IN THE SUPREME COURT OF THE STATE OF NEVADA

JPMORGAN CHASE BANK, N.A., as successor by merger to Chase Home Finance LLC,

Appellant,

vs.

SFR INVESTMENTS POOL 1, LLC, a Nevada limited liability company,

Respondent.

Case No. 71839

District Court Case No. A-12-672963-C

OPPOSITION TO MOTON TO EXTEND DEADLINE TO FILE OPENING BRIEF AND APPENDIX

Respondent SFR Investments Pool 1, LLC ("SFR") opposes appellant JP Morgan Chase Bank, N.A., as successor by merger to Chase Home Finance LLC's ("Chase") "Motion to Extend Deadline to File Opening Brief and Appendix." Specifically, SFR objects to the six-month extension, until October 7, 2017. SFR has informed Chase's counsel that it does not object to extensions in the normal course. SFR objects for the following reasons:

1. This Court has already decided that Constitutional Due Process is not implicated in NRS 116 sales due to the lack of state actor. *Saticoy Bay LLC v Wells Fargo Home Mort.*, 133 Nev. ___, ___, 388 P.3d 970, 975 (2017). While Wells Fargo has indicated that it may file a petition for writ of certiorari, this does not

change the binding nature of the case. Furthermore, Chase's motion presumes Chase has standing to raise a constitutional due process challenge, which it does not, as the district court found that Chase was sent the notices of default and sale, and Chase did not dispute notice. See Docketing Statement, Ex. 10 (Dec. 28, 2016). Thus, even if the United States Supreme Court were to grant cert in *Saticoy Bay*, or in *Bourne Valley Court Trust v. Wells Fargo Bank, N.A.*, Supreme Court Case No. 16-1208, and determine due process is implicated, Chase cannot bring a facial challenge. *Wiren v. Eide*, 542 F.2d 757 (9th Cir. 1976)("receipt of actual notice deprives [appellant] of standing to raise the claim" that a statutory scheme violates due process); *Green Tree Servicing, LLC v. Random Antics, LLC*, 869 N.E.2d 464, 470-71 (Ind. Ct. App. 2007) (where one receives actual notice cannot claim that the noticing provisions of the statute are unconstitutional); *see also United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 272 (2010) (receipt of actual notice satisfies due process even where notice is not provided as required under a statutory scheme). Thus, any decision by the U.S. Supreme Court determining that state action is involved in an NRS 116 sale will not change the result for Chase in this case.

2. As for retroactivity, while this Court has scheduled argument on the certified question, this issue should not result in what is, essentially, a request for stay of briefing. If this Court clarifies that the *SFR Investments Pool 1, LLC v. U.S. Bank,*

N.A.[1] decision should be applied retroactively, similar to the decision about the *Thomas v. Nevada Yellow Cab Corp.*[2] case in the recent opinion of *Nevada Yellow Cab Corp. v. Dist. Ct.*,[3] then SFR will have been prejudiced by having its title continue to be clouded unnecessarily.

3. Chase failed to present any evidence that would justify the district court denying quiet title in favor of SFR free and clear of the first deed of trust. Chase wants to delay final judgement on the case while it looks for more issues to throw at the courts to see what sticks. It should not be allowed to do so.

4. Undersigned counsel has represented to Chase's counsel that SFR would have stipulated to and initial 30-day extension and would have not opposed additional extensions if Chase chose to seek the same.

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[1] 130 Nev. ___, 334 P.3d 246 (2014)
[2] 130 Nev. ___, 327 P.3d 518 (2014).
[3] 132 Nev. ___, 383 P.3d 246, 251-252 (2016).

5. SFR does not believe that Chase has shown good cause to extend briefing an additional 6-months, especially since the focus of the petition in *Bourne Valley* is narrowly focused on the state actor issue and any petition in Saticoy Bay would necessarily be similarly focused. *See Bourne Valley Court Trust v. Wells Fargo, N.A.*, Supreme Court Case No. 16-1208, Petition for Writ of Certiorari (April 3, 2017), attached hereto for the Court's convenience. This Court should deny the motion.

DATED this 12th day of April, 2017.

KIM GILBERT EBRON

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CERTIFICATE OF SERVICE

I certify that on April 12, 2017, I filed the foregoing Opposition to Motion to Extend Deadline to File Opening Brief and Appendix. The following participants will be served via the Court's eflex service system:

Master Service List

Docket Number and Case Title: 71839 - JPMORGAN CHASE BANK, N.A. VS. SFR INV.'S POOL 1, LLC
Case Category Civil Appeal
Information current as of: Apr 12 2017 05:35 p.m.

Electronic notification will be sent to the following:

Matthew Lamb
Lindsay Demaree
Abran Vigil

DATED this 12th day of April, 2017.

/s/Jacqueline A. Gilbert
An employee of Kim Gilbert Ebron

No. 16-___

IN THE

Supreme Court of the United States

BOURNE VALLEY COURT TRUST,

Petitioner,

v.

WELLS FARGO BANK, N.A.,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Like most states, Nevada provides that when a senior creditor forecloses on a lien on real property, junior lienholders are entitled to claim any proceeds in excess of the amount necessary to satisfy the foreclosing creditor's claims, but that the sale otherwise extinguishes their liens. Like the majority of states, Nevada allows "nonjudicial foreclosures," which do not require the filing of a lawsuit or any other material government involvement. In numerous states, the statute regulating nonjudicial foreclosures does not require direct notice to junior lienholders whose liens will be extinguished by the private sale.

In this case, the Ninth Circuit held that passage of Nevada's relevant statute rendered the regulated nonjudicial sales a form of state action subject to the Due Process Clause of the Fourteenth Amendment, construed the statute as not requiring notice to junior lienholders, and held the statute facially unconstitutional for failing to require such notice. The Nevada Supreme Court later upheld the same provisions, holding that enactment of the statute did not convert the private sales into state action, expressly disagreeing with the Ninth Circuit decision in this case. The Question Presented is:

Whether the Ninth Circuit erred in holding that Nevada's statute authorizing nonjudicial foreclosure of association liens, NEV. REV. STAT. §§ 116.3116 *et seq.*, was facially unconstitutional under the Due Process Clause for not requiring direct notice to junior lienholders, when the only state action involved was the enactment of the statute regulating the private sale.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

Petitioner Bourne Valley Court Trust respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-27a) is published at 832 F.3d 1154. The opinion of the district court (Pet. App. 28a-42a) is published at 80 F. Supp. 3d 1131.

JURISDICTION

The judgment of the court of appeals was entered on August 12, 2016. Pet. App. 1a. The court of appeals denied petitioner's timely petition for rehearing en banc on November 4, 2016. Pet. App. 43a-44a. On January 30, 2017, the Justice Kennedy extended the time to file this petition through March 6, 2017. No. 16A753. On February 24, 2017, the Justice Kennedy further extended the time to file this petition through April 3, 2017. *Id.* This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The relevant provisions of Nevada Revised Statutes §§ 116.31162, 116.31163, 116.311635, 116.31168 are included in Appendix D of this petition.

STATEMENT OF THE CASE

This petition arises from a conflict most directly between the Ninth Circuit and the Nevada Supreme Court over the constitutionality of a Nevada statute. That conflict has thrown into disarray hundreds of cases pending in state and federal courts in the aftermath of the mass foreclosures during the recent recession. The conflict is so untenable that Wells Fargo, respondent in this case and the losing party in the Nevada Supreme Court, has obtained a stay of the Nevada judgment pending its planned filing of a petition for a writ of certiorari in this Court on the same basic question.

The decision below also created a circuit conflict over a broader, even more important question of constitutional law that affects the real estate foreclosure laws of many other states as well. In particular, the courts are divided over whether nonjudicial foreclosures constitute a form of state action subject to the notice and other requirements of the Due Process Clause. The decision below would condemn as facially unconstitutional the laws of at least ten other states besides Nevada (including the law in at least one other state in the Ninth Circuit), despite multiple decisions by other circuits and state supreme courts holding that those state statutes are not subject to Due Process challenge, for lack of state action.

I. Legal Background

1. State laws pervasively permit lenders, homeowners' associations, taxing authorities, repairmen, and others to secure payment by recording a lien on the debtor's real property. When

the debt is defaulted, the lienholder may foreclose on the property, causing it to be sold. The distribution of the proceeds is determined by the priority of the liens, which is established by state law (often by statute). If the sale produces less money than is needed to satisfy all the creditors, those with liens of lesser priority (often called "junior" lienholders) may not be paid.

State law also determines what happens to the liens after the sale is completed. A foreclosure sale ordinarily extinguishes all liens junior to the lien being foreclosed upon, but leaves intact any senior liens. *See, e.g.*, GRANT S. NELSON ET AL., REAL ESTATE FINANCE LAW § 7:20 (6th ed. 2014) [hereinafter REAL ESTATE FINANCE LAW]; RESTATEMENT (THIRD) OF PROPERTY (MORTGAGES) § 7.1 cmt. a; *see also United States v. Brosnan*, 363 U.S. 237, 250 (1960) (noting that a "private sale of its own force [is] effective under California law to extinguish all junior liens"). This established rule allows the purchaser to take title to the foreclosed property free and clear of the junior liens, thereby removing a practical impediment to the remedy's effectiveness.

2. Many homes (particularly in states like Nevada) are developed as part of a planned community, in which important services are provided by a homeowners' association (HOA) rather than the local government. In order to finance these services, homeowners are required to pay fees to the HOA. If the fees are not paid, many states permit the HOA to put a lien on the home owner's property. *See* Ryan Prsha, Note, *Are Non-Judicial Sales Unconstitutional? The Super-Priority Lien and Its*

Influence on State Foreclosure Statutes, 81 MO. L. REV. 917, 921 (2016).

When homeowners experience financial distress, they may stop paying HOA fees, often in conjunction with ceasing mortgage payments. Particularly during tough economic times, the default can lead to cascading effects throughout the community – the HOA must increase dues for paying members to make up the deficit (thereby risking default by other, similarly distressed homeowners) or reduce services (thereby decreasing home values even further and possibly putting members under water on their mortgages). *Id.* at 920. To be sure, the HOA could file a lien on the property for the unpaid assessments. But so long as the HOA lien was junior to the mortgage, there often would be no point. Particularly in a down market, if the lender foreclosed, the sale often would not cover much more than the mortgage itself, leaving nothing for the HOA as a junior lienholder. And, indeed, if prices were suppressed sufficiently, the lender might prefer to wait to foreclose until market conditions improved. At the same time, if the HOA foreclosed as the junior lienholder, it would be forced to sell the property with the mortgage lien still attached (an unattractive proposition for most potential buyers) or pay off the mortgage before, or as part of, the sale (which might cost more than the sale price).

In response, a number of states enacted statutes to provide HOA's a "super-priority lien" for a portion of back dues. *See id*. at 921 ("Twenty different states have . . . creat[ed] a super-priority lien status for association dues."). Many of the statutes were modeled on provisions of the Uniform Condominium

Act, the Uniform Common Interest Ownership Act, or the Uniform Planned Community Act.[1]

In Nevada, for example, Section 116.3116(2) of the Nevada Revised Statutes gives an HOA's lien priority over even a first mortgage for nine months of unpaid dues (the lien for the rest of the dues having its ordinary priority behind the mortgage and other liens).

The Nevada Supreme Court, consistent with the decisions of other courts construing similar statutes, has held that the HOA super priority lien operates like any other senior lien – when the HOA forecloses on it, all junior lienholders are entitled to any proceeds in excess of the amount of the HOA's lien but the junior liens are extinguished. *See SFR Investments Pool 1, LLC v. U.S. Bank, N.A.*, 334 P.3d 408, 411-14 (Nev. 2014).[2] Accordingly, just as a foreclosure initiated by the holder of a first mortgage can extinguish a second mortgage, an HOA foreclosure will extinguishes the lien held by a bank with a first mortgage or deed of trust on the property. *Id*. at 419.

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[1] *See* Note, *Priority of Condominium Associations' Assessment Liens Vis-à-Vis Mortgages: Navigating in the Super-Priority Lien Jurisdictions*, 40 SEATTLE U. L. REV. 841, 843-44 (2017) [hereinafter *Priority of Condominium Associations' Assessment Liens*].

[2] *See also Chase Plaza Condo. Ass'n v. JPMorgan Chase Bank, N.A.*, 98 A.3d 166, 172-78 (D.C. 2014); *Summerhill Village Homeowners Ass'n v. Roughley*, 289 P.3d 645 (Wash. Ct. App. 2012).

3. State law generally authorizes foreclosure on a lien on real property through one or both of two methods.

First, a "judicial foreclosure" is commenced by filing an action in state court, which adjudicates the lienholder's assertion of default and any other relevant issues before authorizing sale of the property. REAL ESTATE FINANCE LAW §§ 7:12, 7:20.

