) accept the super-priority tender and forgo foreclosure, or (2) accept the super-priority tender and proceed

with foreclosure on only the sub-priority lien. By capriciously choosing instead to refuse the super-priority tender and proceed with foreclosure as if the super-priority lien was still intact, injecting uncertainty into the real estate market and challenging Carrington's $189,573.00 lien. The HOA's decision is the antithesis of the "reasonable standards of fair dealing" required by NRS 116. Its failure to even argue a legitimate claim to more than the $655.14 tendered by Bank of America only confirms the bad faith animating the refusal and foreclosure.

This Court's recent decision in *Shadow Wood* affirmed that district courts must consider these equities when addressing HOA foreclosure sales. *Shadow Wood Homeowners Ass'n v. New York Cmty. Bancorp, Inc.*, 366 P.3d 1105, 1110-12 (Nev. 2016). In *Shadow Wood*, this Court considered it proper for the district court to develop the factual record in order to "assess the competing equities." *See id*. at 1112-14. Specifically, this Court held that summary judgment could not be granted on the bank's quiet title claim because the district court needed to develop, among other things, what the additional fees and costs claimed by the HOA represented and whether they were reasonable. *Id.*

Here, where the quality of R Ventures' title is only as good as the HOA's lien and the process it used to foreclose on that lien, these unanswered questions regarding the HOA's demands and its refusal of tender make summary judgment improper. The HOA's refusal is all the more indicative of bad faith in that after

Bank of America tendered the super-priority portion of the HOA's lien, the HOA accepted $966.00 from First 100 in exchange for the HOA's rights to proceeds from delinquent accounts. (J.A. at 371.) The district court's assertion that Carrington should bear the burden of the HOA's bad faith requires reversal.

2. The purported sale of the property at a 94% discount was commercially unreasonable

Second, there are questions of material fact surrounding commercial reasonableness of the foreclosure sale of the property for approximately 6% of the value of the deed of trust, *i.e.* $10,100.00 out of $163,000.00. Under Nevada law, a commercially reasonable sale should reflect a calculated effort to promote a sales price equitable to both the debtor and to the secured creditor. As this Court has explained, the "quality of the publicity, the *price obtained at the auction*, [and] the number of bidders in attendance" are also factors to consider when analyzing the commercial reasonableness of a public sale. *Dennison v. Allen Grp. Leasing Corp.*, 110 Nev. 181, 186, 871 P.2d 288, 291 (1994) (emphasis added).

Importantly, it is well-settled under Nevada law that "a wide discrepancy between the sale price and the *value of the collateral* compels close scrutiny into the commercial reasonableness of the sale." *Levers v. Rio King Land & Inv. Co.*, 93 Nev. 95, 98, 560 P.2d 917, 920 (1977) (emphasis added); *see also Iama Corp. v. Wham*, 99 Nev. 730, 736, 669 P.2d 1076, 1079 (1983); *Jones*, 91 Nev. at 368.

Such close scrutiny is surely required here, where a deliberately ill-defined interest in property securing a $189,573.00 loan sold for $10,100.00.

Courts analyzing the commercial reasonableness of foreclosure sales have either voided such sales or refused to grant summary judgment in favor of the foreclosing party where the discrepancy between the sales price and the value of the secured property was much less egregious than the present case. For example, in *Iama Corp.*, this Court reversed a trial court's finding that a sale of collateral was conducted in a commercially reasonable manner. *Iama Corp. v. Wham*, 99 Nev. 730, 737, 669 P.2d 1026 (1983). Central to the Court's decision was the sales price: 25.1% or roughly a fourth of the fair market value. *Id.* at 736. This Court again held that "such a discrepancy compels close scrutiny into the commercial reasonableness of the sale" and then carefully considered whether proper notice was given, whether the bidding was competitive, and whether the sale was conducted pursuant to the sheriffs office's normal procedures. *Id.* Ultimately, the Court set aside the sale because the seller's pre-foreclosure conduct had detrimentally affected the price at auction. *Id.* at 736-37.

This Court also squarely addressed the inferences to be drawn from a grossly inadequate sales price yet again in *Shadow Wood*, 366 P.3d at 1110-12. This Court favorably quoted the rule from the Third Restatement of Property that while "[g]ross inadequacy cannot be precisely defined in terms of a specific percentage

of fair market value[, g]enerally . . . a court is warranted in invalidating a sale where the price is *less than 20 percent* of fair market value." *Id.* at 1112 (quoting Restatement (Third) of Property, Mortgages, § 8.3 cmt. b (1997)) (emphasis added).

In a similar case applying the Uniform Act, the Vermont Supreme Court likewise voided a commercially unreasonable foreclosure sale where a property with a fair market value of $70,000.00 was sold to satisfy an HOA lien of $3,510.10. *Will v. Mill Condo. Owners' Ass'n*, 848 A.2d 336, 338-40 (Vt. 2004). That court explained that a foreclosing HOA bears the burden to prove the foreclosure was commercially reasonable. *Id.* at 342. The party conducting the sale also "must make a good faith effort to maximize the value of collateral," and "have a reasonable regard for the debtor's interest." *Id.* The court voided that sale because the condominium sold for 15% of its value and there was only one bid on the property. *See id.* These facts made the sale commercially unreasonable, and so the court vacated summary judgment and voided the sale. *Id.* at 343.

Here, the HOA sold the property for $10,100.00—approximately 6% of its fair market value. Therefore, the HOA foreclosure in this case falls well within the bounds of what this Court has identified as grossly inadequate, raising the inference that the HOA failed to "t[ake] steps to insure the best possible price would be obtained for the benefit of the debtor." *Levers*, 93 Nev. at 99, 560 P.2d at

920 (holding that the party failed to meet its burden to show that the sale was commercially reasonable).

CONCLUSION

For all of the above reasons, this Court should reverse the district court's judgment.

DATED this 4th day of November, 2016.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this opening brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman and 14 point font size.

I FURTHER CERTIFY that this reply brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the answer exempted by NRAP 32(a)(7)(C) it is proportionally spaced, has a typeface of 14 points or more and contains 10,740 words.

FINALLY, I CERTIFY that I have read this **OPENING BRIEF**, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this answering brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found.

I understand that I may be subject to sanctions in the event that the accompanying answer is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 4th day of November, 2016.

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CERTIFICATE OF SERVICE

In accordance with N.R.A.P. 25, I HEREBY CERTIFY that I am an employee of Akerman LLP, and that on this 4th day of November, 2016, I caused to be served a true and correct copy of the foregoing **OPENING BRIEF** via this Court's Electronic Filing System to the following:

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