Second, many states have a long history of permitting "nonjudicial foreclosures" that bypass the need for judicial or other state involvement when the process is permitted by the terms of the governing financial agreement. *See, e.g.*, REAL ESTATE FINANCE LAW § 7:20 (process is "available in thirty-five jurisdictions"); *Barrera v. Sec. Bldg. & Inv. Corp.*, 519 F.2d 1166, 1172 (5th Cir. 1975) (tracing practice's roots to colonial times). In a nonjudicial foreclosure, "[a]fter varying types and degrees of notice, the property is sold at a public sale, either by a public official, such as a sheriff, by some other third party, or by the mortgagee." REAL ESTATE FINANCE LAW § 7:20.[3]

Nevada permits nonjudicial foreclosures to collect on HOA liens when authorized under the terms of the HOA declaration. NEV. REV. STAT.

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[3] Nonjudicial foreclosures are sometimes called "power of sale" foreclosures, referring to the "power of sale" afforded the lender or a trustee under the mortgage or deed of trust. *See* REAL ESTATE FINANCE LAW § 7:20.

§ 116.31162(1).[4] Before foreclosing, the HOA must, among other things, provide direct notice to the homeowner,[5] record a notice of default and election to sell the property,[6] and send a copy of such notice to "[e]ach person who has requested notice" in a document recorded in title records.[7]

"Mortgagors and junior lienors have challenged the constitutionality" of nonjudicial foreclosure laws, pointing to the lack of pre-deprivation judicial hearings and allegedly inadequate notice. REAL ESTATE FINANCE LAW § 7:24 & n.738 (collecting decisions). For the most part, courts have held that the Due Process Clause does not apply because nonjudicial foreclosures do not involve the state action required to invoke the protections of the Fourteenth Amendment. *See id*. at § 7:28. As

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[4] Unless otherwise indicated, cites to Nevada statutes are to the version in effect at the time of the 2012 foreclosure sale in this case.

[5] *Id*. § 116.31162(1)(a).

[6] *Id*. § 116.31162(1)(b).

[7] *Id*. § 116.31163(1); *see also id*. § 116.31168(1) (allowing interested persons to record such requests). Petitioner and respondent have disputed whether the statute applicable at the time of the foreclosure in this case also required the HOA to provide notice to all recorded lienholders whether they requested it or not. *See* Pet. App. 11a-12a. The Ninth Circuit construed the statute not to require such notice. *Id*. 10a-12a. Recently, the Nevada legislature amended the statute to remove any ambiguity, expressly requiring direct notice to all recorded lienholders. *See* NEV. REV. STAT. § 116.31163(2); Pet. App. 12a n.4. However, as discussed *infra* at 18-22, the amendment does not diminish the need for review.

discussed next, the Ninth Circuit split from that settled authority in this case.

II. Factual And Procedural History

In 2012, petitioner bought a property at an HOA nonjudicial foreclosure sale authorized by Nevada Revised Statutes Sections 116.3116 *et seq.* Pet. App. 4a-5a. As a matter of Nevada law, the sale extinguished all junior liens, including a first trust held by respondent Wells Fargo. *Id*. 5a-6a.

Petitioner subsequently filed an action to quiet title in Nevada state court, which was removed to federal court. Wells Fargo opposed the quiet title action, alleging that the Nevada statute failed to require constitutionally adequate notice to affected lienholders. Respondent did not dispute that the HOA had given notice to the homeowners and duly recorded its lien and Notice of Default and Election to Sell, as required by statute. Nor did Wells Fargo contend that it had ever recorded a request to receive direct notice of such a sale as permitted by the state law. Indeed, Wells Fargo failed even to "present evidence that it did not receive notice." Pet. App. 8a.

Instead, respondent claimed that even if it *had* received actual notice, the foreclosure was invalid because the statute authorizing it was unconstitutional *on its face* due to its failure to require direct notice to those whose liens might be extinguished by the sale.

The district court rejected that argument and granted petitioner summary judgment, Pet. App. 33a-37a, but a divided Ninth Circuit panel reversed, *id*. 15a. The panel majority first concluded that, assuming the Due Process Clause applied, the

statute's "opt-in" notice regime failed to satisfy it, rendering the statute unconstitutional on its face. *Id*. 6a-12a.

The court then turned to "Bourne Valley's strongest argument[, which] is that there has been no 'state action' for purposes of constitutional due process." *Id*. 13a. The majority acknowledged that under this Court's precedents "state action requires both an alleged constitutional deprivation caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible, and that the party charged with the deprivation must be a person who may fairly be said to be a state actor." *Id*. (quoting *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50 (1999) (emphasis omitted) (internal quotation marks and citation omitted)). The court further admitted that "the foreclosure sale itself is a private action." *Id*. And it "acknowledge[d] that there is no state action here that 'encourages' or 'compels' a homeowners' association to foreclose on a property." *Id*. (citation omitted).

Nonetheless, the majority concluded that in "this context, where the mortgage lender and the homeowners' association had no preexisting relationship, the Nevada Legislature's enactment of the Statute is a 'state action.'" *Id*. The court acknowledged this Court's decision in *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149 (1978), Pet. App. 14a, in which the Court expressly rejected the claim that "the mere existence of a body of property law in a State, whether decisional or statutory, itself amounted to 'state action' even though no process or state officials were ever involved in enforcing that

body of law." *Flagg Bros., Inc.*, 436 U.S. at 160 n.10. But the Ninth Circuit distinguished the decision on the ground that "unlike in this case, . . . the parties had a preexisting contractual relationship as creditor and debtor." Pet. App. 14a.[8] In the absence of such a relationship, the court held, a state's enactment of a statute authorizing a nonjudicial foreclosure that can extinguish junior liens constitutes state action subject to the Due Process Clause. Pet. App. 14a-15a

Judge Wallace dissented, rejecting, among other things, the majority's position that mere enactment of a statute regulating private conduct can render the private action state action subject to the Due Process Clause. *Id.* 15a-27a.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit's holding that an important state statute is facially unconstitutional is reason enough to grant review. The Nevada Supreme Court's subsequent rejection of that holding makes review imperative – the results of hundreds of cases arising from the state's foreclosure crisis during the last recession now turn on whether a quiet title action under Nevada law is decided in state or federal court.

The decision below also conflicts with the decisions of at least six circuits and eight state courts of last resort that have rejected the argument that a

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[8] *But see Flagg Bros., Inc.*, 436 U.S. at 153 (plaintiff's personal property was put into the defendant's storage facility involuntarily, by the city marshal in the course of an eviction); *id*. at 160 (plaintiff "alleges that she never authorized the storage of her goods").

state's enactment of a statute regulating nonjudicial foreclosure renders the foreclosures a form of state action subject to the Due Process Clause. At the same time, the Ninth Circuit's contrary ruling draws into constitutional doubt the nonjudicial foreclosure laws of at least ten other states, including Arizona's in the Ninth Circuit. The decision thus casts a cloud on the title of countless properties sold in compliance with statutes whose constitutionality was reasonably deemed settled decades ago. This Court must intervene.

I. Federal Courts Of Appeals And State Courts Of Last Resort Are Divided Over Whether Nonjudicial Foreclosure Statutes Render Such Foreclosures A Form Of State Action Subject To The Due Process Clause.

The Ninth Circuit's decision conflicts with a recent decision of the Nevada Supreme Court as well as the law of numerous circuits and states.

A. The Ninth Circuit And Supreme Court Of Nevada Have Expressly Disagreed Over The Question Presented In Ruling On The Constitutionality Of The Same State Statute.

The facts of the Nevada case, *Saticoy Bay LLC Series 350 Durango 104 v. Wells Fargo Home Mortg.*, 388 P.3d 970 (Nev. 2017), largely mirror the facts in this one. As here, a homeowners' association availed itself of Nevada's nonjudicial foreclosure statute to foreclose on a lien for unpaid HOA dues. *Id*. at 971-72. The purchaser then filed suit against the previous holder of the first mortgage on the property, Wells Fargo, who is also the respondent in this case.

The new owner sought a declaration that it had taken the property free and clear of any encumbrances or liens. *Id*. at 972. Wells Fargo argued that "the foreclosure procedures specified in NRS 116.3116 *et seq*. are facially unconstitutional because they do not require an HOA to give a first security interest holder actual notice of a foreclosure that, once conducted, may extinguish the security interest." *Id*.

The Nevada Supreme Court rejected that argument on the ground that "an HOA acting pursuant to NRS 116.3116 *et seq*. cannot be deemed a state actor." *Id*. at 973. Quoting this Court's decision in *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 936 (1982), the Nevada Supreme Court explained that "[a]ction by a private party pursuant to [a] statute, *without something more*, [is] not sufficient to justify a characterization of that party as a 'state actor.'" *Id.* (emphasis and alterations in original). The court noted the decisions of other federal circuits recognizing that nonjudicial foreclosure statutes do not involve state action and therefore do not "implicate due process." *Id*. (citing, *e.g.*, *Levine v. Stein*, 560 F.2d 1175 (4th Cir. 1977); *Northrip v. Fed. Nat'l Mortg. Ass'n*, 527 F.2d 23 (6th Cir. 1975)).

The Court further directly "reject[ed] Wells Fargo's argument," accepted by the Ninth Circuit in this case, "that the Legislature may be charged with the deprivation because it enacted" the governing statute. *Id*. In doing so, the court relied on this Court's decision in *Flagg Brothers*, which it read to hold that "although the state had enacted the statute, due process was not implicated because the statute did not compel such a sale, and the state was not

otherwise involved in such a sale." *Saticoy Bay*, 388 P.3d at 932 (citing *Flagg Bros.*, 436 U.S. at 157, 166). "Given this federal precedent, the Legislature's mere enactment of [the statute] does not implicate due process absent some additional showing that the state compelled the HOA to foreclose on its lien, or that the state was involved with the sale." *Id*. Finding that "[n]either has been demonstrated here," the court rejected Wells Fargo's due process claim. *Id*. at 973-74.[9]

In so holding, the Nevada Supreme Court expressly "acknowledge[d] that the Ninth Circuit has recently held that the Legislature's enactment of NRS 116.3116 *et seq.* does constitution state action," citing this case. *Id*. at 974 n.5. "However, for the aforementioned reasons, we decline to follow its holding." *Id*.

Wells Fargo subsequently applied for, and was granted, a stay of the judgment to permit it to file a petition for a writ of certiorari challenging the Nevada Supreme Court's state action holding. *See* Motion to Stay Remittur, *Saticoy Bay LLC Series 350 Durango 104 v. Wells Fargo Home Mortg*., 388 P.3d 970 (Nev. 2017) (No. 68630); Order Granting Motion to Stay Remittur, *Saticoy Bay LLC Series 350 Durango 104 v. Wells Fargo Home Mortg*., (No. 68630) (Nev. Feb. 8, 2017).

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[9] Having found no state action, the court decided it "need not determine" whether the statute in fact required direct notice to Wells Fargo. *Id*. at 974.

B. The Ninth Circuit's Decision Is In Conflict With The Law Of Other Circuits And States.

The Ninth Circuit held that enactment of a statute regulating nonjudicial foreclosure renders the otherwise private foreclosures a form of state action so long as the private sale can affect the property rights of lienholders who have no pre-existing contractual relationship with the foreclosing party. Pet. App. 14a-15a. Because nonjudicial foreclosure has the potential of affecting junior lienholders under the settled property law of nearly every state,[10] that holding effectively subjects all (or substantially all) states' nonjudicial foreclosure statutes to Due Process scrutiny, in contravention of the decisions of the majority of circuits and many state courts of last resort.

The D.C., First, Fourth, Fifth, Sixth, and Eighth Circuits have all held that nonjudicial foreclosure statutes involve no state action even when authorized by state statute. *See Bryant v. Jefferson Fed. Sav. & Loan Ass'n*, 509 F.2d 511, 514 (D.C. Cir. 1974) (agreeing with decisions "rejecting the argument that the mere enactment of the statute constituted government action"); *Grapetine v. Pawtucket Credit Union*, 755 F.3d 29, 33 (1st Cir. 2014) (same for Rhode Island statute); *Levine v. Stein*, 560 F.2d 1175 (4th Cir. 1977) (same for Virginia statute); *Barrera v. Sec. Bldg. & Inv. Corp.*, 519 F.2d 1166, 1170-72 (5th

[10] *See supra* at 3.

Cir. 1975) (same for Texas statute);[11] *Northrip v. Fed. Nat'l Mortg. Ass'n*, 527 F.2d 23, 26-28 (6th Cir. 1975) (same for Michigan statute); *Staley Farms, Inc. v. Rueter*, 662 F.2d 520, 520-22 (8th Cir. 1981) (same for Iowa statute);[12]

At least eight state supreme courts have held the same. *See, e.g.*, *Pappas v. Eastern Sav. Bank, FSB*, 911 A.2d 1230, 1237 (D.C. 2006) (finding no state action in District of Columbia's nonjudicial foreclosure statute); *Putensen v. Hawkeye Bank of Clay County*, 564 N.W.2d 404, 409-10 (Iowa 1997) (same for Iowa statute); *Cramer v. Metro. Sav. & Loan Ass'n*, 258 N.W.2d 20, 259-60 (Mich. 1977) (same for Michigan statute); *Leininger v. Merchants & Farmers Bank, Macon*, 481 So.2d 1086, 1090 (Miss. 1986) (same for Mississippi statute); *Fed. Nat'l Mortg. Ass'n v. Howlett*, 521 S.W. 2d 428, 432 (Mo. 1975) (same for Missouri statute); *Saticoy Bay*, 388 P.3d at 972-74 (same for Nevada statute); *Kennebec, Inc. v. Bank of the West*, 565 P.2d 812, 814-16 (Wash.

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[11] *Compare Davis Oil Co. v. Mills*, 873 F.2d 774, 779-81 & n.12 (5th Cir. 1989) (finding state action in Louisiana foreclosure regime where "the sheriff seizes the property and advertises and conducts the sale," such that "the state not only provides the legal framework whereby other interests in the subject property are terminated, it is also 'intimately involved' with the execution of the procedures which accomplish the termination of such interests").

[12] *See also, e.g.*, *Warren v. Government Nat'l Mortg. Ass'n*, 611 F.2d 1229, 1233-35 (8th Cir. 1980) (no federal government action when federally owned private corporation availed itself of Missouri's nonjudicial foreclosure process, even though power of sale provisions in trust required government approval).

1977) (same for Washington statute); *Kottcamp v. Fleet Real Estate Funding Corp.*, 783 P.2d 170, 171-72 (Wyo. 1989) (same for Wyoming statute).

Notably, in a number of these cases, the courts confronted statutes that did not require the individual direct notice the Ninth Circuit held due process requires. *See, e.g.*, *Barrera*, 519 F.2d at 1167 n.2, 1169 (Texas statute requiring only that notice be posted in three public places); *Northrip*, 527 F.2d at 25 (Michigan statute requiring only notice by advertisement and posting on property); *Cramer*, 258 N.W.2d at 22 (same); *Leininger*, 481 So.2d at 1087-88 (Mississippi statute requiring only notice by publication); *Howlett*, 521 S.W.2d at 430 (same for Missouri statute).[13]

To be sure, many of these cases did not directly discuss the fact that the foreclosure would extinguish junior liens. But that fact was obvious, a well-known feature of settled state property law. *See, e.g.*, REAL ESTATE FINANCE LAW § 7:20; RESTATEMENT (THIRD) OF PROPERTY (MORTGAGES) § 7.1 cmt. a ("A power of sale (nonjudicial) foreclosure that complies with applicable statutory notice and related requirements accomplishes" the extinguishment of all junior liens); *Barrera*, 519 F.2d at 1170 (explaining that a "sale under a deed of trust, to be an effective creditor remedy, must of course pass good title," and that the

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[13] *But cf. Island Fin., Inc. v. Ballman*, 607 A.2d 76 (Md. Ct. Spec. App. 1992) (finding due process violation when second mortgage extinguished without direct notice after nonjudicial foreclosure instituted by senior lienholder, where parties did not dispute state action was involved).

remedy thus depends "on the state's acknowledgement of the legal effect of the involuntary change in ownership brought about by the exercise of the power of sale"); *Putensen*, 564 N.W.2d at 406 (noting that consequence of nonjudicial foreclosure is that "[a]ll liens which are inferior to the lien of the foreclosed mortgage are extinguished").

The Ninth Circuit's reasoning is so contrary to this Court's clear holding and rationale in *Flagg Brothers*, *see infra* § III, it is not surprising that few courts have directly confronted it. But those courts that have addressed versions of the argument have resoundingly rejected it. For example, in *Pappas v. Eastern Savings Bank, FSB*, the District of Columbia Court of Appeals rejected a due process claim by junior lienholders who received no notice of a sale that extinguished their liens. *See* 911 A.2d at 1233, 1237. The court concluded that under *Flagg Brothers* a foreclosing party's availment of a nonjudicial foreclosure process "is not conduct that can be ascribed to a state." *Id*. (citing *Flagg Brothers*, 436 U.S. at 166).

Michigan's Court of Appeals has likewise applied its state supreme court's decision finding no state action in nonjudicial foreclosures to reject a plaintiff's request for "a declaratory ruling that he, as a junior mortgagor, was entitled to personal notice rather than notice by publication when defendant foreclosed by advertisement her senior mortgage." *Cheff v. Edwards*, 513 N.W.2d 439, 440-41 (Mich. Ct. App. 1994) (relying on *Cramer*, 258 N.W.2d at 20).

Accordingly, had this case been brought in nearly any other circuit, Wells Fargo's Due Process claim

would have been rejected out of hand on the basis of settled circuit precedent. That kind of disparate treatment of similarly situated parties on the basis of nothing more than geographical happenstance should not persist.

II. The Question Presented Is Of Enormous Practical And Doctrinal Significance.

The Question Presented warrants review as well because the conflict – both between state and federal courts in Nevada, and between state and federal courts generally – is completely untenable.

A. The Conflict Between The Ninth Circuit And Nevada Supreme Court Has Left Hundreds Of Cases In Limbo.

1. Nevada was particularly hard hit in the Great Recession, triggering one of the highest rates of foreclosure in the country and a dramatic fall in real estate prices.[14] During this time, HOAs foreclosed on a great many homes. *See generally* Kylee Gloeckner, Note, *Nevada's Foreclosure Epidemic: Homeowner Associations' Super-Priority Liens Not So "Super" for Some*, 15 NEV. L.J. 326 (2014).

There are presently *hundreds* of cases in the Nevada state and federal courts questioning the title

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[14] *See, e.g.*, Jack Healy, *Underwater in the Las Vegas Desert, Years After the Housing Crash*, New York Times (Aug. 2, 2016), *available at* https://www.nytimes.com/2016/08/03/us/las-vegas-2008-housing-crash.html; Jan Hogan, *Strip left reeling: Picking up the pieces after the Great Recession*, Las Vegas Review-Journal (Mar. 27, 2016), a*vailable at* http://www.reviewjournal.com/business/neon-rebirth/strip-left-reeling-picking-the-pieces-after-the-great-recession.

of properties sold at HOA nonjudicial foreclosures under the statute the Ninth Circuit declared facially unconstitutional but the Nevada Supreme Court sustained. *See, e.g.*, Mortgage Bankers Assoc., *Homeowners and Condominium Associations Should Not Be Granted "Super Lien" Priority*, https://www.mba.org/issues/residential-issues/hoa-super-lien-priority ("Over 1,000 Nevada cases continue to be litigated to determine whether clear title existed for property purchasers at HOA foreclosure sales, and subsequently whether proper notice was given by HOAs to first lien mortgagees before these sales were executed."). Presently, resolution of those cases, worth hundreds of millions of dollars, will depend on nothing more than the happenstance of whether they are decided in state or federal court.

As a result, the split between Nevada's state and federal courts has triggered forum shopping on a massive scale, with parties seeking to remove (or prevent the removal) of hundreds of cases from state to federal courts. For example, Bank of America recently attempted to remove more than 150 quiet title cases from state court to federal bankruptcy court (putatively on the ground that a law firm involved in the sales has gone bankrupt), telling the bankruptcy court it intends to seek summary judgment on the basis of the decision in this case.[15]

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[15] *See* Emergency Motion to Set Hearing on Shortened Time Bank of America, N.A's Motion to Set Case Management Conference In Removed Matters and Set Interim Procedures, *In re: Aleissi & Koenig, LLC*, Docket Entry 329, No. 16-16593-abl, at 1 (D. Nev.)

2. To be sure, the Nevada legislature has now amended state law to unambiguously require HOAs to provide direct notice to junior lienholders in future foreclosures. *See* Pet. App. 12a-13a n.4. But that change has no effect on the validity of the sales that have already taken place under the prior version of the statute or on the hundreds of pending cases challenging the title obtained in those sales.

Moreover, the Ninth Circuit's decision subjects every aspect of the state's revised nonjudicial foreclosure regime to Due Process challenge. Litigants are now free, for example, to argue that the details of the notice requirements fail to provide adequate notice. *See, e.g.*, NEV. REV. STAT. § 116.31162(1)(a)-(b), 116.311635 (2017) (requiring notice only of election to sell, not initial notice of delinquency); *id*. § 116.311635(1)(d)(2) (2017) (requiring notice only to lienholders who have recorded their interests, only if the lien was recorded before the notice of sale, and only to the address recorded in a state database); *id.* § 116.31162(1)(b) (2017) (describing content of required notice to homeowners and lienholders); *id*. § 116.31162(1)(a)-(c) (2017) (prescribing timing of notice relative to sale).

The prospect of future Due Process challenges is more than mere hypothesis. Such challenges have been brought against even states that require notice to junior lienholders, alleging deficiencies in other aspects of their statutory procedures. *See, e.g.*, *First Sec. Bank N.A. v. Chase Manhattan Mortg. Corp*., No. E033880, 2004 WL 1234104, at *3 (Cal. Ct. App. June 4, 2004) (rejecting Due Process claim by junior lienholder who was not entitled to notice under state

statute due to failure to record a judgment lien, finding lack of state action); *Homestead Sav. v. Darmiento*, 281 Cal. Rptr. 367, 368-69 (Ct. App. 1991) (rejecting junior lienholder's claim that state statute "violated its due process rights" insofar as it provided "that a bona fide purchaser for value at a trustee's sale conducted as part of a nonjudicial foreclosure under a trust deed is entitled to a conclusive presumption as to a trustee's compliance with statutory notice requirements").

B. The Circuit Conflict Has Important Ramifications Outside Of Nevada As Well.

The circuit conflict also draws into question the constitutionality of many other state foreclosure regimes, casting a cloud on the title of countless properties sold through nonjudicial foreclosures.

1. The decision below establishes a principle of law that would render nonjudicial foreclosures a form of state action in most states and would render unconstitutional the nonjudicial foreclosure statutes in at least ten of them.

a. The Ninth Circuit held in this case that a nonjudicial foreclosure sale is a form of state action if: (a) a state statute provides that the sale will extinguish a lien; and (b) the affected lienholder is not in contractual privity with the foreclosing party; *See* Pet. App. 14a-15a. That describes virtually every nonjudicial foreclosure regime in existence.

Certainly, the holding below applies to the more than twenty states that give HOA or condominium

liens super-priority over mortgages, including five within the Ninth Circuit.[16] Given the settled principle that a foreclosure extinguishes junior liens, *see supra* at 3, the creation of a super-priority lien inevitably subjects lenders' liens to extinction when an HOA forecloses. And, as the Ninth Circuit noted below, the lenders generally are not parties to the agreement between the homeowner and the HOA that authorizes nonjudicial foreclosure on an HOA lien.

But the rule also applies more generally to the far more common circumstance in which a first mortgage holder forecloses on a home securing a second mortgage to a different lender. In that circumstance, the nonjudicial foreclosure by the senior lienholder also extinguishes the junior lienholder's second mortgage. And the holder of the second mortgage generally is not a party to the agreement between the homeowner and the provider of the first mortgage.[17]

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[16] *See Priority of Condominium Associations' Assessment Liens*, *supra*, at 846 ("Currently, twenty-one states, the District of Columbia, and Puerto Rico have assessment priority lien statutes . . . ."); *id*. at 846 n.37 (listing Alaska, Nevada, Hawaii, Washington, and Oregon as having super-priority liens).

[17] The Ninth Circuit's rule would also apply to other self-help procedures available to creditors in a range of contexts. *See, e.g.*, *Jarvis v. Vill. Gun Shop, Inc*., 805 F.3d 1 (1st Cir. 2015) (rejecting due process challenge to private sale of property by warehouse for lack of state action); *Wittstock v. Mark A. Van Sile, Inc*., 330 F.3d 899, 901 (6th Cir. 2003) (same for private sale by tax sale purchaser); *Shirley v. State Nat'l Bank of Conn.*, 493 F.2d 739 (2d Cir. 1974) (same for self-help auto repossession statute).

2. Ruling that virtually every nonjudicial foreclosure statute is subject to Due Process scrutiny might not be so consequential if it were clear that every state's statutes (except Nevada's) complied with every possible Due Process requirement. But the opposite is true. As one treatise has observed, "[i]f the requisite state action is present, the notice provisions of many state power of sale statutes do violate the requirements of procedural due process." REAL ESTATE FINANCE LAW § 7:25.

Indeed, on petitioner's count, the nonjudicial foreclosure statutes of at least ten states and the District of Columbia would be facially unconstitutional under the Ninth Circuit's decision. Two jurisdictions that separately regulate HOA super-priority liens fail to require direct notice to all junior lienholders whose rights will be affected by an HOA foreclosure. *See* D.C. CODE § 42-1903.13(c)(4)-(5) (requiring only notice to homeowner and mayor's office); MICH. COMP. LAWS § 559.208(9) (notice required only for homeowner and first mortgagee, not other junior lienholders). Other states' general nonjudicial foreclosure provisions would also not pass muster. Missouri requires direct notice to the homeowner, but otherwise has the same opt-in notice system the Ninth Circuit declared unconstitutional in this case.[18] Eight other states require direct notice to the homeowner but provide junior lienholders notice only by advertisement or publication.[19] Finally, the

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[18] *See* MO. REV. STAT. §§ 443.320, 443.325; Prsha, *supra* at 922.

[19] *See* ALA. CODE § 35-10-13; GA. CODE ANN., § 44-14-162.2; MICH. COMP. LAWS § 600.3208; MINN. STAT. § 580.03; MISS.

only notice required in Arizona (located within the Ninth Circuit) and the District of Columbia is recording the notice of sale in the jurisdiction's land records.[20]

Even more importantly, the decision below lays the groundwork for challenges to the lack of a pre-deprivation hearing, which is ordinarily required to satisfy minimum due process standards. *See, e.g.*, REAL ESTATE FINANCE LAW § 7:26 ("Power of sale statutes frequently have been challenged on the ground that the Fourteenth Amendment Due Process Clause requires the opportunity for a hearing before a person may be deprived of a significant property interest." (citing *Sniadach v. Family Fin. Corp. of Bay View*, 395 U.S. 337 (1969) and *Fuentes v. Shevin*, 407 U.S. 67 (1972)); *see* also REAL ESTATE FINANCE LAW § 7:26 ("Several courts have cited *Fuentes* to invalidate power of sale provisions" when state action found); *id*. n.772 (collecting cases); *Charmicor, Inc. v. Deaner*, 572 F.2d 694, 695 (9th Cir. 1978) (rejecting earlier due process challenge to Nevada's general nonjudicial foreclosure statute based on lack of pre-sale hearing, finding no state action).

In short, in addition to throwing hundreds of cases into disarray and ensuring massively disparate treatment of identically situated Nevada property owners, the decision below draws into question the validity of the entire concept of nonjudicial foreclosures.

CODE ANN. § 89-1-57; R.I. GEN. LAWS § 34-27-4; TENN. CODE ANN. § 35-5-101; TEX. PROP. CODE ANN. § 51.002-51.

[20] *See* ARIZ. REV. STAT. ANN. § 33-807; D.C. CODE § 42-815.

A decision calling into constitutional question the settled law of so many states warrants this Court's review. *See* ROBERT L. STERN, ET. AL., SUPREME COURT PRACTICE § 4.12 (8th ed. 2002); *see also Flagg Bros.*, 436 U.S. at 155 (noting Court granted certiorari "to resolve the conflict over this provision of the Uniform Commercial Code, in effect in 49 States and the District of Columbia, and to address the important question it presents concerning the meaning of 'state action' as the term is associated with the Fourteenth Amendment"). This Court regularly grants certiorari to resolve circuit conflicts have far less significant and immediate effect on far fewer cases.

3. The constitutionality of nonjudicial foreclosure statutes has been recognized as an important issue not only by the courts, but by commentators and practioners many times over the years. *See, e.g.*, REAL ESTATE FINANCE LAW § 7:28; Henry L. Judy and Robert A. Witte, *Uniform Condominium Act: Selected Key Issues*, 13 REAL PROP. PROB. & TR. J. 437, 515-516 (1978); Kenneth M. Krock, *The Constitutionality of Texas Nonjudicial Foreclosure: Protecting Subordinate Property Interests from Deprivation Without Notice*, 32 HOUS. L. REV. 815 (1995); Prsha, *supra*. The state action question is thus thoroughly percolated and ready for this Court's review.

III. The Ninth Circuit's Decision Is Wrong.

The Ninth Circuit's decision also warrants review because it is plainly wrong.

The panel majority recognized that this case stands virtually on all fours with this Court's decision in *Flagg Brothers*. *See* Pet. App. 14a-15a. In both cases, the plaintiff complained of a sale conducted by

a private party with no material involvement of the state. *See Flagg Bros.*, 436 U.S. at 157; Pet. App. 13a (acknowledging that "the foreclosure sale itself is a private action" and that "there is no state action here that 'encourages' or 'compels' a homeowners' association to foreclose on a property"). In both cases, the details of the sale were subject to regulation by a state statute. *See Flagg Bros.*, 436 U.S. at 151-52; Pet. App. 14a. And in both cases, the private sale effected a change in property rights only because state law so provided. *Flagg Bros.*, 436 U.S. at 160 n.10; Pet. App. 14a.

The only basis the court of appeals gave for distinguishing *Flagg Brothers* was that "unlike in this case, . . . the parties had a preexisting contractual relationship as creditor and debtor." Pet. App. 14a (citing *Flagg Bros.*, 436 U.S. at 153). As a consequence, the court claimed, the "creditors' authority to extinguish the debtors' property rights arose out of the parties' contractual relationship." *Id*. In this case, by contrast, because Wells Fargo had no contractual relationship with the HOA. *Id.* 14a-15a. As a result, "the homeowners' association's ability to extinguish Wells Fargo's interest in the Property arose directly and exclusively from the statute." Id. 15a. In that circumstance, the Ninth Circuit held, enactment of a statute permitting private conduct to affect a unconsenting third-party's property rights renders that private conduct state action under the Fourteenth Amendment. *Id*. This reasoning fails at two basic levels.

First, it relies on a misdescription of *Flagg Brothers*. The plaintiff in that case had been evicted from her apartment by the city marshal. 436 U.S. at

153. Contrary to the Ninth Circuit's description, the plaintiff did not then contract with the defendant warehouse to store her goods. Instead, the "*city marshal* arranged for Brooks' possessions to be stored by petitioner Flagg Brothers, Inc., in its warehouse." *Id*. (emphasis added). The plaintiff thus "allege[d] that she never authorized the storage of her goods." *Id*. at 160.

Accordingly, it was "clear that, whatever power of sale the warehouseman has, it does not derive from the consent of the [plaintiff]." *Id.* at 169 (Stevens, J., dissenting); *see also id*. at 169 n.2 (noting that the lower courts had rejected the claim that there had been "an 'implied contract' between the warehouseman and respondents providing for the sale of respondents' possessions in satisfaction of a lien"). Instead, the "claimed power derives solely from the State, and specifically from § 7-210 of the New York Uniform Commercial Code." *Id*. 169 (Stevens, J., dissenting); *see also id*. at 151 & n.1 (majority opinion) (same).

Accordingly, this Court's decision in *Flagg Brothers* was not based on the premise that the plaintiff had consented to the sale, or that state law simply enforced an agreement between the seller and the person whose property rights were extinguished by the sale. Indeed, the Court specifically distinguished *Fuentes v. Shevin*, 407 U.S. 67 (1972), explaining that "[t]he 'consent' inquiry in *Fuentes* occurred only after the Court had concluded that state action for the purposes of the Fourteenth Amendment was supplied by the participation in the seizure on the part of the sheriff." *Id*. at 160 n.10 And it rejected the dissent's position that the

plaintiff's "lack of consent to the deprivations triggers affirmative constitutional protections which the State is bound to provide." *Id*.[21]

Instead, the Court relied on the facts that no state actors were involved in the sale, *see id*. at 157 (majority opinion), that the sale involved no exercise of exclusively sovereign powers, *id*. at 157-64, and that the state neither encouraged nor compelled the sale, *id*. at 164-66. The Ninth Circuit acknowledged that each of these factors was present in this case as well. Pet. App. 13a.

Second, the court of appeals reasoned that even if the sale was strictly private, the extinguishment of Wells Fargo's property right was accomplished only by virtue of a state statute, rendering the sale state action. Pet. App. 14a-15a.[22] But the same was true in *Flagg Brothers* – the warehouseman's sale resulted

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[21] It was the *dissent* in *Flagg Brothers* that insisted that "a state statute which authorizes a private party to deprive a person of his property without his consent must meet the requirements of the Due Process Clause of the Fourteenth Amendment." 436 U.S. at 169 (Stevens, J., dissenting).

[22] There is language in the opinion that could be read as suggesting that the *passage* of the statute constituted the state action subject to due process constraints. *See* Pet. App. 14a. But the court obviously did not mean that the enactment of the statute was the event that deprived Wells Fargo of its property interest, as opposed to the private sale the statute authorized. Otherwise, it would follow that the State was compelled to provide respondent prior notice of the statute's *enactment* rather than prior notice of the *foreclosure*. The panel clearly held that only the latter was required. *Id*. 4a ("We hold that the Statute's 'opt-in' notice scheme . . . facially violated the lender's constitutional due process rights. . . .").

in a transfer of title to the goods in storage from the plaintiff to the purchaser only by operation of state law, which recognized the sale's validity. This Court expressly noted as much, explaining that

> [t]he validity of the property interests in these possessions which respondents previously acquired from some other private person depends on New York law, and the manner in which that same property interest in these same possessions may be lost or transferred to still another person likewise depends on New York law.

Id. at 160 n.10. But this Court unambiguously rejected the proposition that state law's role in defining who owned the goods sold upon foreclosure converted the private sale into state action:

> It would intolerably broaden, beyond the scope of any of our previous cases, the notion of state action under the Fourteenth Amendment to hold that the mere existence of a body of property law in a State, whether decisional or statutory, itself amounted to "state action" even though no process or state officials were ever involved in enforcing that body of law.

Id.

The same can be said of the decision in this case. The only state action identified by the Ninth Circuit was a "body of property law" that dictated that the buyer (like the buyer in *Flagg Brothers*) took title to the purchased property free and clear or certain

competing claims (claims of the evicted tenant in *Flagg Brothers*, claims of junior lienholders here).[23]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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[23] For the reasons given in Judge Wallace's dissent, Pet. App. 21a-27a, to the extent the Due Process Clause did apply to Nevada's statute, it was satisfied.

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BOURNE VALLEY COURT TRUST,
Plaintiff-Appellee,

v.

WELLS FARGO BANK, NA,
Defendant-Appellant.

No. 15-15233
D.C. No.
2:13-cv-00649-PMP-NJK

OPINION

Appeal from the United States District Court
for the District of Nevada
Philip M. Pro, Senior District Judge, Presiding

Argued and Submitted June 13, 2016
San Francisco, California

Filed August 12, 2016

Before: J. Clifford Wallace, Dorothy W. Nelson,
and John B. Owens, Circuit Judges.

Opinion by Judge D.W. Nelson;
Dissent by Judge Wallace

SUMMARY*

Nevada Foreclosures

The panel vacated the district court's summary judgment entered in favor of Bourne Valley Court Trust in the Trust's action to quiet title on real property that it had acquired after the property had been foreclosed by a homeowners' association.

Nevada Revised Statutes section 116.3116 *et seq*. strips a mortgage lender of its first deed of trust when a homeowners' association ("HOA") forecloses on the property based on delinquent HOA fees.

The panel held that the Statute's "opt-in" notice scheme, which required a HOA to alert a mortgage lender that it intended to foreclose only if the lender had affirmatively requested notice, facially violated the lender's constitutional due process rights under the Fourteenth Amendment to the Federal Constitution. The panel held that the "state action" requirement for purposes of constitutional due process was met by the Nevada Legislature's enactment of the Statute, which unconstitutionally degraded the mortgage lender's interest in the property. The panel remanded for further proceedings.

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* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Judge Wallace dissented because he would hold there was no state action, and because the Statute satisfied due process by incorporating another provision in the Nevada Revised Statues that required HOAs to provide written notice to a mortgage lender.

COUNSEL

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Michael F. Bohn (argued), Law Offices of Michael F. Bohn, Esq., Ltd., Las Vegas, Nevada, for Plaintiff-Appellee.

OPINION

D.W. NELSON, Circuit Judge:

Nevada Revised Statutes section 116.3116 *et seq.* (the Statute)[1] strips a mortgage lender of its first deed of trust when a homeowners' association forecloses on the property based on delinquent HOA

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[1] As discussed below, the Nevada Legislature recently amended the Statute. *See infra* footnote 4. Unless otherwise stated, all references to the Statute are to the unamended version, which all parties agree applies to this action.

dues. Before it was amended, it did so without regard for whether the first deed of trust was recorded before the HOA dues became delinquent, and critically, without requiring actual notice to the lender that the homeowners' association intends to foreclose.

We hold that the Statute's "opt-in" notice scheme, which required a homeowners' association to alert a mortgage lender that it intended to foreclose only if the lender had affirmatively requested notice, facially violated the lender's constitutional due process rights under the Fourteenth Amendment to the Federal Constitution. We therefore vacate the district court's judgment and remand for proceedings consistent with this opinion.

BACKGROUND

This case arises out of an action to quiet title to real property located at 410 Horse Pointe Avenue (the Property) purchased at a homeowners' association foreclosure auction in North Las Vegas, Nevada.

Renee Johnson, the original homeowner, purchased the Property in 2001 with a loan for $174,000 from Plaza Home Mortgage, Inc. (Plaza). The Property is part of a planned development governed by the Parks Homeowners' Association (Parks). Plaza recorded a deed of trust securing a note on the property, and Appellant Wells Fargo was assigned all beneficial interest in the note and deed of trust in February 2011.

Johnson fell behind on payments for her HOA dues, and Parks recorded a Notice of Delinquent Assessment Lien on August 30, 2011. The total amount due was $1,298.57. On October 12, 2011, Parks recorded a Notice of Default and Election to Sell. On April 9, 2012, Parks recorded a Notice of Trustee/Foreclosure Sale against the Property.

On May 22, 2012, a Trustee's Deed Upon Sale was recorded, reflecting that Horse Pointe Avenue Trust paid $4,145 at the homeowners' association foreclosure sale. Horse Pointe Avenue Trust conveyed its interest in the Property to Appellee Bourne Valley Court Trust (Bourne Valley).

Bourne Valley filed an action to quiet title in Nevada state court. The action was removed to the federal district court for the District of Nevada pursuant to 28 U.S.C. § 1441. The district court granted summary judgment for Bourne Valley.

The district court's ruling was based largely on the Nevada Supreme Court's decision in *SFR Investments Pool 1 v. U.S. Bank*, 334 P.3d 408 (Nev. 2014). There, the Nevada Supreme Court interpreted the Statute to give a homeowners' association a "super priority" lien on an individual homeowner's property for up to nine months of unpaid HOA dues. 334 P.3d at 419. As the Nevada Supreme Court interpreted the Statute, the foreclosure of a homeowners' association "super priority" lien extinguished all junior interests in the property, including even a mortgage lender's first deed of trust. Thus, following the Nevada Supreme Court's

interpretation of the Statute, the district court held that Parks's foreclosure extinguished Wells Fargo's interest in the Property.

Wells Fargo timely appealed.

JURISDICTION AND STANDARD OF REVIEW

The district court had jurisdiction pursuant to 28 U.S.C. § 1332. We have jurisdiction pursuant to 28 U.S.C. § 1291.

We review a district court's order granting summary judgment *de novo*. *Fed. Deposit Ins. Corp. v. New Hampshire Ins. Co*, 953 F.2d 478, 485 (9th Cir. 1991).

ANALYSIS

I. The Statute was facially unconstitutional.

Before explaining why the Statute's notice scheme rendered the Statute unconstitutional, we first review how the Statute would have otherwise permitted a homeowners' association lien foreclosure to extinguish a mortgage lender's first deed of trust.

Section 116.3116(2) set forth the priority of the homeowners' association lien with respect to other liens. Pursuant to that section, a homeowners' association lien took priority over all other liens except:

> (a) Liens and encumbrances recorded before the recordation of the declaration and, in a cooperative, liens and encumbrances which

> the association creates, assumes or takes subject to;
>
> (b) A first security interest on the unit recorded before the date on which the assessment sought to be enforced became delinquent . . . ; and
>
> (c) Liens for real estate taxes and other governmental assessments or charges against the unit or cooperative.

Thus, section 116.3116(2)(b) ordinarily made a first deed of trust superior to a homeowners' association lien. However, section 116.3116(2) gave "super priority" to the portion of a homeowners' association's lien for dues owed in the 9 months immediately proceeding an action to enforce the lien:

> The lien is also prior to all security interests described in paragraph (b) to the extent of any charges incurred by the association on a unit pursuant to NRS 116.310312 and to the extent of the assessments . . . which would have become due in the absence of acceleration during the 9 months immediately preceding institution of an action to enforce the lien . . . .
>
> N.R.S. section 116.3112(2)(c).

In *SFR Investments*, the Nevada Supreme Court held that foreclosure of a "super priority" lien under § 116.3116(2) extinguished all junior interests, including a first deed of trust. 334 P.3d at 410–14. As noted, the district court relied on *SFR Investments* in concluding that Parks's lien foreclosure extinguished

Wells Fargo's interest in the Property. The district court explained that because Bourne Valley had shown that the required statutory notices were sent, and because Wells Fargo did not present evidence that it did not receive notice,[2] Wells Fargo's due process challenge failed. The district court did not address whether the Statute's notice scheme was facially unconstitutional.[3] We turn to that question now.

A. The Statute impermissibly shifted the burden to mortgage lenders, requiring them to affirmatively request notice.

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[2] We note the practical difficulty Wells Fargo or any mortgage lender faces in trying to prove that it did not receive notice. *See Elkins v. United States*, 364 U.S. 206, 218 (1960) ("[A]s a practical matter it is never easy to prove a negative.").

[3] We do not fault the district court for this omission. Wells Fargo's due process challenge has evolved in this case. While it apparently made only an as-applied challenge before the district court, it raises a facial challenge on appeal. Nevertheless, Bourne Valley does not argue that Wells Fargo waived any facial challenge, and it is "well-established that a party can waive waiver." *Norwood v. Vance*, 591 F.3d 1062, 1068 (9th Cir. 2009) (internal quotation marks and citations omitted).

Before its amendment, the Statute employed a peculiar scheme for providing mortgage lenders with notice that a homeowners' association intended to foreclose on a lien. Even though such foreclosure forever extinguished the mortgage lenders' property rights, the Statute contained "optin" provisions requiring that notice be given only when it had already been requested. *See, e.g.*, N.R.S. section 116.31163(2) (requiring notice of default and election to sell be mailed to "any holder of a security interest encumbering the unit's owner's interest who has notified the association, 30 days before the recordation of the notice of default, of the security interest"). Thus, despite that only the homeowners' association knew when and to what extent a homeowner had defaulted on her dues, the burden was on the mortgage lender to ask the homeowners' association to please keep it in the loop regarding the homeowners' association's foreclosure plans. How the mortgage lender, which likely had no relationship with the homeowners' association, should have known to ask is anybody's guess, and indeed Bourne Valley offers no arguments here. But this system was not just strange; in our view, it was also unconstitutional.

Before it takes an action that will adversely "affect an interest in life, liberty, or property . . . , a State must provide 'notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 795 (1983)

(quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)). Moreover, "[n]otice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of *any* party, whether unlettered or well versed in commercial practice, if its name and address are reasonably ascertainable." *Id.* at 800 (emphasis in original).

We have never addressed the constitutionality of an "optin" notice scheme like the one provided for in the Statute. Another court of appeals has, finding that "opt-in" notice does not pass muster.

In *Small Engine Shop, Inc. v. Cascio*, the Fifth Circuit Court of Appeals concluded that an "opt-in" notice clause contained in Louisiana's real property foreclosure statute could not satisfy due process requirements. 878 F.2d 883 (5th Cir. 1989). The clause at issue provided that actual notice of seizure of real property was required for only those who requested it. Citing *Mennonite*, the court explained that it would be unconstitutional for the state by statute to "prospectively shift the entire burden of ensuring adequate notice to an interested property owner regardless of the circumstances." *Id.* at 884 (citing *Mennonite*, 462 U.S. at 797).

The Statute we address here is similar. Like the provision at issue in *Small Engine Shop*, the Statute shifted the burden of ensuring adequate notice from the foreclosing homeowners' association to a mortgage lender. It did so without regard for: (1)

whether the mortgage lender was aware that the homeowner had defaulted on her dues to the homeowners' association, (2) whether the mortgage lender's interest had been recorded such that it would have been easily discoverable through a title search, or (3) whether the homeowners' association had made any effort whatsoever to contact the mortgage lender. In our view, such a scheme was not constitutional.

Bourne Valley argues that Nevada Revised Statutes section 107.090 should be read into the Statute and that its provisions cure the deficiency we have identified. We disagree.

Section 107.090 governs the notice required for the default and sale of a deed of trust. Subsection 107.090(3) requires the trustee or person authorized to record the notice of default to send a copy of the notice by registered or certified mail to each "person with an interest whose interest or claimed interest is subordinate to the deed of trust." N.R.S. section 107.090(3)(b).

Bourne Valley argues that Nevada Revised Statute section 116.31168(1), which incorporated section 107.090, mandated actual notice to mortgage lenders whose rights are subordinate to a homeowners' association super priority lien. Section 116.31168(1) stated, "[t]he provisions of NRS 107.090 apply to the foreclosure of an association's lien as if a deed of trust were being foreclosed." According to Bourne Valley, this incorporation of section 107.090 means that foreclosing homeowners' associations

were required to provide notice to mortgage lenders even absent a request.

Bourne Valley's preferred reading would impermissibly render the express notice provisions of Chapter 116 entirely superfluous. *See S. Nev. Homebuilders Ass'n v. Clark County*, 117 P.3d 171, 173 (Nev. 2005) (a statute must be interpreted "in a way that would not render words or phrases superfluous or make a provision nugatory") (internal quotation marks omitted). In particular, section 116.31163 and section 116.31165 required any secured creditor to request notice of default from a homeowners' association before the homeowners' association had any obligation to provide such notice. If section 116.31168(1)'s incorporation of section 107.090 were to have required homeowners' associations to provide notice of default to mortgage lenders even absent a request, section 116.31163 and section 116.31165 would have been meaningless. We reject Bourne Valley's argument.[4]

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[4] The Nevada Legislature recently amended the Statute, requiring homeowners' associations to provide holders of first deeds of trust (and all others with recorded interests) with notice of default and notice of sale even when notice has not been requested. S.B. 306 (Nev. 2015). Such amendment provides further evidence that the version of the Statute applicable in this action did not require notice unless it was requested. If the Statute already

B. The "state action" requirement is satisfied.

Bourne Valley's strongest argument is that there has been no "state action" for purposes of constitutional due process.

We think the "state action" requirement has been met. A "state action requires *both* an alleged constitutional deprivation caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible, *and* that the party charged with the deprivation must be a person who may fairly be said to be a state actor." *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50 (1999) (internal quotation marks and citation omitted).

In this context, where the mortgage lender and the homeowners' association had no preexisting relationship, the Nevada Legislature's enactment of the Statute is a "state action." It is true, as Bourne Valley contends, that the foreclosure sale itself is a private action. And we acknowledge that there is no state action here that "encourages" or "compels" a homeowners' association to foreclose on a property. *Apao v. Bank of New York*, 324 F.3d 1091, 1094 (9th Cir. 2003).

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required homeowners' associations affirmatively to provide notice, there would have been no need for the amendment.

But that the foreclosure sale itself is a private action is irrelevant to Wells Fargo's due process argument. Rather than complaining about the foreclosure specifically, Wells Fargo contends—and we agree—that the enactment of the Statute unconstitutionally degraded its interest in the Property. Absent operation of the Statute, Wells Fargo would have had a fully secured interest in the Property. A foreclosure by a homeowners' association would not have extinguished Wells Fargo's interest. But with the Statute in place, Wells Fargo's interest was not secured. Instead, if a homeowners' association foreclosed on a lien for unpaid dues, Wells Fargo would forfeit all of its rights in the Property. In our view, the "state action" requirement is satisfied.

Bourne Valley's reliance on *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149 (1978) and *Charmicor, Inc. v. Deaner*, 572 F.2d 694 (9th Cir. 1978) is misplaced. Both of those cases addressed the "state action" requirement and found that it was not met where a private creditor enforced its contractual rights. But unlike in this case, in each of those cases, the parties had a preexisting contractual relationship as creditor and debtor. *See Flagg Bros., Inc.*, 436 U.S. at 153 (noting parties' contractual relationship); *Charmicor*, 572 F.2d at 695 (noting that nonjudicial foreclosure statute conferred power of sale to trustee after breach of the "underlying obligation" by the debtor). The creditors' authority to extinguish the debtors' property rights arose out of the parties' contractual relationships. Here, Wells Fargo and the foreclosing homeowners' association had no preexisting

relationship, contractual or otherwise. Indeed, it is unclear if they were even aware of each other's existence. Thus, in contrast to the creditors in *Flagg Brothers* and *Charmicor*, the homeowners' association's ability to extinguish Wells Fargo's interest in the Property arose directly and exclusively from the Statute.

CONCLUSION

Nevada Revised Statutes section 116.3116's "opt-in" notice scheme facially violated mortgage lenders' constitutional due process rights. We therefore **VACATE** the district court's judgment and remand for proceedings consistent with this opinion.

VACATED and REMANDED.

WALLACE, J., dissenting

The majority holds that section 116.3116 *et seq.* of the Nevada Revised Statutes (HOA Statute) is facially unconstitutional because it fails to satisfy the Fourteenth Amendment's Due Process Clause. I dissent for two reasons. First, both the Supreme Court's case law and our own precedent make it clear that for a due process challenge to succeed, the challenger must show that there has been "overt official involvement," or, in other words, state action. Because there has been no state action here, I would hold that Wells Fargo's challenge necessarily fails. Second, even were there sufficient state action to implicate the Due Process Clause, the HOA Statute satisfies due process because it incorporates another provision in the Nevada Revised Statutes that

requires the homeowners' association (HOA) to provide written notice to a mortgage lender.

I.

A foundational principle for all constitutional law is that "most rights secured by the Constitution are protected only against infringement by governments." *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 156 (1978). Thus, "[w]hile as a factual matter any person with sufficient physical power may deprive a person of his property, only a State or a private person whose action may be fairly treated as that of the State itself, may deprive him of an interest encompassed within the Fourteenth Amendment's protection." *Id.* at 157 (internal quotation marks omitted). This understanding has led to what is commonly termed the state action requirement. To determine whether there has been state action, the Supreme Court has "insisted that the conduct allegedly causing the deprivation of a federal right be fairly attributable to the State." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982). The fair-attribution test has two parts: (1) "the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the state or by a person for whom the State is responsible," and (2) "the party charged with the deprivation must be a person who may fairly be said to be a state actor." *Id.*

Here, only the second part of the fair-attribution test is at issue, since there is no doubt that the deprivation Wells Fargo has alleged was caused by Bourne Valley's exercise of "some right or privilege"

created by Nevada's HOA Statute. *Id.* But that still leaves the second part of the test, that is, whether Bourne Valley "may fairly be said to be a state actor." *Id.* The answer to that question is no.

The majority concedes, as it must, that the nonjudicial foreclosure sale that resulted in Bourne Valley obtaining title to the property does not count as state action. This makes common sense: an HOA is not a government actor and a nonjudicial foreclosure by definition takes place without government involvement. So, if the foreclosure itself does not constitute state action, how then does the majority reach the merits of the Due Process issue? It does so by holding "that the enactment of the [HOA] Statute unconstitutionally degraded its interest in the Property." This holding is faulty in several respects.

First, it is wrong as a matter of timing. The HOA Statute cannot possibly have "degraded" Wells Fargo's interest in the property because it was passed long before the bank acquired its interest. The Nevada legislature passed the HOA Statute in 1991; Wells Fargo's mortgage interest was created in 2006.[1] Given this timing, how can the majority claim that

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[1] The HOA Statute has been amended multiple times since 1991. However, since the beginning it has provided that an HOA lien is prior to a first security interest "to the extent of the assessments for common expenses." NEV. REV. STAT. § 116.3116(2) (1991).

the "enactment" of the HOA Statute "degraded" Wells Fargo's interest?

The second, and more critical, problem with the majority's holding is that it misapplies the case law. In *Apao v. Bank of New York*, we dealt with a due process challenge to a Hawaii statute that authorized a lender to exercise a contractual right to nonjudicial foreclosure if the borrower defaulted on the loan. 324 F.3d 1091, 1092–93 (9th Cir. 2003). In rejecting that argument, we reviewed the Supreme Court's cases involving foreclosures or seizures of property to satisfy a debt, and we concluded that "the Supreme Court has held that the procedures implicate the Fourteenth Amendment only where there is at least some direct state involvement in the execution of the foreclosure or seizure." *Id.* at 1093.

To illustrate how the Court has applied that rule, we cited several cases where the Court concluded there was state action. In one case, the Court held there was state action where a clerk of court issued a writ of replevin authorizing a sheriff to seize property. *Fuentes v. Shevin*, 407 U.S. 67, 70–71 (1972). In another, the Court held there was sufficient state involvement where a clerk of court issued a summons at the request of a creditor, which allowed the creditor to garnish an individual's wages. *Sniadach v. Family Fin. Corp. of Bay View*, 395 U.S. 337, 338–40 (1969). Last, in *Lugar*, the Court held there was state action where a sheriff sequestered property upon executing a creditor's petition for a writ of prejudgment attachment. 457 U.S. at 924–25. The common thread among these three cases is that

each involved a government actor taking some official action.

By contrast, the Court had concluded there was insufficient state involvement to support satisfaction of the state action requirement where a creditor enforced a lien through a nonjudicial sale. *Flagg Bros., Inc.*, 436 U.S. at 152–53. Importantly for the case before us, the Court reached its holding even though the creditor derived its power to conduct the sale from a state statute that delegated "to the [creditor] a portion of its sovereign monopoly power." *Id.* at 155 (internal quotation marks omitted). We described the Court's reasoning in *Flagg Brothers* as follows:

> *Flagg Bros.* further held that the state's statutory authorization of self-help provisions is not sufficient to convert private conduct into state action. The statute neither encourages nor compels the procedure, but merely recognizes its legal effect. The state has not compelled the sale of a [debtor's property], but has merely announced the circumstances under which its courts will not interfere with a private sale.

Apao, 324 F.3d at 1094 (internal quotation marks and citations omitted). In short, *Flagg Brothers* came out the way it did because there was no "overt official involvement." *Apao*, 324 F.3d at 1095 (internal quotation marks omitted).

Returning to our decision in *Apao*, after tracing the Supreme Court's case law, we then applied it to

the Hawaii statute. We concluded that the facts were analogous to *Flagg Brothers* because nonjudicial foreclosure procedures lack any "overt official involvement." *Id.* (quoting *Flagg Bros., Inc.*, 436 U.S. at 157).

Apao is also important because we rejected a broader theory of state action that the borrower proposed. The borrower in *Apao* made an argument similar to the one Wells Fargo has made here: that government regulation of the mortgage business converted any action by a lender into state action. *Id.* We rejected that argument, holding that "the development of the extensively regulated secondary mortgage market does not convert the private foreclosure procedures at issue here into state action." *Id.* We explained that "'[s]tatutes and laws regulate many forms of purely private activity, such as contractual relations and gifts, and subjecting all behavior that conforms to state law to the Fourteenth Amendment would emasculate the state action concept.'" *Id.* (quoting *Adams v. S. Cal. First Nat'l Bank*, 492 F.2d 324, 330–31 (9th Cir. 1974)).

The Supreme Court's decisions in *Fuentes*, *Sniadach*, *Lugar*, and *Flagg Brothers*, dictate that we conclude there has been no state action in this case. There has been no "overt official involvement": no government actor was in any way involved in the nonjudicial foreclosure that resulted in Bourne Valley holding title to the property. The majority attempts to distinguish this line of cases by observing that in *Flagg Brothers*, the parties had a preexisting contractual relationship. But the Court's holding

focuses on "overt official involvement," not preexisting relationships.

Nor can the operation of the HOA Statute alone provide a basis for finding sufficient state action. *Adams* so holds and there is no basis—and the majority offers none—on which we might either distinguish that case or depart from its rule.

Because there has been no "overt official involvement" in this case, I would hold that Wells Fargo has failed to demonstrate the necessary state action that is needed for it to succeed on its Due Process Clause argument.

II.

Even if there were any state action, Wells Fargo's due process challenge fails because the HOA Statute requires an HOA to provide a mortgage lender with a notice of default, satisfying due process.

Due process demands that "in any proceeding which is to be accorded finality," interested parties must receive "notice reasonably calculated, under all the circumstances, to apprise [them] of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). The Supreme Court has held that a lender's mortgage interest is protected as "property" under the Due Process Clause. *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 798 (1983). In that same case, the Court also held that "constructive notice alone does not satisfy" the demand of due process. *Id.* The issue

we confront here is whether the HOA Statute meets these demands.

As the majority points out, most of the notice provisions in the HOA Statute create an opt-in framework, meaning that interested parties will receive notice only if they affirmatively request it. But one of its notice provisions, found in section 116.31168(1) (2005), departs from that framework. That subsection provides that "[t]he provisions of NRS 107.090 apply to the foreclosure of an association's lien as if the deed of trust were being foreclosed." NEV. REV. STAT. § 116.31168(1). In turn, section 107.090(3) provides as follows:

> The trustee or person authorized to record the notice of default shall, within 10 days after the notice of default is recorded and mailed pursuant to NRS 107.080, cause to be deposited in the United States mail an envelope, registered or certified, return receipt requested and with postage prepaid, containing a copy of the notice, addressed to:
>
> (a) Each person who has recorded a request for a copy of the notice; and
>
> (b) Each other person with an interest whose interest or claimed interest is subordinate to the deed of trust.

Thus, in relevant part, the statute requires the "person authorized to record the notice of default" (here, the HOA) to mail a copy of the notice of default to "[e]ach other person with an interest whose interest or claimed interest is subordinate to the deed

of trust." A lender like Wells Fargo clearly has an "interest" in the soon-to-be foreclosed property since it has a recorded security interest in it. The lender's security interest is also "subordinate" to the HOA's lien by virtue of the HOA Statute's superpriority provision. This is the case even though the lender's security interest was recorded first, since the superpriority provision provides that an HOA lien "is . . . prior to all security interests." NEV. REV. STAT. § 116.3116(c) (2005). Further, we must read the term "deed of trust" in section 107.090 to mean an HOA lien since section 116.31168 provides that "[t]he provisions of [section] 107.090 apply to the foreclosure of an association's lien as if a deed of trust were being foreclosed."

In essence, while section 107.090 does not by itself apply to HOA liens, the HOA Statute expressly incorporates section 107.090 so that it applies to HOA liens. And section 107.090's notice provisions require an HOA to send a notice of default to "[e]ach other person" with a subordinate interest. Thus, under the HOA Statute, due process is satisfied because "[e]ach other person with an interest . . . [that] is subordinate to the [HOA lien]" receives "notice, reasonably calculated, to apprise [them] of the pendency of the action." *Mullane*, 339 U.S. at 314.

The majority disagrees with this reading of the statutes. It does so because, according to it, "Bourne Valley's preferred reading would impermissibly render the express notice provisions of Chapter 116 entirely superfluous." In essence, the majority rejects

the most obvious reading of the statute by relying on a single canon of construction—the surplusage canon.

The surplusage canon has deep roots in statutory interpretation and arises out of the recognition that "words cannot be meaningless, else they would not have been used." *United States v. Butler*, 297 U.S. 1, 65 (1936). But the canon is not without limitations. Most importantly here, the surplusage canon cannot overcome straightforward textual meaning. *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW 176 ("Put to a choice, however, a court may well prefer ordinary meaning to an unusual meaning that will avoid surplusage"). That limitation precludes use of the canon here because there is no reasonable way to interpret sections 116.31168 and 107.090 other than to conclude that they mandate that an HOA provide a mortgage lender with the notice of default. The majority tacitly acknowledges this conclusion by offering no contrary reading of those statutes. Instead, the majority applies the surplusage canon without even attempting to provide a reading of the statutes that is contrary to the one I have provided. This use of the surplusage canon is backwards; courts should not apply the canon without first deciding that there are at least two potential readings of the statute (one that renders parts superfluous and one that does not).

Ironically, the surplusage canon could also work against the majority's position. Reading section 116.31168 as the majority does renders the HOA Statute's command that "[t]he provisions of [section]

107.090 apply to the foreclosure of an association's lien as if a deed of trust were being foreclosed" mere surplusage since refusing to heed section 116.31168's incorporation of section 107.090 renders both sections irrelevant for purposes of the HOA Statute.

A larger problem with the majority's analysis is that it ignores another canon of construction that is at least on a par with the surplusage canon, namely the constitutional doubt canon. The Supreme Court has explained that under the constitutional doubt canon, "[w]hen the validity of an act of the [legislature] is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Crowell v. Benson*, 285 U.S. 22, 62 (1932).

As an example of how the constitutional doubt canon works, take the Supreme Court's decision in *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566 (2012). There, five justices concluded that the Commerce Clause could not support Congress's enacting of the individual mandate imposed by the Patient Protection and Affordable Care Act of 2010. *Id.* at 2591 (opinion of Roberts, C.J.); *id.* at 2643 (dissenting opinion of Justices Scalia, Kennedy, Thomas, and Alito). But, rather than strike the statute down, the Court found the statute constitutional under Congress's power to tax. *Id.* at 2595–96. The Court explained its rationale for reaching the taxing power issue as follows:

> The question is not whether [reading the statute as being within Congress's power to tax] is the most natural interpretation of the mandate, but only whether it is a "fairly possible" one. As we have explained, every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.

Id. at 2594 (internal quotation marks and citations omitted).

While sections 116.31168 and 107.090 of the Nevada Revised Statutes seem to me to be sufficiently straightforward that I would not rely on the constitutional doubt canon in the first instance (again, the majority offers no interpretation of them that contradicts mine), even if there were a reasonable reading of them that would raise due process concerns, I would apply the constitutional doubt canon and conclude that the constitutional reading is "fairly possible." *Id.* Because it is "fairly possible" to find a reasonable reading of the HOA Statute that renders it constitutional, that construction "must be resorted to." *Id.*

By resorting to a faulty application of the surplusage canon without even applying the constitutional doubt canon, the majority selectively picks and chooses among tools of statutory interpretation so that it can reach its desired outcome. That is not the role of judges. Our role is not to decide whether the HOA Statute was good policy. Indeed, it appears that it was not, as the Nevada

legislature has reworked the statute so that the concerns articulated by Wells Fargo are no longer at issue. *See* S.B. 306 (Nev. 2015). But none of that should concern us. We are tasked only with deciding whether the HOA Statute required HOAs to send lenders actual notice. Because its terms leave no doubt that they were required to, we should uphold it.

III.

Wells Fargo's due process challenge fails in multiple respects. First, because there has been no "overt official involvement," there is no state action that would justify reaching the merits of the due process argument. Second, even were there state action, the HOA Statute satisfies due process by requiring HOAs to send lenders a notice of default. Accordingly, I would reject Well Fargo's arguments and affirm the district court's judgment.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

BOURNE VALLEY COURT TRUST,

Plaintiff,

v.

WELLS FARGO BANK, NA, et al.

Defendants.

2:13-CV-00649-PMP-NJK

ORDER

Presently before the Court is Plaintiff Bourne Valley Court Trust's Motion for Summary Judgment (Doc. #45), filed on September 26, 2014. Defendant Wells Fargo Bank, N.A. filed an Opposition (Doc. #48) on November 3, 2014. Plaintiff Bourne Valley Court Trust filed a Reply (Doc. #51) on December 1, 2014.

I. BACKGROUND

This case involves a dispute over whether a foreclosure sale conducted by a homeowners' association ("HOA") to collect unpaid HOA assessments extinguishes all junior liens, including a first deed of trust. The property at issue, located at 410 Horse Pointe Avenue, Las Vegas, Nevada, previously was owned by Defendant Renee Johnson. (Mot. for Summ. J. (Doc. #45) ["MSJ"], Ex. 2 at 1.) The property was subject to a first deed of trust recorded in 2006, which identified Plaza Home Mortgage, Inc. as the lender. (Def. Wells Fargo Bank, N.A.'s Req. for Judicial Notice (Doc. #25) ["Req. for Judicial Notice"], Ex. B at 1.) On March 7, 2011, Plaza Home Mortgage, Inc. assigned the deed of trust to Defendant Wells Fargo Bank, N.A. ("Wells Fargo"). (Req. for Judicial Notice, Ex. C at 1.) Later that same date, Plaza Home Mortgage, Inc. recorded a notice of default and election to sell based on Defendant Johnson's deed of trust. (Req. for Judicial Notice, Ex. D.)

The property is subject to Covenants, Conditions and Restrictions ("CC&Rs") recorded in 2000 by The Parks Homeowners Association ("The Parks"). (Def. Wells Fargo Bank, N.A.'s Opp'n to Pl.'s Mot. for Summ. J. (Doc. #48) ["Opp'n"], Ex. B.) In August of 2011, The Parks recorded a notice of delinquent assessment lien with respect to Johnson's property, and in October of 2011, The Parks initiated an HOA foreclosure sale of the property pursuant to Nevada Revised Statutes § 116.3116 et seq. to recover unpaid HOA assessments. (Req. for Judicial Notice, Ex. F,

Ex. G.) The sale was conducted on May 7, 2012, at which Horse Pointe Avenue Trust purchased the property for $4,145.00. (MSJ, Ex. 2.) The HOA foreclosure deed was recorded with the Clark County Recorder on May 29, 2012. (*Id*.) The HOA foreclosure deed states that the foreclosure sale was conducted in compliance with all applicable notice requirements. (*Id*. at 1.) The same date, a grant deed from Horse Pointe Avenue Trust to Plaintiff Bourne Valley Court Trust ("Bourne Valley") was recorded with the Clark County Recorder. (MSJ, Ex. 1.) According to Wells Fargo, at the time of the HOA foreclosure sale, the property's assessed value was $90,543.00. (Opp'n, Ex. A.)

Bourne Valley brought suit in Nevada state court on January 16, 2013, asserting claims for quiet title and declaratory relief against Defendants. (Pet. for Removal (Doc. #1), Ex. A at 5-8, Ex. D at 4-6.) According to Bourne Valley, the foreclosure deed extinguished Wells Fargo's deed of trust and vested clear title in Bourne Valley, leaving Wells Fargo nothing to foreclose. (*Id*.) Defendant MTC Financial Inc. removed the action to this Court on April 17, 2013. (Pet. for Removal.)

Bourne Valley now moves for summary judgment on its claims, arguing Nevada Revised Statutes § 116.3116 and *SFR Investments Pool 1, LLC v. U.S. Bank, N.A.*, 334 P.3d 408 (Nev. 2014), provide an HOA with a lien for nine months' worth of unpaid HOA assessments that is superior to the first deed of trust, commonly referred to as the "super priority lien." Bourne Valley further argues that *SFR*

Investments clarifies that under § 116.3116, foreclosure of an HOA super priority lien extinguishes all junior liens, including a first deed of trust. Bourne Valley therefore contends that Wells Fargo's first deed of trust was extinguished by the HOA foreclosure sale and that title to the property should be quieted in Bourne Valley's name.

Wells Fargo responds that Bourne Valley is not entitled to summary judgment because it does not provide evidence indicating that the HOA sale complied with the notice requirements of Nevada Revised Statues Chapter 116. Wells Fargo further argues that the HOA foreclosure sale was commercially unreasonable and therefore was void. Wells Fargo also argues Bourne Valley is not a bona fide purchaser because it purchased the property with knowledge of the previously-recorded CC&Rs, which contain a mortgage protection clause stating that a lender's deed of trust cannot be extinguished by an HOA foreclosure sale to satisfy a lien for delinquent assessments. Finally, Wells Fargo argues that because Bourne Valley does not provide evidence the HOA complied with all statutory notice requirements, Bourne Valley has not demonstrated that constitutional due process requirements were met.

Bourne Valley replies that the recitals in the trustee's deed upon sale stating there was compliance with all statutory notice requirements are conclusive proof that the HOA complied with the notice requirements. Bourne Valley further argues that Wells Fargo does not provide any evidence indicating

it did not receive the required statutory notices. Regarding Wells Fargo's argument that the HOA foreclosure sale was commercially unreasonable, Bourne Valley replies that Chapter 116 does not require an HOA foreclosure sale to be commercially reasonable. Bourne Valley further argues that the inadequacy of the price is not sufficient to void the HOA foreclosure sale when there is no evidence of fraud, procedural defects, or other irregularities in the conduct of the sale. As for Wells Fargo's mortgage protection clause argument, Bourne Valley replies that the clause is unenforceable to the extent that it attempts to limit the super priority lien given to the HOA under § 116.3116. Finally, regarding Wells Fargo's due process argument, Bourne Valley replies that no state action is involved in a nonjudicial HOA foreclosure sale. Bourne Valley further argues the trustee's deed reciting compliance with all applicable notice requirements is conclusive proof that statutory notice requirements were met, and hence Wells Fargo received all process that was due.

II. DISCUSSION

Summary judgment is appropriate if the pleadings, the discovery and disclosure materials on file, and any affidavits "show[] that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a), (c). A fact is "material" if it might affect the outcome of a suit, as determined by the governing substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). An issue is "genuine" if sufficient evidence exists such that a

reasonable fact finder could find for the non-moving party. *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1061 (9th Cir. 2002). Initially, the moving party bears the burden of proving there is no genuine issue of material fact. *Leisek v. Brightwood Corp.*, 278 F.3d 895, 898 (9th Cir. 2002). After the moving party meets its burden, the burden shifts to the non-moving party to produce evidence that a genuine issue of material fact remains for trial. *Id*. The Court views all evidence in the light most favorable to the non-moving party. *Id*.

A. Notice

Wells Fargo argues Bourne Valley is not entitled to judgment on its quiet title claim because Bourne Valley does not provide evidence indicating that the HOA sale complied with the notice requirements of Chapter 116. Bourne Valley contends that the recitals in the trustee's deed upon sale stating there was compliance with all statutory notice requirements are conclusive proof that the HOA complied with the notice requirements. Bourne Valley further argues that Wells Fargo does not provide any evidence indicating it did not receive the required statutory notices.

The Nevada statutes and case law applicable in this case are clear and conclusive. Section 116.3116(2) sets forth the priority of the HOA lien with respect to other liens on the property. Pursuant to § 116.3116(2), the HOA lien is prior to all other liens on the property except:

> (a) Liens and encumbrances recorded before the recordation of the declaration and, in a cooperative, liens and encumbrances which the association creates, assumes or takes subject to;
>
> (b) A first security interest on the unit recorded before the date on which the assessment sought to be enforced became delinquent . . . ; and
>
> (c) Liens for real estate taxes and other governmental assessments or charges against the unit or cooperative.

Although § 116.3116(2)(b) makes a first deed of trust superior to an HOA lien, the last paragraph of § 116.3116(2) gives what is commonly referred to as "super priority" status to a portion of the HOA's lien which is superior to the first deed of trust:

> The lien is also prior to all security interests described in paragraph (b) to the extent of any charges incurred by the association on a unit pursuant to NRS 116.310312 and to the extent of the assessments for common expenses based on the periodic budget adopted by the association pursuant to NRS 116.3115 which would have become due in the absence of acceleration during the 9 months immediately preceding institution of an action to enforce the lien, unless federal regulations adopted by the Federal Home Loan Mortgage Corporation or the Federal National Mortgage Association require a shorter period of priority for the lien. . . . This

> subsection does not affect the priority of mechanics' or materialmens' liens, or the priority of liens for other assessments made by the association.

Id. § 116.3116(2).

The Nevada Supreme Court recently held in *SFR Investments* that foreclosure of a super priority lien established pursuant to § 116.3116(2) extinguishes all junior interests, including a first deed of trust on the property. 334 P.3d at 410-14; *see also 7912 Limbwood Court Trust v. Wells Fargo Bank, N.A.*, 979 F. Supp. 2d 1142, 1149 (D. Nev. 2013). *SFR Investments* resolves a previous division of authority among the Nevada state trial courts and decisions from the United States District Court for the District of Nevada on the question. 334 P.3d at 412.

To conduct a foreclosure on this type of lien, an HOA must comply with certain notice requirements at certain time intervals, including mailing a notice of delinquent assessment, recording and mailing a notice of default and election to sell, and providing notice of the time and place of the sale. Nev. Rev. Stat. §§ 116.31162-116.311635. Contrary to the argument advanced by Wells Fargo, a deed which recites that there was a default, that the notice of delinquent assessment was mailed, that the notice of default and election to sell was recorded, that 90 days have lapsed between notice of default and sale, and that notice of the sale was given, is "conclusive proof of the matters recited." *Id*. § 116.31166(1). A deed containing these recitals also "is conclusive against

the unit's former owner, his or her heirs and assigns, and all other persons." *Id*. § 116.31166(2).

Here, the foreclosure deed recites as follows:

> Default occurred as set forth in the Notice of Default and Election to Sell which was recorded October 12, 2011 as instrument/document number 201110120001641 in the office of the Recorder of said County. After the expiration of ninety (90) days from the recording and mailing of the copies of the Notice of Default and Election to Sell, a Notice of Trustee's Sale was recorded on April 09, 2012 as instrument/document number 201204090000179 in the Office of the Recorder of said County and the Association claimant, The Parks Homeowners Association, demanded that such sale be made.
>
> All requirements of law regarding the recording and mailing of copies of the Notice of Delinquent Assessment, Notice of Default and Election to Sell, and the recording, mailing, posting and publication of copies of the Notice of Trustee's Sale have been complied with.

(MSJ, Ex. 2 at 1.) Given that the foreclosure deed recites there was a default, the proper notices were given, the appropriate amount of time has lapsed between notice of default and sale, and notice of the sale was given, under § 116.31166(1), the foreclosure

deed constitutes "conclusive proof" that the required statutory notices were provided. Bourne Valley therefore has met its burden of showing the required statutory notices were provided to Wells Fargo.

Once Bourne Valley met its burden of showing the required statutory notices were provided, Wells Fargo was required to come forward with evidence that a genuine issue of fact remains for trial as to notice. *See Leisek*, 278 F.3d at 898. Wells Fargo does not provide any evidence or even assert that it did not receive the required statutory notices. Nor does Wells Fargo point to any other procedural irregularities related to the HOA foreclosure sale that would explain Wells Fargo's failure to pay the HOA lien to avert its loss of security. *See SFR Investments*, 334 P.3d at 414; *Limbwood*, 979 F. Supp. 2d at 1149 ("If junior lienholders want to avoid this result, they readily can preserve their security interests by buying out the senior lienholder's interest."). Therefore, no issue of fact remains as to whether the required statutory notices were provided. Given that Wells Fargo's due process arguments are premised on Bourne Valley not providing evidence that the statutory notice requirements were met, the Court likewise finds that no genuine issue of material fact remains as to whether Wells Fargo's due process rights were violated.

B. HOA Foreclosure Sale

Wells Fargo next argues that even if the HOA foreclosure sale extinguished its first deed of trust on

the property, the HOA foreclosure sale was "commercially unreasonable" and therefore was void. (Opp'n at 5-7.) Specifically, Wells Fargo argues the HOA foreclosure sale was not conducted in good faith because "the HOA made no effort to obtain the best price or to protect either Johnson or Wells Fargo" by selling the property for $4,145.00 when the assessed value of the property was $90,543.00. (*Id*. at 7.) Bourne Valley replies that Chapter 116 does not require an HOA foreclosure sale to be commercially reasonable. Bourne Valley further argues that the inadequacy of the price is not sufficient to void the HOA foreclosure sale when there is no evidence of fraud, procedural defects, or other irregularities in the conduct of the sale.

The commercial reasonableness here must be assessed as of the time the sale occurred. Wells Fargo's argument that the HOA foreclosure sale was commercially unreasonable due to the discrepancy between the sale price and the assessed value of the property ignores the practical reality that confronted the purchaser at the sale. Before the Nevada Supreme Court issued *SFR Investments*, purchasing property at an HOA foreclosure sale was a risky investment, akin to purchasing a lawsuit. Nevada state trial courts and decisions from the United States District Court for the District of Nevada were divided on the issue of whether HOA liens are true priority liens such that their foreclosure extinguishes a first deed of trust on the property. *SFR Investments*, 334 P.3d at 412. Thus, a purchaser at an HOA foreclosure sale risked purchasing merely a

possessory interest in the property subject to the first deed of trust. This risk is illustrated by the fact that title insurance companies refused to issue title insurance policies on titles received from foreclosures of HOA super priority liens absent a court order quieting title. (Mot. To Remand to State Court (Doc. #6), Decl. of Ron Bloecker.) Given these risks, a large discrepancy between the purchase price a buyer would be willing to pay and the assessed value of the property is to be expected.

Moreover, Wells Fargo does not point to any evidence or legal authority indicating the Court must void an HOA foreclosure sale because the purchaser bid only a fraction of the property's assessed value. Wells Fargo does not point to evidence of fraud or any other procedural defects or other irregularities in the conduct of the sale that would require the Court to void the sale, or any evidence indicating the HOA acted in bad faith by selling the property for an amount that would satisfy the unpaid assessments. Nor does Wells Fargo point to evidence or legal authority indicating that beyond selling the property to the highest bidder, the HOA was responsible for protecting Wells Fargo and Johnson's interests in addition to the homeowners' interests. *See Carmen v. S.F. Unified Sch. Dist.*, 237 F.3d 1026, 1028–31 (9th Cir. 2001) (stating that a court need not "comb the record" looking for a genuine issue of material fact if the party has not brought the evidence to the court's attention) (quotation omitted)). Thus, no genuine issue of material fact remains as to whether the HOA

foreclosure sale was commercially unreasonable. Under the specific facts presented here, it was not.

C. CC&Rs

Wells Fargo argues Bourne Valley is not a bona fide purchaser because it purchased the property with knowledge of the previously-recorded CC&Rs, which contain a mortgage protection clause. According to Wells Fargo, under the mortgage protection clause, its deed of trust cannot be extinguished by an HOA foreclosure sale to satisfy a lien for delinquent assessments. Bourne Valley replies that the clause is unenforceable to the extent that it attempts to limit the super priority lien given to the HOA under § 116.3116. The mortgage savings clause states as follows:

> [N]o lien created under this Article V [titled "Mortgage Protection"] or under any other Article of this Declaration, nor any lien arising by reason of any breach of this Declaration, nor the enforcement of any provision of this Declaration, shall defeat or render invalid the rights of the beneficiary under any Recorded Mortgage of first and senior priority now or hereafter upon a Lot, made in good faith and for value, perfected before the date on which the Assessment sought to be enforced became delinquent.

(Opp'n, Ex. B at § 5.08.) The preceding section, titled "Unpaid Assessments," provides that liens for unpaid assessments "shall be created in accordance with NRS § 116.3116 and shall be foreclosed on in the

manner provided for in NRS § 116.31162-116.31168 as is now or hereafter may be in effect." (*Id*. at § 5.07.)

The Nevada Supreme Court held in *SFR Investments* that a mortgage protection clause does not affect the application of § 116.3116(2) in an HOA super priority lien foreclosure case. 334 P.3d at 419. Specifically, "Chapter 116's 'provisions may not be varied by agreement, and rights conferred by it may not be waived . . . [e]xcept as expressly provided in' Chapter 116." *Id*. (quoting Nev. Rev. Stat. § 116.1104) (emphasis omitted). "Nothing in [NRS] 116.3116 expressly provides for a waiver of the HOA's right to a priority position for the HOA's super priority lien." *Id*. (quoting *Limbwood*, 979 F. Supp. 2d at 1153).

Given that Chapter 116's requirements cannot be varied by agreement, the mortgage protection clause in the CC&Rs does not preserve Wells Fargo's security interest in the property. Morever, by the CC&R's plain language, in § 5.07 The Parks preserved its statutory super priority lien rights by reference to § 116.3116, which is the statutory section setting forth the relative priority of the HOA's super priority and the junior liens in relation to a first deed of trust. Thus, no genuine issue of fact remains as to whether the mortgage protection clause affects the application of § 116.3116 in this case. The Court therefore will grant Bourne Valley's Motion for Summary Judgment.

III. CONCLUSION

IT IS THEREFORE ORDERED that Plaintiff Bourne Valley Court Trust's Motion for Summary Judgment (Doc. #45) is GRANTED.

DATED: January 23, 2015

/s/ Philip M. Pro

Philip M. Pro

United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BOURNE VALLEY COURT TRUST,
Plaintiff-Appellee,

v.

WELLS FARGO BANK, NA,
Defendant-Appellant.

No. 15-15233
D.C. No.
2:13-cv-00649-PMP-NJK
District of Nevada,
Las Vegas

FILED
NOV 04 2016
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

ORDER

Before: WALLACE, D.W. NELSON, and OWENS, Circuit Judges.

Judges Nelson and Owens have voted to deny the petition for rehearing. Judge Wallace voted to grant the petition for rehearing. Judge Owens voted to deny the petition for rehearing en banc. Judge Nelson

recommended denying the petition for rehearing en banc. Judge Wallace recommended granting the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. (Fed.R. App. P. 35.)

The Petition for Rehearing or Rehearing En Banc is **DENIED**.

APPENDIX D

Relevant Statutory Provisions[1]

Nevada Revised State § 116.31162 provides:

Foreclosure of liens: Mailing of notice of delinquent assessment; recording of notice of default and election to sell; period during which unit's owner may pay lien to avoid foreclosure; limitations on type of lien that may be foreclosed

1. Except as otherwise provided in subsection 4, in a condominium, in a planned community, in a cooperative where the owner's interest in a unit is real estate under NRS 116.1105, or in a cooperative where the owner's interest in a unit is personal property under NRS 116.1105 and the declaration provides that a lien may be foreclosed under NRS 116.31162 to 116.31168, inclusive, the association may foreclose its lien by sale after all of the following occur:

> (a) The association has mailed by certified or registered mail, return receipt requested, to the unit's owner or his or her successor in interest, at his or her address, if known, and at the address of the unit, a notice of delinquent assessment which states the amount of the assessments and

---

[1] All provisions are the versions in effect in 2012.

other sums which are due in accordance with subsection 1 of NRS 116.3116, a description of the unit against which the lien is imposed and the name of the record owner of the unit.

(b) Not less than 30 days after mailing the notice of delinquent assessment pursuant to paragraph (a), the association or other person conducting the sale has executed and caused to be recorded, with the county recorder of the county in which the common-interest community or any part of it is situated, a notice of default and election to sell the unit to satisfy the lien which must contain the same information as the notice of delinquent assessment and which must also comply with the following:

(1) Describe the deficiency in payment.

(2) State the name and address of the person authorized by the association to enforce the lien by sale.

(3) Contain, in 14-point bold type, the following warning:

WARNING! IF YOU FAIL TO PAY THE AMOUNT SPECIFIED IN THIS NOTICE, YOU COULD LOSE YOUR HOME, EVEN IF THE AMOUNT IS IN DISPUTE!

(c) The unit's owner or his or her successor in interest has failed to pay the amount of the lien, including costs, fees and expenses incident to its

enforcement, for 90 days following the recording of the notice of default and election to sell.

2. The notice of default and election to sell must be signed by the person designated in the declaration or by the association for that purpose or, if no one is designated, by the president of the association.

3. The period of 90 days begins on the first day following:

(a) The date on which the notice of default is recorded; or

(b) The date on which a copy of the notice of default is mailed by certified or registered mail, return receipt requested, to the unit's owner or his or her successor in interest at his or her address, if known, and at the address of the unit,

whichever date occurs later.

4. The association may not foreclose a lien by sale based on a fine or penalty for a violation of the governing documents of the association unless:

(a) The violation poses an imminent threat of causing a substantial adverse effect on the health, safety or welfare of the units' owners or residents of the common-interest community; or

(b) The penalty is imposed for failure to adhere to a schedule required pursuant to NRS 116.310305.

Nevada Revised State § 116.31163 provides in relevant part:

Foreclosure of liens: Mailing of notice of default and election to sell to certain interested persons

The association or other person conducting the sale shall also mail, within 10 days after the notice of default and election to sell is recorded, a copy of the notice by first-class mail to:

1. Each person who has requested notice pursuant to NRS 107.090 or 116.31168;

2. Any holder of a recorded security interest encumbering the unit's owner's interest who has notified the association, 30 days before the recordation of the notice of default, of the existence of the security interest; and

3. A purchaser of the unit, if the unit's owner has notified the association, 30 days before the recordation of the notice, that the unit is the subject of a contract of sale and the association has been requested to furnish the certificate required by NRS 116.4109.

Nevada Revised State § 116.311635 provides in relevant part:

Foreclosure of liens: Providing notice of time and place of sale; service of notice of sale; contents of notice of sale; proof of service

1. The association or other person conducting the sale shall also, after the expiration of the 90 days and before selling the unit:

(a) Give notice of the time and place of the sale in the manner and for a time not less than that required by law for the sale of real property upon execution, except that in lieu of following the procedure for service on a judgment debtor pursuant to NRS 21.130, service must be made on the unit's owner as follows:

(1) A copy of the notice of sale must be mailed, on or before the date of first publication or posting, by certified or registered mail, return receipt requested, to the unit's owner or his or her successor in interest at his or her address, if known, and to the address of the unit; and

(2) A copy of the notice of sale must be served, on or before the date of first publication or posting, in the manner set forth in subsection 2; and

(b) Mail, on or before the date of first publication or posting, a copy of the notice by first-class mail to:

(1) Each person entitled to receive a copy of the notice of default and election to sell notice under NRS 116.31163;

(2) The holder of a recorded security interest or the purchaser of the unit, if either of them has notified the association, before the mailing of the notice of sale, of the existence of the security interest, lease or contract of sale, as applicable; and

(3) The Ombudsman.

2. In addition to the requirements set forth in subsection 1, a copy of the notice of sale must be served:

(a) By a person who is 18 years of age or older and who is not a party to or interested in the sale by personally delivering a copy of the notice of sale to an occupant of the unit who is of suitable age; or

(b) By posting a copy of the notice of sale in a conspicuous place on the unit.

3. Any copy of the notice of sale required to be served pursuant to this section must include:

(a) The amount necessary to satisfy the lien as of the date of the proposed sale; and

(b) The following warning in 14-point bold type:

WARNING! A SALE OF YOUR PROPERTY IS IMMINENT! UNLESS YOU PAY THE

AMOUNT SPECIFIED IN THIS NOTICE BEFORE THE SALE DATE, YOU COULD LOSE YOUR HOME, EVEN IF THE AMOUNT IS IN DISPUTE. YOU MUST ACT BEFORE THE SALE DATE. IF YOU HAVE ANY QUESTIONS, PLEASE CALL (name and telephone number of the contact person for the association). IF YOU NEED ASSISTANCE, PLEASE CALL THE FORECLOSURE SECTION OF THE OMBUDSMAN'S OFFICE, NEVADA REAL ESTATE DIVISION, AT (toll-free telephone number designated by the Division) IMMEDIATELY.

4. Proof of service of any copy of the notice of sale required to be served pursuant to this section must consist of:

(a) A certificate of mailing which evidences that the notice was mailed through the United States Postal Service; or

(b) An affidavit of service signed by the person who served the notice stating:

(1) The time of service, manner of service and location of service; and

(2) The name of the person served or, if the notice was not served on a person, a description of the location where the notice was posted on the unit.

Nevada Revised State § 116.31168 provides in relevant part:

Foreclosure of liens: Requests by interested persons for notice of default and election to sell; right of association to waive default and withdraw notice or proceeding to foreclose

1. The provisions of NRS 107.090 apply to the foreclosure of an association's lien as if a deed of trust were being foreclosed. The request must identify the lien by stating the names of the unit's owner and the common-interest community.

2. An association may, after recording a notice of default and election to sell, waive the default and withdraw the notice or any proceeding to foreclose. The association is thereupon restored to its former position and has the same rights as though the notice had not been recorded.

No. 16-____

In The

Supreme Court of the United States

Bourne Valley Court Trust,

Petitioner,

v.

Wells Fargo Bank, N.A.,

Respondent.

CERTIFICATE OF SERVICE

The undersigned certifies that he has this day caused three copies of the foregoing Petition for a Writ of Certiorari to be served upon the below-named counsel for respondent by email and by overnight courier, and further certifies that all persons required to be served have been served:

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April 3, 2017

Kevin K. Russell

No. 16-_____

In the

Supreme Court of the United States

Bourne Valley Court Trust,
Petitioner,

v.

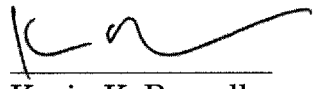
Wells Fargo Bank, N.A.,
Respondent.

CERTIFICATE OF COMPLIANCE WITH RULE 33.1(h)

Pursuant to Supreme Court Rule 33.1(h), the undersigned certifies that this brief complies with the type-volume limitations of Rule 33.1(g).

1. Exclusive of the exempted portions identified in Rule 33.1(d), the brief contains 7,348 words. (The undersigned is relying on the word-count utility in Microsoft Word 2010, the word-processing system used to prepare the brief, consistent with Rule 33.1(d)).

2. The brief was produced with Microsoft Word 2010 software in New Century Schoolbook Limited Standard 12-point typeface.



Kevin K. Russell
April 3, 2017